



CHAMBERS
Global Practice Guides

TMT

Switzerland – Law & Practice

Contributed by
Niederer Kraft & Frey AG

2016

SWITZERLAND

LAW & PRACTICE:

p.3

Contributed by Niederer Kraft & Frey AG

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law & Practice

Contributed by *Niederer Kraft & Frey AG*

CONTENTS

1. General Structure of TMT Regulation and Ownership	p.4	4. Wireless	p.9
1.1 Statutes, Laws and Legislation	p.4	4.1 Important Companies	p.9
1.2 Government Ministries, Regulatory Agencies and Privatised Entities	p.4	4.2 General Requirements for Obtaining a Licence /Authorisation to Provide Wireless Services	p.10
1.3 Developing Rules and Adopting Policies	p.5	4.3 Transfer of Wireless Licences/Authorisations to Other Entities	p.10
1.4 Ownership of Telecoms Media Technology Industries	p.5	4.4 Spectrum Allocation	p.10
1.5 Limits on Participation	p.5	4.5 Procedures to Identify and Assign Spectrum Among Competitors	p.10
1.6 Restrictions on Foreign Ownership or Investment	p.5	4.6 Unlicensed Spectrum Uses	p.10
1.7 World Trade Organization Membership	p.5	4.7 Government Policy/Regulation to Promote Next Generation Mobile Services	p.11
1.8 Appellate Process	p.5	4.8 Price Regulation for Mobile Services	p.11
1.9 Annual or Recurring Fees	p.6	5. Internet/Broadband	p.11
2. Broadcasting/Media	p.6	5.1 Important Companies	p.11
2.1 Important Companies	p.6	5.2 Regulation of Voice Over IP Services	p.11
2.2 Requirements for Obtaining a Licence /Authorisation to Provide Services	p.6	5.3 Interconnection and Access Regulatory Conditions to IP-Based Networks	p.11
2.3 Typical Term for a Licence/Authorisation to Provide Services	p.6	5.4 Net Neutrality Requirements	p.11
2.4 Transfer of Licences/Authorisations to Other Entities	p.6	5.5 Government Regulation of Internet/Broadband	p.12
2.5 Spectrum Allocation	p.6	5.6 Over-the-Top Internet-based Providers	p.12
2.6 Restrictions on Common Ownership	p.7	6. Privacy	p.12
2.7 Content Requirements and Regulations	p.7	6.1 Government Access to Private Communications	p.12
2.8 Transition from Analogue to Digital Broadcasting	p.7	6.2 Use of Encryption Technology	p.12
3. Telecoms	p.7	6.3 Liability of TMT Companies for Content Carried Over Their Networks	p.12
3.1 Important Companies	p.7	6.4 Obligation of TMT Companies to Block Access to Certain Sites or Content	p.12
3.2 Requirements for Obtaining a Licence /Authorisation to Provide Services	p.7	6.5 Obligation of TMT Companies to Retain Customer Data	p.13
3.3 Transfer of Telecoms Licences/Authorisations to other Entities	p.7	6.6 Prohibition of Unsolicited Communications	p.13
3.4 Regulations for Network-to-Network Interconnection and Access	p.8	7. Future	p.13
3.5 Accounting, Functional and Legal Separation	p.8	7.1 Status and Process of Convergence	p.13
3.6 Provisions for Access to Public and Private Land	p.9	7.2 Changes to Statutes, Laws or Legislation	p.13
3.7 Rules which Govern the Use of Telephone Numbers	p.9	7.3 Changes to Government Ministries, Regulatory Agencies or Privatised Entities	p.14
3.8 Regulation of Retail Tariffs	p.9	7.4 Identification and Assignment of Additional Spectrum	p.14
3.9 Rules to Promote Service in Underserved Areas	p.9		

SWITZERLAND LAW & PRACTICE

Contributed by *Niederer Kraft & Frey AG* **Author:**

Niederer Kraft & Frey AG is a pre-eminent Swiss law firm with a decades-long track record of legal excellence. As a market leader in Switzerland, NKF has built long-standing relationships with the world's best international law firms. The majority of NKF lawyers have undertaken further training at American, British or other foreign universities

and many of them have gained professional experience in partner law firms abroad. NKF attaches great importance to combining a highly professional approach and persistence in pursuing its clients' goals with being easy to work with, even in the most demanding situations. NKF currently employs around 95 lawyers, including 29 partners.

Author



András Gurovits Gurovits is a partner at Niederer Kraft & Frey Ltd., Zurich, Switzerland. His main areas of practice are arbitration/litigation, sports, TMT and corporate governance. He is a listed arbitrator with the Court of Arbitration

for Sport CAS/TAS in Lausanne, member of the Legal Committee of the International Ice Hockey Federation IIHF and member of the board of directors of Neue Grasshopper Fussball AG (Grasshopper Club Zurich). He has vast practical professional experience in the TMT market after having assumed and exercised various business functions in the industry for more than a decade prior to joining NKF. Gurovits regularly advises clients in domestic as well as international IT and outsourcing transactions, in particular, in respect of structuring the relevant tender procedures, in drafting and negotiating the

corresponding contractual framework as well as in monitoring performance of the providers in the implementation and deployment phase. in civil/commercial disputes before state courts and arbitral tribunals as well as in administrative proceedings before the relevant state authorities. Further, he regularly acts as sole arbitrator, member of a panel or chairman in arbitration proceedings before the CAS. His corporate governance experience includes, in particular, planning and implementation of organisational regulations, codes of conduct and similar instruments to ensure proper conduct of commercial entities and sports governing bodies/sports organizations. His sports practice covers all aspects of sports related issues, such as commercialisation of sports rights, organisation of sports events and management of sports organisations.

1. General Structure of TMT Regulation and Ownership

1.1 Statutes, Laws and Legislation

The relevant statutory provisions in Switzerland for the broadcasting industry are to be found in the Federal Radio and Television Act (RTVG) and its associated ordinance, the Ordinance on Radio and Television (RTVO), whilst the legal framework for the telecommunications, wireless, satellites, internet and broadband markets is set out in the Federal Telecommunications Act (FMG) and the Federal Act on the Surveillance of Postal and Telecommunications Traffic (BÜPF). There are also associated ordinances, such as the Ordinance on Telecommunication Services (FDV), the Ordinance on Telecommunication Installations (FAV) and a number of other ordinances regulating specific technical matters on telecommunications. Where unlawful concerted practices, abuse of market dominance and concentration of undertakings are concerned, the Cartel Act (KG) and associated ordinances are to be taken into consideration.

1.2 Government Ministries, Regulatory Agencies and Privatised Entities

The regulator in the Swiss telecommunications markets is the Swiss Communications Commission (ComCom), which is supported by the Federal Office for Communication (Ba-

kom), whilst in the broadcasting sector the Federal Department on Environment, Transport, Energy and Communications (UVEK) as well as Bakom have regulatory functions. As far as antitrust law issues are concerned, the Competition Commission (WEKO), supported by its Secretariat (Sekretariat), is the competent regulatory body.

The (seven) members of ComCom and (12) members of WEKO are elected by the Swiss Federal Council (the Swiss government). This notwithstanding, ComCom and WEKO in particular are deemed independent from directives of the Federal Council and other governmental agencies.

ComCom's main function in the telecommunications sector is comprised of the grant of certain licences of particular importance, such as mobile telecommunications licences and universal service licences. It is also competent to determine access conditions if the telecommunications service providers fail to reach an agreement. In all its activities ComCom may request the assistance of Bakom. This body is also responsible for intervening, and imposing sanctions, if it has detected violations of the relevant laws. In addition, Bakom is the licensing authority for those licences that are not issued by ComCom.

A broadcaster that intends to broadcast a programme in Switzerland must notify Bakom. Depending on the programme in question, it may also require a licence issued by UVEK.

1.3 Developing Rules and Adopting Policies

The process for developing policies or adopting rules regulating to the telecom and media technology industries follows the standard procedure available in Switzerland for legislative changes. Initiatives to pass a new law or to amend an existing law can either be initiated by members of the Swiss parliament, consisting of the national council and the council of states, or by the Federal Council. Once a draft law is available it is subject to discussion by the two councils. If the draft is passed it comes into force at a date determined by the Federal Council, unless a referendum requires a public vote approving the new law.

To the extent that the law confers certain competencies on the Federal Council, the latter has the power to enact the relevant ordinances against which no referendum is available. The laws and the ordinances may also provide that specific issues are to be regulated in ordinances issued by lower instance governmental authorities, which is particularly the case in the telecommunications sector, where Bakom has certain powers to enact ordinances of merely technical content.

1.4 Ownership of Telecoms Media Technology Industries

As a rule, telecoms, media and technology industries are privately owned. Examples include telecommunication services providers such as Sunrise, Salt and UPC Cablecom in the telecommunications sector, as well as Tele Züri in the broadcasting area. However, two important exceptions are relevant. In accordance with the Federal Telecommunications Operator Act (TUG), the majority stock in the telecommunications services provider Swisscom, which is the successor of the former incumbent PTT Telecom, is, and has to be, held by the Swiss Confederation. In addition, the Swiss Broadcasting Association (SRG) is the national radio and television broadcaster and exercises a Constitutional mandate in the radio and television market.

1.5 Limits on Participation

The telecommunications markets are, as a rule, open to competition. Providers that intend to render telecommunications services in Switzerland only have to register themselves with Bakom, but do not require a specific licence, unless they want to use the mobile frequency spectrum or wish to provide a universal service. Nationwide mobile telecommunications licences are allocated under public tender, as a rule, by means of an auction (except for the GSM licences that were put on tender in 1998 after the liberalisation of the Swiss telecommunications markets and were allocated

on the basis of a comparative contest). In the broadcasting sector, a licence must be sought from UVEK by broadcasters with a so-called performance mandate, whilst other broadcasters intending to broadcast a Swiss programme have to register themselves with Bakom.

1.6 Restrictions on Foreign Ownership or Investment

In the Swiss telecommunications markets no specific restrictions exist that would give preference to Swiss nationals over foreign entities, except for the ownership restrictions in Swisscom, according to which the Swiss Confederation must hold a majority stock.

In accordance with the RTVG, anyone who applies for a broadcast licence must be a Swiss resident. Further, foreign operators may be refused a licence if the relevant foreign state does not grant reciprocal treatment, unless a bilateral or international treaty would provide otherwise. In addition, and as already explained, the Swiss Broadcasting Association, SRG, is an association in accordance with the Swiss Civil Code and subject to specific legislation.

1.7 World Trade Organization Membership

Switzerland is a signatory to the General Agreement on Trade in Services (GATS), and thus bound by its relevant provisions, including the specific annex on telecommunications. Switzerland's commitments include, in particular, commitments regarding the prevention of anti-competitive practices, interconnection (eg non-discrimination, transparency of interconnection agreements, availability of a dispute settlement procedure), public availability of licensing criteria, availability of independent regulators and non-discriminatory allocation of frequencies. Exemptions are provided in respect to broadcast licences for foreign persons, that are to be granted, as a rule, on the basis of bilateral treaties only. This measure is aimed at promoting common cultural objectives, regulating access to a market which is limited in scale and preserving diversity of supply.

1.8 Appellate Process

As a general rule, decisions of the regulatory body are appealable with the Federal Administrative Court, whose decision is then normally subject to appeal with the Swiss Federal Tribunal which is the court of last instance in Switzerland. In the radio and television sector, the Independent Complaints Authority for Radio and Television (ICA) and the ombudsman service have certain functions in respect to control of the content of editorial programmes. If a complaint against the content of an editorial programme is brought before the ombudsman and the parties are not able to settle the matter, a complaint may be filed with the ICA who will render a decision. The ICA's decisions can be appealed with the Swiss Federal Tribunal directly, ie there is no requirement to lodge an appeal with the Federal Administrative Court first.

1.9 Annual or Recurring Fees

As a rule, the licensing authority (ComCom or Bakom, as the case may be) charge a fee for mobile communication licences, whilst no fee will be charged for radio communication licences used for the broadcasting of radio or television programme services. The fee amount 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 of the licence; as well as
- the term of the use.

If the mobile communications licence is granted by way of an auction, the licence fee will correspond to the value of the bid (which in any case must be equal to or exceed the minimum bid amount determined by the licensing authority).

In addition, administrative charges covering the relevant authority's costs are levied for the authority's decisions and services, such as, for example, (i) the registration and surveillance of telecommunications service providers; (ii) decisions concerning access, interoperability and joint use of installations; (iii) as well as the registration and surveillance of telecommunication installations. Finally, telecommunications service providers are to pay a fee which is to be used to finance the uncovered costs of the provision of the universal service (if any). Licensed broadcasters of Swiss programme services must pay an annual fee which is not to exceed 1% of the gross revenue achieved through advertising and sponsoring.

Under the current law, anyone who uses a receiver for the reception of radio and television programmes (a receiver) must pay a reception fee. As a result of a public vote in June 2015, the current fee regime under the RTVG will change, and, in future, all households (and, as a rule, legal entities) will have to pay a yearly charge, irrespective of whether they own a receiver or not. It is expected that this amendment to the law will enter into force in 2018.

2. Broadcasting/Media

2.1 Important Companies

Market shares in the Swiss broadcasting markets are assessed by Mediapulse. Shares are separately measured for the German, the French and the Italian-speaking regions of Switzerland. Market shares are assessed by the number of spectators, rather than by revenue. In the first half of 2015, in the German-speaking region the top five broadcasters were SRF 1 and 2 (the German language programmes of the Swiss national broadcaster) holding 28.7%, RTL CH holding 6.0%, ZDF holding 5.2%, ARD holding 5.1% and SAT.1 CH holding 4.0% market share. In the French-speaking region the

top five were RTS 1 and 2 (the French language programmes of the Swiss national broadcaster) holding 27.0%, TF 1 CH holding 11.4%, M6 CH holding 8.8%, France 2 holding 6.3% and France 3 holding 4.1% market share. Finally, in the Italian-speaking region the top five broadcasters in the first half of 2015 were RSI 1 and 2 (the Italian language programmes of the Swiss national broadcaster) holding 29.8%, RAI 1 and 2 holding 11.7%, Canale 5 holding 9.7%, Italia 1 holding 5.4% and SRF 1 and 2 holding 2.5% market share.

2.2 Requirements for Obtaining a Licence/Authorisation to Provide Services

As a rule, Swiss broadcasters are only obliged to register themselves with Bakom prior to starting transmission (regardless of the means of transmission, ie internet, wire, radio frequency or satellite). However, a licence is required by the Swiss national broadcaster SRG as well as those broadcasters performing under a so-called performance mandate. Licences with a performance mandate may be awarded to broadcasters of local or regional programme services which take care of local or regional particularities and those that, by means of a complementary, non-profit-orientated radio programme service, contribute to the development of cultural life in the relevant area. These licences are, as a rule, granted by UVEK in a public tender procedure. The licence will be awarded in a comparative contest applying qualitative criteria rather than by means of an auction.

2.3 Typical Term for a Licence/Authorisation to Provide Services

Activities of broadcasters that only have to notify themselves with Bakom are, as a rule, not limited in time. The broadcasters have to comply with the relevant statutory framework and may be sanctioned in the event of a violation of the pertaining rules. Licences are limited in time. The standard licence term is ten years. A licence can be withdrawn if the licensee, for instance, seriously violates the law or continuously violates the licence terms.

2.4 Transfer of Licences/Authorisations to Other Entities

A licence may be transferred with the consent of the licensing authority. The same applies in the case of a change of ownership or a so-called economic transfer of the licence. Consent is to be sought if more than 20% of the capital of the licensee is (directly or indirectly) transferred.

2.5 Spectrum Allocation

Frequency is allocated in accordance with the Swiss National Frequency Allocation Plan (NFAP), which is published by Bakom. The NFAP takes account of international radio regulations and the relevant publications of the European Conference of Postal and Telecommunications Administrations (CEPT). It is a comprehensive document identifying the radio frequency bands allocated in Switzerland. The spec-

trums allocated to broadcasting include the 525.5 – 1'606.5 kHz, 87.5 – 108 MHz, 174 – 230 MHz and the 470 – 862 MHz bands.

2.6 Restrictions on Common Ownership

Pursuant to the RTVG, a broadcaster or the company holding common ownership, respectively, may acquire not more than two television licences and two radio licences.

2.7 Content Requirements and Regulations

The law provides a number of restrictions and requirements applicable to the broadcasting industry. These can be divided into requirements for broadcast content as well as requirements and restrictions applicable to advertising and sponsorship. The provisions regarding content include:

- minimum standards for the respect of fundamental rights, such as dignity, non-discrimination, public morals, as well as fairness, security and variety of content;
- measures on the protection of adolescents;
- independence of the broadcasters from intervention by the authorities; and
- broadcasting of public messages in case of danger to the public order or general safety.

The provisions on advertising and sponsorship include requirements in respect to:

- clear identification of advertising;
- ban of advertising for certain product categories such as tobacco, alcohol and therapeutic products as well as political parties and religious beliefs;
- timing and duration of advertising;
- sponsored programmes; and
- protection of minors.

2.8 Transition from Analogue to Digital Broadcasting

The switchover from analogue to digital transmission or content, respectively, is ongoing. On the one hand, according to media reports, the Swiss National Broadcaster and private radio station owners plan to phase out FM radio broadcasting until the year 2024 and, from that date, broadcast only digital radio programmes. On the other hand, must-carry obligations for specific programmes have been abrogated and providers offering digital content do not have to make analogue offerings as well. Further, if a cable network operator makes a basic digital offering that is comparable to analogue offerings, it may limit its offerings to digital programmes and if it does so, it thereby avoids causing extra costs to the customers.

3. Telecoms

3.1 Important Companies

The term telecom in Switzerland comprises all kind of landline and wireless telecommunications services. However, not all major participants have offerings in all relevant markets. Salt (formerly Orange), for instance, focuses on mobile communications services, whilst upc cablecom has a strong footprint in cable TV and telephone/internet networks, without, however, operating its own mobile telecommunications network. The incumbent Swisscom, on the other hand, offers landline and mobile telecommunication services as well as internet and TV services. For this reason, telecom companies can be ranged according to revenue, but market shares would have to be assessed based on the markets in question.

In terms of revenue, Swisscom is the number one with revenues in 2014 of CHF11.7 billion. Sunrise is number two with revenues in 2014 of CHF2.08 billion. Salt (formerly Orange) and upc cablecom both reported 2014 revenues of CHF1.3 billion.

As other sectors or markets of telecommunications will be separately discussed below, market share data is given in this chapter for the fixed net telecommunications market. The most recent official data available for this area is from the end of 2012. In accordance therewith, Swisscom had a market share of 64.0%, followed by upc cablecom with 10.1% and Sunrise with 9.8%.

3.2 Requirements for Obtaining a Licence/Authorisation to Provide Services

The FMG does not require a licence for the provision of telecommunications services. Any provider that intends to render telecommunications services in Switzerland must, however, register itself with Bakom, which keeps a list of all providers that have made a notification. In addition, the telecommunications service providers must fulfil a number of statutory conditions and duties. They must, in particular, have the required technical skills and capabilities to render the services in question, to comply with the applicable laws and regulations, to comply with the pertaining rules on labour conditions and to offer an appropriate number of apprenticeships. Further, more specific obligations exist in respect to, for example, access conditions, technical installations, safety and data protection.

3.3 Transfer of Telecoms Licences/Authorisations to other Entities

As previously explained, as a rule providers of telecommunications services do not require a licence. Therefore, in the case of a change of ownership, no specific approval under the FMG is required. Of course, if the relevant turnover thresholds or other conditions provided for in the Cartel Act are met, the transaction may have to be cleared by WEKO for merger control purposes. Approval requirements in the case

of a change of control of a mobile network operator or transfer of a mobile licence, respectively, will be discussed further below in the “wireless” section.

There is, however, one exception from the principle that telecommunications service providers do not require a licence and only have to notify themselves to Bakom prior to rendering their services. A licence from ComCom is required to provide a universal service. If more applicants than licences are available, the licences will be put out to public tender, which will be carried out according to the principles of transparency, objectivity and non-discrimination. Otherwise, ComCom may appoint the relevant universal service provider. According to the FMG, anyone who intends to obtain a universal service licence must:

- demonstrate it has the required technical skills;
- provide reasonable evidence it is in a position to render the service concerned throughout the term of the licence, in particular in terms of financial conditions;
- ensure compliance with the applicable legislation, in particular the FMG and its implementing ordinance as well as the licence conditions; and
- ensure compliance with labour law rules and customary working conditions in the industry.

In June 2007, ComCom granted a universal service licence to Swisscom.

Licence conditions in connection with the use of the frequency spectrum and operation of mobile networks will be discussed further below.

3.4 Regulations for Network-to-Network Interconnection and Access

As a general rule, any provider that offers a service which is part of the universal service is to ensure interconnection and must make its basic offering transparent, must make the technical and commercial conditions publicly available for providers requesting interconnection (Article 61) and is required to publish the relevant interface information. In the event of disputes, ComCom will determine the conditions for interconnection in accordance with customary principles on the relevant markets.

In addition, the FMG requires telecommunications service providers that hold a dominant position in the market to grant other providers access to their own networks and services in a transparent and non-discriminatory manner at cost-oriented prices. The law provides various types of access, including:

- fully unbundled access to the local loop;
- fast bitstream access for four years;
- rebilling for fixed network local loops;
- interconnection;

- leased lines; and
- access to cable ducts (the latter to the extent that sufficient capacity is available).

The particular services that are to be provided comprise of: (i) originating, terminating and transit of calls; (ii) identification of callers' lines, identification of the connected line, and suppression of such identifying information; (iii) access to value-added services; and, finally, physical connection between the telecommunication installations of different providers.

In the context of conditions for access, non-discrimination means that the dominant provider is not to treat the other providers less favourably than it treats its own business units and subsidiaries or other parties. The difference between the access prices that the dominant provider offers and its end-customer prices must be such that it would allow another (comparable and efficient) provider to achieve cost-covering revenues.

It is a difficult and complex task to determine what charge is actually “cost-oriented.” The implementing ordinance to the FMG provides certain guidelines. First and foremost, the dominant provider must calculate the access price based, on a forward-looking basis, on costs which any other efficient provider would incur. Such costs may take account of replacement costs for equivalent assets by considering the long-term additional costs of the network components used and the long-term additional costs caused by the access services (so-called LRIC). On top of this price, a premium is calculated as a proportional share of the relevant joint and common costs (the so-called constant mark-up), as well as a return, at a rate customary in the market, on the capital used for investments.

If no agreement on access can be found within three months of negotiations, ComCom will determine the conditions at the request of one party.

3.5 Accounting, Functional and Legal Separation

Swiss law does not provide for any general rules on separation. To a certain extent, separation may be seen in the universal service provider's obligation to demonstrate its net costs for the provision of the universal service, because, according to the FMG, that provider will be compensated for costs of the universal service that are not covered. In order to demonstrate the uncovered costs for which it is to be compensated (if any), the universal service provider must apply the following principles:

- the computation of the costs is to be performed on a current basis;
- the network costs are to be assessed using book values;

- the capital yield on investments will be customary for the relevant market sector;
- the depreciation method is to take account of the economic lifetime of the relevant market sector; and
- direct and indirect revenues must be subtracted from the costs.

The computation of the net costs must be made in accordance with relevant professional standards in Switzerland such as FER or the internationally recognised accounting standards (IAS) or comparable internationally recognised accounting guidelines.

As far as access costs are concerned, see section 4.

3.6 Provisions for Access to Public and Private Land

Owners of land in public use, including, for example, roads and waterways, are to allow providers of telecommunications services the use of that land in order to enable the installation and operation of telecommunications lines (and public pay phones), provided that these installations do not interfere with the public use of the land. The providers are to respect the original purpose and use of the property and will bear all costs of restoring it to its original state once the use for telecommunication purposes has come to an end. According to the FMG, the authorisation procedure must be simple and quick and no compensation, other than an administrative charge to cover the costs, is to be levied.

The FMG allows UVEK to grant a right of expropriation of land if it is needed for building a telecommunications installation and if this use is in the public interest. In such a case the procedure will follow the standard rules under the Federal Law on Expropriation.

Furthermore, Bakom may grant a provider, in exchange for appropriate consideration, the right of joint use of another provider's telecommunications installations and other installations, such as cable ducts and transmitter locations, if that other party has sufficient capacity, provided, however, that this joint use is in the public interest. Under the same conditions, Bakom may require telecommunications service providers to co-install and co-use telecommunications installations and other installations, such as cable ducts and transmitter locations.

3.7 Rules which Govern the Use of Telephone Numbers

Bakom has a duty to manage the addressing resources in accordance with international standards. It must take appropriate measures to ensure a sufficient supply of numbering elements and communication parameters. However, ComCom is to approve the national numbering plans.

In terms of portability, providers are to ensure number portability and freedom of choice of the relevant provider(s), both in respect to national and international connections.

3.8 Regulation of Retail Tariffs

Under Swiss law, only certain universal and value-added services are subject to statutory price ceilings. Otherwise, prices are not regulated. This is also particularly true in respect to important tariffs at wholesale level, such as mobile termination rates (MTR) and roaming charges. This notwithstanding, ComCom would have the competence, upon the request of an operator, to regulate MTR on a cost basis if the other relevant provider were deemed to hold a dominant position in the relevant market.

3.9 Rules to Promote Service in Underserved Areas

Under the FMG, the ComCom has a duty to ensure that a minimum universal service is provided to the entire population and in all parts of Switzerland. To this end, it will periodically grant one or more universal service licence(s). Such a universal service licence decrees that the licensee delivers specific universal services as defined in the law to the entire population within the licence territory.

A universal service licence-holder is to meet the demand in its licence territory and provide a set of services in accordance with present state-of-the-art technology. These services include: (i) public telephone service, which means the real time transmission of voice and data, as well as connection and additional services, (ii) access to emergency call services, (iii) public pay telephones, and (iv) access to the Swiss directories of subscribers. A provider of universal services must ensure that the services may be offered to disabled people at comparable terms and conditions in terms of quality, quantity and price.

If, despite efficient management, it is not possible for the universal service provider to cover the costs of provision of the universal service in a given territory, it will be entitled to financial compensation which is to be equal to the uncovered costs of the universal service. The uncovered costs will be the net total costs of the universal service which are equal to the difference between the costs of the provider providing the universal service and the costs it would incur without providing the universal service.

4. Wireless

4.1 Important Companies

The market leader in the Swiss mobile market is Swisscom, with a market share of 54.9% at the end of 2014 and a revenue in the mobile sector of CHF6.5 billion, followed by Sunrise with a market share of 21% and revenues of CHF1.3 billion and Salt (formerly Orange) with 21% and revenues of CHF1.2 billion.

4.2 General Requirements for Obtaining a Licence/Authorisation to Provide Wireless Services

The use of the mobile frequency spectrum is subject to the grant of a licence by either ComCom or Bakom, depending on the type of the licence sought. ComCom is the licensing authority for nationwide mobile communications licences, and Bakom is the licensing authority of the other mobile licences, for example point-to-point frame relay licences. The FMG requires that a provider applying for a licence must (a) have the necessary technical capacities, (b) ensure compliance with the applicable laws and regulations and (c) ensure compliance with the licence terms.

The grant of a mobile licence is conditional on enough frequencies being available under the national frequency allocation plan. The grant of nationwide mobile communications licences is usually subject to public tender proceedings and the licences are allocated by way of auction. The rules and timelines are defined by ComCom. The proceedings must comply with the principles of objectivity, non-discrimination and transparency. Whilst this is the current practice of the Swiss regulator, the first mobile licences granted after the Swiss telecommunications market was liberalised in 1998 were granted on the basis of a comparative contest where specific qualitative and quantitative criteria were relevant, and where Swisscom, Orange and diAx (later merged with Sunrise) prevailed. The last auction for nationwide mobile telecommunications licences took place in February 2012. In these proceedings Sunrise acquired frequencies at a price of CHF481 million, Swisscom at a price of CHF360 million and Orange (today Salt) at a price of CHF154 million.

The granting of a mobile telecommunications licence must not eliminate or seriously impair effective competition, unless an exception can be justified on grounds of economic efficiency. In cases of doubt, the licensing authority will consult with WEKO prior to rendering any decision. In practical terms, this means specifically that no one can hold (directly or indirectly) more than one nationwide telecommunications licence. Should two mobile operators wish to merge, and should that merger be approved by ComCom and WEKO, the merging entities would have to return one licence.

4.3 Transfer of Wireless Licences/Authorisations to Other Entities

Any transfer of a mobile telecommunications licence requires approval by the licensing authority. This also applies in the case of a so-called economic transfer of the licence where (direct or indirect) ownership by the licence-holder changes. Consent must be sought from the telecommunications authorities, ie ComCom and Bakom, depending on the type of the licence, as well as from WEKO if the relevant turnover thresholds triggering the duty to notify for merger control purposes are met. A notification with WEKO for

merger control purposes is required if, in the financial year preceding the transaction, (a) the undertakings concerned together reported a turnover of at least CHF2 billion, or a turnover in Switzerland of at least CHF500 million, and (b) at least two of the undertakings concerned each reported a turnover in Switzerland of at least CHF100 million.

4.4 Spectrum Allocation

The most relevant frequency bands for mobile telecommunications are the 800 MHz, 900 MHz, 1,800 MHz, as well as the 2,100 MHz and 2,600 MHz bands, currently allocated to Swisscom, Salt and Sunrise.

4.5 Procedures to Identify and Assign Spectrum Among Competitors

As previously stated, spectrum is usually allocated between competitors by means of an auction. The last auction in Switzerland took place in February 2012. Ahead of the auction, ComCom had decided to award all mobile frequencies in one single auction, arguing that a phased allocation as suggested by some market participants would increase complexity and delay introduction of the LTE standard, causing Switzerland to fall behind in terms of technological development. When designing the auction format, ComCom left the number of licences and the available bandwidth for each licence open so that, ultimately, it was up to the market to determine which bandwidth would be allocated to the relevant licensees. In addition, ComCom decided to grant a licence term of up to the year 2028, with the intention of enabling long-term investment planning by the operators. Prior to the start of the auction, the interested operators had to submit a candidature dossier in which they had to specify the maximum amount of spectrum they intended to acquire in the respective frequency bands. They also had to submit a bank guarantee amounting to 50% of the minimum bid for the requested frequencies and to demonstrate that they had the required skills and capabilities to comply with the statutory requirements and the specific conditions set out in the licence. Four candidates submitted their dossier, but only three of them, Swisscom, Salt and Sunrise, were admitted. The outcome of this auction was discussed in 4.2. The auction took place over the internet. It started on 6 February 2012 and ended on 22 February 2012.

4.6 Unlicensed Spectrum Uses

The use of the frequency spectrum in Switzerland is regulated in order to prevent interference. Bakom is the licensing authority for mobile licences of lesser relevance, such as maritime radio, aeronautical radio and amateur radio. Applications for the majority of these mobile licences can be submitted in a straightforward manner online, through the so-called electronic shop of Bakom.

4.7 Government Policy/Regulation to Promote Next Generation Mobile Services

The allocation of the mobile licences by way of auction in February 2012, discussed above, was a very important step in terms of the timely introduction of next-generation mobile services. By designing the auction rules in a way that meant all interested providers had the opportunity to acquire a future-proof, full frequency portfolio, ComCom wanted to ensure long-term planning security and, in particular, fast deployment of the latest mobile telecommunications standards, such as LTE in Switzerland.

In this context, it should also be noted that on 19 November 2014, the Swiss Federal Council issued a report on recent developments in the Swiss telecommunications market in which it proposed a number of revisions to the FMG, including proposals with respect to use of mobile networks. The Federal Council aims at achieving a more flexible usage of the spectrum as well as improvements in respect to the joint use of infrastructure by the operators. It also proposes strengthening supervision of the providers in respect to network and service reliability and availability by granting the regulator the power to request implementation of measures that increase the resilience of the operators' network infrastructure. The Federal Council mandated UVEK to prepare and present a draft of the new law by the end of the year 2015.

4.8 Price Regulation for Mobile Services

Mobile service prices are not regulated in Switzerland. The operators are free to determine their charges, including mobile termination rates (MTR), as well as roaming and retail prices. MTR and international roaming prices are, however, regularly subject to discussion and calls for regulatory intervention. Indeed, in accordance with the FMG, ComCom could regulate MTR on a cost basis if a corresponding request were submitted by an operator and if the other operator were held to be dominant in the relevant market. As WEKO has already held that the three nationwide mobile networks of Swisscom, Sunrise and Salt (formerly Orange) are considered distinct product markets where each operator holds a market share of 100%, it may well happen that ComCom determine, on the request of an operator, MTR on a cost basis. But until now, ComCom did not intervene to regulate MTR. Regarding international roaming, the FMG does not envisage regulatory intervention. This may also remain the case after any possible implementation of the Federal Council's report on proposals to amend the current law. Although it is acknowledged that international roaming prices in Switzerland may still be higher than in the rest of Europe, the Federal Council does not propose to introduce price ceilings for international roaming.

5. Internet/Broadband

5.1 Important Companies

The largest market participants in the broadband market are Swisscom, Sunrise, upc cablecom, as well as local utilities that upgrade their cable ducts to allow deployment of telecommunications dark fiber technology as well. Reliable market share data is not available for this sector.

5.2 Regulation of Voice Over IP Services

The FMG defines telecommunications services as the transmission of information for third parties by means of telecommunications techniques, ie by sending or receiving information through fixed or mobile networks using electrical, magnetic or optical signals or other electromagnetic signals. Against this background, internet services, including voice over IP (VoIP) services, are considered to be telecommunications services and are therefore subject to regulation under the FMG.

VoIP service providers must therefore register themselves with Bakom. They must have the required technical skills and ensure compliance with the FMG. This includes, for instance, the obligation to ensure confidentiality of communication as well as price transparency.

5.3 Interconnection and Access Regulatory Conditions to IP-Based Networks

The provisions under the FMG regulating access by market-dominant providers apply, irrespective of the chosen technology. These provisions are, in other words, technology-neutral. The interconnection and access regulatory conditions, therefore, also apply to IP-based networks.

5.4 Net Neutrality Requirements

Swiss law does not provide any specific statutory provisions on net neutrality. The core issue of considerations on net neutrality is the fact that data can be transported on the internet in different qualities. For this reason, net neutrality is a heavily discussed topic in Switzerland, resulting in calls for various initiatives of interest groups and even the legislator. These discussions culminated in a motion to amend the current law and to introduce specific rules on net neutrality, in particular regarding a transparent and non-discriminatory data transmission through the internet. Whilst this motion was supported in the national council of the Swiss parliament, it was rejected in the council of states in March 2015. The majority of the council of states argued that at present there is no evidence of abusive practices and, therefore, there is no need for intervention by the legislator which may distort effective competition. Consequently it was decided to abstain from any amendment for the time being and to watch for any relevant international development.

5.5 Government Regulation of Internet/Broadband

No governmental subsidies are available for the development of broadband infrastructure such as FTTH. Internet and broadband penetration is rather being pushed forward by initiatives of the traditional telecom operators as well as cable TV providers and public utilities deploying broadband networks. A survey of the Swiss Federal Office for Statistics as at June 2014 confirms a steep progression of broadband subscriptions which, in total figures, increased from 157'000 in 2001 to 3.4 million in 2014. According to this survey, 47 out of 100 households had subscribed for broadband services, a number that quite significantly exceeds the OECD average of 27.4.

In its report of 19 November 2014 (mentioned above), the Federal Council also proposes to improve access conditions to the broadband infrastructure and, in particular, promotes implementation of access rules to cable ducts and physical infrastructure. Time will tell whether such provisions will be enacted in a future amendment to the FMG.

5.6 Over-the-Top Internet-based Providers

Over-the-top telecommunications services are based on other communications services, in particular data transmission services over the internet, where the telecommunications service providers involved have no contractual link to each other. Examples include Skype in the area of IP telephony, as well as Wilmaa and Zattoo in the area of radio and TV programmes. Under the current legislation it is clear that the providers of the underlying services are telecommunications services providers as defined in the law. It is, however, unclear whether providers of such OTT services also qualify as telecommunications providers and are also subject to regulation by the FMG. The Federal Council, therefore, proposes in its report of 19 November 2014 to amend the law and to clarify this issue.

6. Privacy

6.1 Government Access to Private Communications

Legal requirements and policies permitting access and interception of private communication are set out in the Swiss Federal Act on the Surveillance of Postal and Telecommunications Traffic (Bundesgesetz betreffend die Überwachung des Post- und Fernmeldeverkehrs, BÜPF) as well as the relevant implementing ordinance. The rules under the BÜPF apply in the context of criminal investigations as well as international judicial assistance in criminal matters. It also applies in the context of a search for a missing person. The BÜPF grants the relevant authority certain competences to order a variety of measures facilitating the investigation or search. All telecommunications service providers are bound by this Act.

6.2 Use of Encryption Technology

Swiss law does not provide specific statutory requirements governing the use of encryption technology.

6.3 Liability of TMT Companies for Content Carried Over Their Networks

Swiss law does not provide specific rules on the liability of telecommunications providers for content carried over their networks. However, liability of telecommunications providers has become the subject matter of an ongoing legislative initiative and the issue of liability of providers for (third party) content is being scrutinised. Therefore, it is not excluded that in the not-too-distant future the Federal Council will present a proposal for an amendment of the law.

Pending the introduction of any such specific statutory provisions and based on general principles of Swiss law, the provider of the content in question bears responsibility for it. Access or hosting or other providers may become liable if they acted negligently and if there is a causal nexus between their negligence and the transmission or dissemination of content that proved to be illegal. This may be the case if the relevant provider did not remove the content, even though it was aware of the illegal nature of the content, or if it does not block access to that content despite requests by state authorities or private persons. In a decision of 2013, the Swiss Federal Tribunal even held that a media company that made available a platform to bloggers was liable (from a civil law perspective) for a violation of personality rights of another person because of illicit content contained in a blog produced by one of the bloggers. In that particular case, liability was based on Article 28 of the Swiss Civil Code which provides that anyone whose personality rights are unlawfully infringed may request protection against all those causing the infringement. According to Article 28 of the Civil Code, the mere contribution to a violation of personality rights is sufficient to become liable, and fault is no requirement for such a liability.

6.4 Obligation of TMT Companies to Block Access to Certain Sites or Content

TMT companies may be obliged to block access to certain sites or content or otherwise limit file-sharing activities on the basis of general principles of Swiss law. Such obligations may be based on the Civil Code providing protection against unlawful violations of personality rights. The Penal Code penalises, for instance, defamation, certain kinds of pornography and racial discrimination, or the copyright act protecting the rights of authors of works in the sense of the Act. Whether or not an obligation to block access exists depends on various circumstantial factors, such as the role of the provider, its knowledge of the fact that content is or may be illicit and the offence in question. As a rule, a provider must block content if it knows that it is illicit and if it actually has the required technical means to block access. In the

light of the decision of the Federal Court of 2013 (discussed above), providers operating platforms for third-party content must pro-actively verify that the content does not violate personality rights of third parties and must block access if that content is posted on that platform.

6.5 Obligation of TMT Companies to Retain Customer Data

The FMG provides various rules on the keeping and disclosing of customer data. As a general rule, providers are to retain the personal data of their customers to the extent and for as long as such retention is necessary for establishing communications, fulfilling their obligations under the Federal Act on the Surveillance of Post and Telecommunications, and for obtaining due payment for their services. Such data must also be retained because during the period in which they may dispute an invoice, customers may request the provider to disclose all relevant data on which billing is based. In addition, if a customer can reasonably demonstrate that they are the victim of nuisance calls or have received unfair mass advertising, the provider must, upon the customer's request, disclose the date, time and duration of the calls or the date and time of the message, as well as addressing resources, names and addresses of the customers whose connections were used for the calls or from which the unfair mass advertising was sent.

Regarding confidentiality of customer data, the law provides that (unless otherwise provided for in the law) the providers must keep all information relating to their customers' communications confidential and must not disclose it to any third party.

6.6 Prohibition of Unsolicited Communications

Unsolicited communications may qualify as acts of unfair competition and may be subject to sanctions set out in the Act Against Unfair Competition, in particular if mass mails are sent without the recipient's consent, without indication of the sender's address or without offering a simple and cost-free method to refuse receipt of such mails. The FMG and its implementing ordinance provide a quite detailed statutory framework aimed at combating this kind of unsolicited communication, and state, as a general principle, that telecommunications service providers are to protect their customers from unfair mass advertising, as far as the current state of the art permits.

More particularly, as soon as it becomes aware that one of its customers is sending or forwarding unfair mass advertising via its telecommunication network, a provider must immediately block these messages. The provider may then also disconnect the relevant sender from its telecommunication network. In addition, each provider is to operate a notification service through which customers can notify the

provider of the receipt of unfair mass advertising originating from or sent through its network.

7. Future

7.1 Status and Process of Convergence

The Swiss legislator took account of the convergence of networks, content and equipment by recently amending the Telecommunications Act, FMG, and the Act on Radio and Television, RTVG. As a result, distribution of radio and TV programmes is subject to regulation in the FMG only, whilst the RTVG focuses on formulating the needs of radio and TV providers for telecommunications resources. Whilst digitisation significantly increases transmission capacities, convergence triggers direct competition between telecommunications services and radio and TV programmes. Therefore, the FMG and RTVG provide a number of instruments aimed at protecting radio and TV providers from being squeezed out from digital platforms by potential telecommunications service providers. Such instruments include, for instance, the obligation of the telecommunications network providers to offer transmission services to the radio and TV providers with conditions that are fair, appropriate and non-discriminatory, as well as the right of the broadcaster with a specific performance mandate to obtain access to distribution services on a cost-oriented basis.

From a commercial and market perspective, it is relevant to note that convergence of technology leading to IP-based transmission techniques has increased competition between broadband networks of cable TV providers and utilities, as well as mobile networks of the three mobile operators, Swisscom, Sunrise and Salt (formerly Orange).

7.2 Changes to Statutes, Laws or Legislation

As already mentioned, on 19 November 2014 the Federal Council presented a report on developments in the telecommunications markets and corresponding challenges for the legislator. The Federal Council proposes a number of revisions to the FMG. The draft of the new law was scheduled to be ready by the end of 2015. Once the draft is available it will be discussed and agreed by the national council and the council of states. If the new law is passed by the parliament, it may be enacted in 2017 at the earliest. Should Swiss voters request a referendum, the new law would also have to pass a public vote successfully at federal level, in which case the entering into force of the law could be delayed by another one or two years.

The most relevant changes proposed by the Federal Council include provisions regarding:

- a new definition of the term "telecommunications service provider";
- improving access conditions to the net infrastructure;

- increasing flexibility of the use of the frequency spectrum and joint use of networks;
- introduction of more comprehensive rules regarding administration and use of internet domain names, including use of the top-level domain “.ch”;
- improving safety and reliability of telecommunications networks and services;
- introducing specific rules regarding liability of providers;
- safeguarding of services diversity;
- introduction of new billing practices for international roaming;
- strengthening protection of consumers and young people; as well as
- improving security of telecommunications equipment/ installations.

On the other hand, the Federal Council does propose to refrain from abolishing the rules on ownership in Swisscom, according to which the Swiss Confederation will maintain a majority stock in the incumbent provider. The Federal Council is thus willing to accept the conflicting situation whereby the Confederation is, on the one hand, the majority shareholder of the largest telecommunications provider competing in the Swiss market and, on the other hand, the legislator, regulator and supervising authority of that market.

7.3 Changes to Government Ministries, Regulatory Agencies or Privatised Entities

No changes to government ministries, regulatory agencies or other governmental or privatised entities are currently being discussed.

7.4 Identification and Assignment of Additional Spectrum

The last allocation of frequency spectrum to the three mobile operators Swisscom, Sunrise and Salt took place in 2012 and was implemented in 2014, so no plans to assign additional spectrum for wireless services in the short or mid term are currently being discussed.

Niederer Kraft & Frey AG

Bahnhofstrasse 13
Zurich
Switzerland
CH-8001

Tel: +41 58 800 8000
Fax: +41 58 800 8080
Email: nkf@nkf.ch
Web: www.nkf.ch

NIEDERER KRAFT & FREY