



ICLG

The International Comparative Legal Guide to:

Telecoms, Media & Internet Laws & Regulations 2016

9th Edition

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

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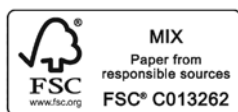
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EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Telecoms, Media & Internet Laws & Regulations*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of telecoms, media and internet laws and regulations.

It is divided into two main sections:

One general chapter. This chapter provides an overview of the EU Regulatory Framework for electronic communications and services in the EU Member States.

Country question and answer chapters. These provide a broad overview of common issues in telecoms, media and internet laws and regulations in 37 jurisdictions.

All chapters are written by leading telecoms, media and internet lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Rob Bratby of Olswang LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

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1 Overview

1.1 Please describe the: (a) telecoms; (b) audio-visual media distribution; and (c) internet infrastructure sectors in Switzerland, in particular by reference to each sector's: (i) importance (e.g. measured by annual revenue); (ii) 3-5 most important companies; (iii) whether they have been liberalised and are open to competition; and (iv) whether they are open to foreign investment.

(a) Telecoms

Swisscom, the former monopolist, is the incumbent and market leader for fixed line phone networks, with a market share of 54% at the end of 2014, followed by Sunrise, with a market share of 10.4%. The rest of the market is divided up between various TV cable operators.

The mobile phone market is chiefly divided among three major phone companies and Swisscom again is the market leader, with a market share of 54.9% in 2015. Sunrise and Salt share most of the remaining market, with market shares of 26.9% and 18.2% respectively.

Approximately 96% of the Swiss population above 14 years of age owned at least one mobile phone in 2014 and the penetration was close to 145%. The markets have been liberalised and are open to foreign investment.

(b) Audio-visual media distribution

Swiss TV and radio channels are mostly provided as public services (*service public*) managed by the association SRG SSR. In addition, there are many smaller regional and local radio and TV channels with and without a public performance mandate. Swiss people watch an average of 128 to 177 minutes of TV per day.

SRG SSR provides TV and radio channels in all four language regions of Switzerland (three TV and six radio stations in German, two TV and four radio stations in French, two TV and three radio stations in Italian, one radio station in Romansh, and three radio stations with music only). SRG SSR is funded both through radio and television licence fees, which are collected from consumers and through advertisement income. However, in June 2015 the Swiss people accepted a partial revision of the Federal Act on Radio and Television (“RTVA”), which is expected to be in force in 2018/2019. After the revision, SRG SSR’s *service public* services will no longer be funded by individual licence fees but by a device-independent tax instead.

The markets have been liberalised and are open to foreign investment.

(c) Internet infrastructure

In 2014, 91% of all Swiss households were connected to the internet and 53% of the households had a mobile broadband internet connection.

The majority of all Swiss households are connected to the internet via xDSL. There were 2,332,000 (67%) internet connections via xDSL and 1,150,000 (33%) internet connections via TV cable modem by the end of 2014. Swisscom and Sunrise share the great majority of the xDSL market, with market shares of 81% and 14% respectively. Other Internet Service Providers (“ISPs”) make up the remaining 4.9%. UPC Cablecom leads the market for internet connections via TV cable (9% overall market growth in the last year), with a market share of about 63%.

Furthermore, 69% of the Swiss population owned a smartphone in 2014. Smartphones, together with other mobile devices, enable a total of two thirds of the population to connect to the internet from outside their home or workplace.

1.2 List the most important legislation which applies to the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in Switzerland.

(a) Telecoms

- Telecommunications Act of 30 April 1997 (“TCA”).
- Ordinance on Telecommunications Services of 9 March 2007 (“OTS”).
- Ordinance on Telecommunications Installations of 14 June 2007 (“TIO”).
- Ordinance on the Addressing Resources of Telecommunications Services of 6 October 1997 (“OART”).
- Ordinance on Frequency Management and Radio Licenses of 9 March 2007 (“OFMRL”).
- Federal Act on Surveillance of Post and Telecommunications of 6 October 2000 (“SPTA”).
- Ordinance on Surveillance of Post and Telecommunications of 31 October 2001 (“SPTO”).

(b) Audio-visual media distribution

- Federal Act on Radio and Television of 24 March 2006 (“RTVA”).
- Ordinance on Radio and Television of 9 March 2007 (“RTVO”).

(c) Internet

The only specific legislation pertaining to the internet is the Ordinance on Internet Domains of 5 November 2014 (“OID”). In

addition to that, the acts and ordinances mentioned above as well as other general statutes apply, such as:

- Federal Act on Data Protection of 19 June 1992 (“FADP”).
- Code of Obligations of 30 March 1911 (“CO”).
- Federal Act on Unfair Competition of 19 December 1986 (“UCA”).
- Ordinance on Price Disclosure of 11 December 1978 (“PDO”).
- Swiss Criminal Code of 21 December 1937 (“SCC”).

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; (b) audio-visual media distribution; and (c) internet sectors in Switzerland.

There are three authorities that play a key role in regulating these sectors.

The Federal Office of Telecommunications (“OFCOM”) has responsibilities in all three sectors. It is mainly responsible for guaranteeing the quality of the provision of the universal service and the *service public*. The OFCOM also sets the national numbering plans (see art. 58 *et seq.* TCA).

The Federal Communications Commission (“ComCom”), as an independent regulatory authority, is responsible for regulating all communications matters in Switzerland. Amongst other things, the ComCom also grants licences for the use of radio communication frequencies, awards universal service licences and approves national numbering plans (see art. 56 *et seq.* TCA).

The Independent Complaints Authority for Radio and Television assesses complaints concerning radio and television programmes (see art. 82 *et seq.* RTVA).

1.4 Are there any restrictions on foreign ownership or investment in the: (a) telecoms; (b) audio-visual media distribution; and (c) internet sectors in Switzerland?

(a) Telecoms

The telecommunications services market was liberalised in 1988. However, the ComCom has the power to ban the supply of telecommunications services in Switzerland by foreign enterprises if reciprocal rights are not granted by the corresponding foreign state (art. 5 TCA).

(b) Audio-visual media distribution

A licence to a foreign enterprise may be refused if the corresponding foreign state does not guarantee similar reciprocal rights. The same is true for enterprises with foreign participation and for foreign natural persons (art. 44 subpara. 2 RTVA).

(c) Internet

The same rules apply as detailed in (a) above.

2 Telecoms

General

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

Switzerland joined the WTO on 1 July 1995. Switzerland has

adopted the reference paper on regulatory principles and has made commitments regarding telecommunications under GATS.

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

All legislation is Federal. The OFCOM and the ComCom are the competent authorities.

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

The ComCom regulates telecommunications in Switzerland (see question 1.3). Its responsibilities consist of managing and regulating the use of frequencies.

The Competition Commission, as an independent authority, enforces the Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (“CartA”). It enforces merger control legislation, combats harmful cartels, monitors dominant companies for anti-competitive conduct, and prevents restraints of competition.

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

According to the Federal Act on the Federal Administrative Court of 17 June 2005 and the Federal Act on Administrative Procedure of 20 December 1968, decisions of the national regulatory authority may be appealed to the Federal Administrative Court (for violation of the law and/or incorrect/incomplete determination of the facts. This decision may be appealed to the Federal Supreme Court.

Licences and Authorisations

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

Generally, no authorisation is required to provide telecommunications services, with the exception of services using the radiocommunications frequency spectrum (arts. 4 and 22 TCA). Radiocommunications licences are generally granted by the ComCom based on a public invitation to tender (art. 24 TCA). The ComCom will then analyse whether the conditions for obtaining a radio communication frequency have been met by the applicants.

Even though no authorisations are required, generally every Telecommunications Services Provider (“TSP”) must notify the OFCOM (there are some exceptions in art. 4 subpara. 2 TCA).

The OFCOM grants the licence for providing universal service to one or more providers based on an invitation to tender (art. 14 TCA). The universal service was created to ensure that the whole country has access to public telephone services, emergency call services and other services detailed in the TCA.

2.6 Please summarise the main requirements of Switzerland’s general authorisation.

No general authorisation is required in Switzerland.

2.7 In relation to individual authorisations, please identify their subject matter, duration and ability to be transferred or traded.

Licences for universal service and radiocommunications frequencies are limited in duration. The TCA does not set out a specific duration (arts. 14 and 24c TCA), but such is listed in the respective licence. The consent of the licensing authority (normally the ComCom) is required for transferring licences to a third party or an acquiring company of the licensed entity (art. 24d TCA).

Public and Private Works

2.8 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 owners of land in public use, such as roads or public spaces, are, according to the TCA, obligated to allow TSPs to use that land to install and operate phone lines, provided that those installations do not interfere with the public use of the land (art. 35 TCA). If the establishment of a telecommunications installation is in the public interest, the Federal Department of the Environment, Transport, Energy and Communications (“DETEC”) has the power to expropriate (art. 36 TCA).

Access and Interconnection

2.9 How is network-to-network interconnection and access mandated?

A market-dominating TSP must provide interconnection to other TSPs (art. 11 TCA). The same applies to a provider of the universal service (art. 21a TCA).

2.10 How are interconnection or access disputes resolved?

Upon request, ComCom will make a decision after having consulted the OFCOM, provided that the TSPs have not agreed on the interconnection and access conditions offered by the dominant TSP within three months (art. 11a TCA). The decision may be appealed to the Federal Administrative Court but not to the Federal Supreme Court (art. 83 of the Federal Act on the Federal Supreme Court of 17 June 2005).

A civil judge will have jurisdiction if disputes arise from agreements or decisions regarding access (art. 11b TCA).

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

TSPs with a market-dominating position are obligated to disclose the conditions and prices for their individual access services separately. They are also required to provide the OFCOM with a copy of their access agreements. Unless there is an overriding public or private interest, the OFCOM will then allow agreements to be consulted (art. 11 TCA).

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?

A market-dominating TSP is required to charge cost-oriented prices for interconnection and access (art. 11 TCA).

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

Operators are not subject to accounting separation, functional separation and/or legal separation.

2.14 Are owners of existing copper local loop access infrastructure required to unbundle their facilities and if so, on what terms and subject to what regulatory controls? Are cable TV operators also so required?

The owners of existing copper local loop access infrastructure with a dominant position in the market must provide fully unbundled access to the local loop. These TSPs must provide such access to other providers in a transparent and non-discriminatory manner at cost-oriented prices (art. 11 TCA). Disputes regarding access are resolved as described in question 2.10.

There is no such obligation regarding the broadcasting of radio and television programme services (art. 11 TCA).

2.15 How are existing interconnection and access regulatory conditions to be applied to next-generation (IP-based) networks? Are there any regulations or proposals for regulations relating to next-generation access (fibre to the home, or fibre to the cabinet)? Are any ‘regulatory holidays’ or other incentives to build fibre access networks proposed? Are there any requirements to share passive infrastructure such as ducts or poles?

Switzerland does not have any regulation concerning next-generation networks (“NGN”). The ComCom and the OFCOM have therefore set up four working groups tasked with defining the framework conditions which will enable a coordinated development of the optical fibre network. The working groups released a series of recommendations with the main goal of facilitating competition, including hardware to be used, standardisation of access levels to the network, and standard contracts between TSPs and landlords.

In addition, current regulation is mainly focused on traditional copper and TV cable networks. For this reason the OTS was revised in 2014. The new Ordinance changed the calculation method used to define the access costs for new telecommunications providers. With this change, the calculation of the access costs is based on the costs that a new, efficient TSP has to invest to build a new network (art. 54 OTS). Revisions of the TCA and its ordinances are planned as well.

Price and Consumer Regulation

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

Only prices for universal service are controlled by the Federal Council, which ensures that prices do not depend, for example,

on distance. The Council will periodically fix upper limits for the prices of the universal service (art. 17 TCA). Aside from that, TSPs are free to set their prices as they wish.

2.17 Is the provision of electronic communications services to consumers subject to any special rules and if so, in what principal respects?

There is no specific statute under Swiss law regulating the provision of electronic communications services to consumers. Nevertheless, consumer protection rules, as well as other statutory provisions pertaining to data protection, unfair competition and the secrecy of telecommunications, apply.

Numbering

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

The OFCOM manages and allocates the addressing resources. The ComCom approves national numbering plans (art. 28 TCA).

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

The national numbering plans apply. Furthermore, TSPs must ensure number portability and freedom of choice of TSP in the matter of national and international connections (the corresponding rules are set by the ComCom; art. 28 TCA).

2.20 Are there any obligations requiring number portability?

TSPs must ensure number portability and freedom of choice of TSP in the matter of national and international connections (the corresponding rules are set by the ComCom; art. 28 TCA). Number portability is only granted for the same services and not between services (mobile and fixed line).

3 Radio Spectrum

3.1 What authority regulates spectrum use?

Spectrum use is regulated by the ComCom (art. 24a TCA). Additionally, the OFCOM supports the ComCom in preparing its decisions.

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

Anyone wishing to use the radiocommunications frequency spectrum in Switzerland must obtain a licence from the ComCom. A licence is generally granted on the basis of a public invitation to tender and is conducted in accordance with the principles of objectivity, non-discrimination and transparency (art. 22 TCA).

3.3 Can the use of spectrum be made licence-exempt? If so, under what conditions?

The armed forces and civil defence do not require a licence in order to use the frequencies allocated to them in the course of their duties. Other exceptions have been granted when the technical means employed to use the frequencies are of limited importance (art. 22 TCA).

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

According to the Ordinance on the Fees in the Telecommunications of 7 December 2007, the calculation is based on the type of radio communication (wireless network, satellite, etc.), the spectrum, and the frequency range used.

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

Please refer to question 2.7. The transfer must be approved by the licensing authority (art. 24d TCA).

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

It is possible to transfer the licence in part or as a whole, if the licensing authority gives its consent (art. 24d TCA).

4 Cyber-security, Interception, Encryption and Data Retention

4.1 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 state may obtain access to private communications based on the SPTA, which is currently subject to revision, and the SPTO. The SCC, the Swiss Criminal Procedure Code of 5 October 2007 (“CrimPC”), as well as the Federal Act on International Mutual Assistance in Criminal Matters of 20 March 1981, may also be applicable.

The state may order the surveillance of post and telecommunications services in the context of criminal proceedings, judicial assistance and when searching for missing persons (art. 1 SPTA). Any surveillance must be in accordance with the rules and procedures in the CrimPC (art. 269 *et seqq.*). The monitoring can be conducted in real-time or on a retroactive basis.

Surveillance is initiated by the public prosecutor through a surveillance order. This order must be reviewed by the compulsory measures court within 24 hours of surveillance or the release of information being ordered in order to determine whether the surveillance is permitted. The court will set an initial maximum period of three months for the surveillance (art. 274 CrimPC). Following this procedure, the Federal Post and Telecommunications Surveillance Bureau (“PTTS”) requests the TSP to provide the required information and forwards this information to the requesting public prosecutor (art. 2 *et seqq.* SPTA). At the end of the surveillance, the person and any third parties being under surveillance have to be informed by the public prosecutor.

4.2 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?

By virtue of the SPTA, TSPs are obliged to have and maintain the appropriate infrastructure for surveillance. They must be able to run surveillance at any time on emails, fixed or mobile telephones, VoIP calls, video calls and instant messenger, as well as all other telecommunications services.

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

The PTTS provides the details of the individual to the TSP after receiving an order of surveillance. The order is executed and the data is transferred to the PTTS by the TSP, which forwards the data to the authority ordering the surveillance.

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

Since Switzerland has implemented a liberal policy regarding encryption, the development and manufacturing of cryptographic software and hardware is not limited in any way. However, in order to export cryptographic goods, an individually granted licence may be required according to the Ordinance on the Export, Import, and Transit of Dual-Use Goods and Special Military Goods of 25 June 1997.

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

TSPs are obliged to store all data related to the identification of users (including IP addresses), data flow and invoicing for at least six months. Please note that under the revised SPTA the retention period will be 12 months. TSPs must also store user data of prepaid mobile phone plans for at least two years (art. 15 SPTA).

5 Distribution of Audio-Visual Media

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

Anyone wishing to broadcast a Swiss programme service must either notify the OFCOM or apply for a licence with the competent authority (art. 3 RTVA).

The national public broadcaster SRG SSR holds a licence from the Federal Council and has a constitutional programme service mandate (art. 23 *et seqq.* RTVA). The SRG SSR must therefore fulfil certain obligations regarding quality, content and diversity of its programmes detailed in the licence and in legislation. In addition to the SRG SSR, there are other licensed broadcasters with a performance mandate (regional radio stations and TV channels with non-profit and regional culture orientation) that receive a part of the licence fees paid by consumers (fee splitting; art. 38 *et seqq.* RTVA). Other licensed regional broadcasters with a performance

mandate do not receive fee splitting because they do not fulfil the conditions (art. 43 *et seqq.* RTVA). Finally, broadcasters without a performance mandate must only notify the OFCOM (art. 3 RTVA).

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.

Yes, there are some additional rules that apply to content broadcasted via television and radio. With regard to content in general, the provisions of the UCA and the FADP apply. The RTVA stipulates additional, specific rules in the following categories for content broadcasted via television and radio (art. 9 *et seqq.* RTVA):

- Clear separation of advertising and editorial content.
- Splitscreen, interactive and digital advertising.
- Interruption of programmes by advertising.
- Limitation/prohibition of advertising for tobacco, alcohol, therapeutic products, political and religious content, etc.

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

Please refer to question 5.1. There are three different types of licences according to the RTVA: SRG SSR's programme service mandate licence; a licence for broadcasters with a performance mandate and fee splitting; and a licence with a performance mandate and without fee splitting. Licensees must fulfil the obligations detailed in the licence and legislation, such as promoting understanding and exchange between different regions of Switzerland or contributing to the development of cultural life in the coverage area.

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

Licences are assignable, however the DETEC must be notified about the transfer of the licence and may refuse approval of the assignment within three months of receipt of the notice. The DETEC examines whether the conditions of the licence will also be fulfilled after the transfer. This procedure also applies for change of control (if more than 20% of the share capital changes ownership; art. 48 RTVA).

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?

Unless they were aware of the infringement, ISPs and TSPs may not be found liable for infringements committed on their networks by a third party. However, in a recent decision of the Federal Supreme Court, a blog platform was found liable for content uploaded by a third party to the platform (5A_792/2011).

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

There is no obligation for TSPs or ISPs to assist content owners by disclosing the information registered in their networks or by deleting such information. They can, however, be held liable if they were aware of the fact that an illegal action was being committed on their network and if they have not taken the required actions to stop the illegal undertaking. In such a situation, a court may consider that they have been informed by the content owner of the infringement.

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

Currently, there is no specific legislation on net neutrality. TSPs and ISPs are bound by the CartA and related legislation. The issue of network neutrality is nevertheless being debated in Switzerland.

A working group, which consisted of the main stakeholders in this field in Switzerland, issued a report with recommendations in October 2014. *Inter alia*, the report focuses on a general obligation of TSPs to disclose information and it suggests imposing a non-discrimination obligation on TSPs. Moreover, Swisscom, Sunrise, UPC Cablecom, Salt and the cable network companies' association Swisscable have formulated a code of conduct on net neutrality.

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

No, there is no such obligation in any statute. TSPs and ISPs are only obliged to do so based on a court order.

6.5 How are 'voice over IP' services regulated?

There are no specific definitions on or provisions relating to VoIP in Swiss law, and hence existing telecommunications legislation is applicable. Swiss law allows the provision of commercial VoIP services, however a provider is subject to the notification requirements detailed in the TCA.



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