

Switzerland



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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

In Switzerland, 92% of the population own at least one mobile phone and within this category 54% own two mobile phones. Three major mobile phone companies are sharing the market with the preponderance of Swisscom with a market share of 59.9% at the end of 2012 (the Swiss government still owns the majority of the shares in Swisscom). The two Swisscom's major competitors are Sunrise and Orange with a respective market share of 20.8% and 15.2%.

Concerning the fixed telephone network, Swisscom is the leader with 59.8% (around the same percentage than with the mobile phones); Sunrise owns 13.8% and Cablecom owns 11%.

Both domains are liberalised and open to foreign investments.

(b) Audio-visual media distribution

On average, Swiss people spend 139 minutes per day watching TV.

The public service managed by the SRG SSR is composed of TV and radio channels divided between the four linguistic regions that compose Switzerland: two TV and four radio channels in French; three TV and six radio channels in German; two TV and three radio channels in Italian; and one radio channel in Romansh. The SRG SSR is funded through the collection of the radio and television licence fee ("redevance") and by the display of advertisement. There is no nationwide public or private TV broadcaster. In addition to the public sector, Switzerland counts 50 licensed regional radio stations and 14 licensed regional TV channels. These are the broadcasters with a performance mandate (some of them receive a part of the radio and television licence fee). There are also 42 minor radio stations and 105 minor TV channels that do not have any performance mandate and that just need to register at the competent federal office.

The market is liberalised and open to foreign investments.

(c) Internet

Concerning the Internet industry, the majority of Swiss people are connected through DSL. Swisscom is once again the leader on the DSL with a market share of 54%, followed by Sunrise with 11%. The remaining 17% are shared by minor and not representative Internet providers.

The access to Internet via cable operator has grown by 8.8% from 2010 to 2011. The leader is UPC-Cablecom with 18.1% (of the entire Internet market, including DSL).

Year after year the number of individuals using their smartphones to connect to the Internet is growing. In February 2013, 58% of mobile phone owners had a smartphone and used it to connect to Internet.

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

The entire legislation is at the federal level:

- Telecommunications Act (TCA) of 1997.
- Ordinance on Telecommunications Services (OTS) of 2007.
- Ordinance on Telecommunications Installations (TIO) of 2002.
- Ordinance on the Addressing Resources of Telecommunications Services of 1997.
- Surveillance of post and telecommunications Act (SPTA) of 2000.
- Ordinance on the Surveillance of post and telecommunications of 2001.

(b) Audio-visual media distribution

The entire legislation is at the federal level:

- Act on Radio and Television (RTVA) of 2006.
- Ordinance on Radio and Television (RTVO) of 2007.

(c) Internet

There is no specific legislation on Internet, except the Acts and ordinances mentioned above and other general law such as:

- Federal Act on Data Protection (DPA) of 1992.
- Swiss Criminal Code.

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.

The Federal Office of Telecommunications is responsible for tasks relating to regulation and to national authority, in particular, ensuring the quality of the universal service and the public service. It is responsible for the determination of national numbering plans. This Office is responsible for the telecoms, the audio-visual media distribution and the Internet sectors.

The Federal Communications Commission is the independent regulatory authority for all the matters relating to communications in Switzerland. The Commission grants licences for the use of radio communication frequencies, awards universal service licences, and approves national numbering plans.

For the televisions and radios, there is also an Independent Complaints Authority for Radio and Television which role is to assess complaints about radio and television programmes.

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

Although the telecommunications services market has been liberalised in 1988, the Federal Communications Commission (ComCom) may prohibit undertakings incorporated under foreign law from providing telecommunications services in Switzerland if reciprocal rights are not granted.

(b) Audio-visual media distribution

Similarly, a legal person controlled from abroad, a domestic legal person with foreign participation or a natural person without Swiss citizenship may be refused the licence if the corresponding foreign state does not guarantee reciprocal rights to a similar extent.

(c) Internet

Investments are subject to the rules and restrictions applying to telecoms.

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 has been a member of the World Trade Organisation since the 1st July 1995. Switzerland has made commitments under the GATS regarding telecommunications and adopted the reference paper on regulatory principles.

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

The entire legislation is at the federal level and the competent authorities are the Federal Office of Communications and the Federal Communications Commission.

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

The Federal Communication Commission is, as seen in question 1.3, the regulatory authority for telecommunications in Switzerland. Its role is to manage and regulate the use of frequencies. The Competition Commission is the independent authority responsible of the application of the Cartel Act. Its role is to combat harmful cartels, monitor dominant companies for signs of anti-competitive

conduct or enforce merger control legislation. Lately, the Competition Commission has refused the merge of the second and third mobile phone operators by arguing that it would lead to a situation of monopoly with only two big companies.

They are both independent from the government.

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

The decisions of the national regulatory authority can be appealed to the Federal Administrative court (based on the Federal Administrative Court Act) for misinterpretation of the law and of the facts. Then the decision of the Federal Administrative Court Act can be appealed to the Federal Supreme Court.

Licences and Authorisations

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

There is no need to get an authorisation to provide telecommunication services. The only obligation to get an authorisation is when the use of frequency spectrum is necessary. The Federal Communications Commission will grant the frequencies on the basis of a public invitation to tender. It will then analyse if the applicants fulfil the conditions to obtain a radio communication frequency.

If no frequencies are necessary, every telecommunications services provider needs to be registered at the Federal Office of Communications (unless they are considered as minor providers; in this case, the registration is not mandatory).

The authorisation for universal service is granted by the Federal Communications Commission to one or many providers. The universal service has been created to insure that the entire country and the entire population have access to public telephone services, to emergency call services and to other services detailed in the Act. Furthermore, the universal service authorisation integrates the services for the hearing impaired and for the visually impaired. The provider of the universal service receives a subvention from the government and from the other telecommunications services providers.

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

As seen above, there is no general authorisation in Switzerland.

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

The authorisations for universal service and for radio communication frequencies are limited in time (the duration is specified in the authorisation; there is no duration fixed in the law). The transfer to a third party or to the acquiring company of the authorised company of authorisation is possible with the consent of the Federal Communications Commission.

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?

According to the Telecommunications Act, the owners of land in public use such as roads or footpaths are required to allow providers of telecommunications services to use that land to install and operate phone lines, provided that those installations do not interfere with the public use of land. Furthermore, the Telecommunications Act gives a power of expropriation to the Federal Department of the Environment, Transport, Energy and Communications if the establishment of a telecommunication installation is in the public interest.

Access and Interconnection

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

The provider with a dominant position in the market has the obligation to provide interconnection to the other providers. The same situation applies for the provider of the universal service, which must provide access and interconnection to the other providers.

2.10 How are interconnection or access disputes resolved?

If providers of telecommunications services do not agree within three months on the access conditions granted by the dominant provider, both providers can send a request to the Federal Communications Commission that will take a decision after having consulted the Federal Office of Communications, which acts as the instruction authority. The decision can be appealed to the Federal Administrative Court, but not to the Federal Supreme Court.

If a dispute arises from agreement and decisions regarding access, the civil judge will be competent.

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

The telecommunications service providers with a dominant position shall disclose the conditions and prices for their individual access services separately. Furthermore, the telecommunications service providers have the obligation to provide the Federal Office of Communications with a copy of their access agreements. The Office shall then, unless there is some overriding public or private interest not to do so, allow agreements to be consulted.

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?

There is no price or cost regulation. However, the law states that the provider with a dominant position shall determine the charges for interconnection and access based on a cost-oriented price basis.

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

There are no operators 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 the local loop have the obligation to fully unbundle their facilities. There are three types:

- The first type is the fully unbundled local loop: the dominant provider which was the owner of the local loop does not have the access on the local loop anymore.
- The second type is when the local loop is shared between the dominant provider and the other provider (as an example: the dominant provider keeps providing fixed telephone services, while the second provider will provide Internet access).
- The last solution is when the new provider provides its service through the local loop and through the network of the dominant provider. In this case, the provider is still under the control of the dominant provider.

This obligation does not apply to cable operators, as there is no obligation to guarantee access in relation to the broadcasting of radio and television programme services.

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 regulatory conditions relating to the NGN. The Communications Commission (ComCom) and the Federal Office of Communications (OFCOM) have brought together all the players in the industry (telecommunications companies, electricity providers, cable operators and landlords) and set up four working groups in order to define the framework conditions, which will allow coordinated development of the optical fibre network. These working groups issued a series of recommendations including, among others, the definition of the hardware to be used, the type of socket to be installed in homes, the standardisation at the level of access to the network (guaranteeing alternative operators access to optical fibre), the definition of contracts between providers and landlords, in particular, to facilitate competition.

To the extent that the current telecommunications regulations are largely confined to the traditional copper network and the cable networks of the cable operators, the Federal Council considers that the Telecommunications Act has reached its limits from a technological point of view and should submit proposals for legislative amendments by 2015.

Cooperation in the telecommunications area must respect antitrust law, in particular, the exclusion criteria for the network access system and agreements on prices and quantities.

Price and Consumer Regulation

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

The telecommunications service providers are free to determine their prices. The only limitation is for the universal service: in this case, the Federal Council will ensure that the prices do not depend, as an example, on distance. It will periodically fix upper limits for the prices of the services.

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

Consumer protection rules apply to any provision of electronic communications services to consumers. Additionally, disparate statutory provisions related to the secrecy of telecommunications, data protection and unfair competition (prohibition of spamming in many cases) may be applicable.

However, the provision of electronic communications services to consumers is not subject to any special act under Swiss law.

Numbering

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

The Federal Communications Commission shall approve the national addressing resources plan and the Federal Office of Communications manages the addressing resources and decides to whom the numbering resource will be given. The Office is also responsible to determine the price the providers shall pay for the use of the resource.

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

The rule is to respect the national addressing resources plan and to respect the rules set by the Federal Office of Communications.

2.20 Are there any obligations requiring number portability?

The Providers of telecommunications services shall ensure number portability and freedom of choice of service provider. There is a geographical portability of numbering resources and a portability between services providers. In contrast, the portability between the services (fixed and mobile services) is not allowed.

3 Radio Spectrum

3.1 What authority regulates spectrum use?

The regulatory authority is the Federal Communications Commission, which delegated a part of this power to the Federal Office of Communications.

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.?

To use a radio spectrum in Switzerland it is necessary to obtain an authorisation from the Federal Communications Commission. The procedure is based on a public invitation to tender. The process shall be conducted in accordance with the principles of objectivity, non-discrimination and transparency. The ordinance of the Federal Council on the management of the radio communication spectrum and on the authorisation to use a frequency states that the authorisation can be granted based on two types of procedures: one based on criteria; and one based on auctions.

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. Furthermore, other exceptions have been determined, especially if the technical means employed to use the frequencies are of limited importance.

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

The calculation methods are determined by the Ordinance on the Fees in the Telecommunications. The calculation is based on the type of radio communication used (wireless network, by satellites) and on the range of the radio communication frequency.

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

See answer to question 2.7. The Federal Communications Commission/Federal Office of Communications (depending on which authority granted the authorisation) shall approve the transfer.

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

Yes, but with the approval of the Federal Communications Commission/Federal Office of Communications (depending on which authority granted the authorisation).

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 Federal Act on the Surveillance of Postal and Telecommunications completed by the Ordinance on the Surveillance of Postal and Telecommunications are the two main texts of law governing the ability of the state to obtain access to private communications. Some rules are also contained in the Swiss Criminal Procedure Code, in the Swiss Penal Code and in the Federal Act on International Mutual Assistance in Criminal Matters.

The law enables the state to exercise surveillance over the following communications medium: post; fixed phones; mobile phones; and Internet. Such monitoring may be conducted in real-time or on a retroactive basis, and may be obtained only for crimes described in the Swiss Criminal Procedure Code.

The surveillance starts with an order of surveillance. This is an act drafted by the penal authority that wishes to obtain information through surveillance. A judiciary authority needs to review this order of surveillance in order to determine whether the ordering authority is competent to order a surveillance mandate and whether the mandate is about a punishable act contained on the crime list. Then the Post and Telecommunications Surveillance Federal Service will ask the telecommunication service provider to provide the requested information and will transfer it to the requesting authority. At the end of the surveillance, the authority has the obligation to inform the subject of the surveillance.

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?

The telecommunications service providers must have and maintain the appropriate infrastructures for surveillance. They must be ready at any time to run surveillance on fixed and mobile telephones, emails, VoIP calls, instant messenger, video calls and all the telecommunications services based on digital media.

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

After having received an order of surveillance from a law enforcement authority, the Post and Telecommunications Surveillance Service will communicate the details of the individual to the telecommunications services provider. The TSP will then execute the order and transfer the data to the Service, which will then transfer it to the law enforcement authority.

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

Switzerland is convinced of the value of encryption in the context of new digital information and communication infrastructure. Electronic commerce represents a real chance for a country such as Switzerland, which operates in a small national market and depends on its exports. Data protection and digital infrastructures preservation are essential for the success of this new market. For those reasons, Switzerland applies a liberal policy with regard to encryption.

Development and manufacturing of cryptographic software and hardware is not subject to any limitation. Therefore there is no limit on the length of the encryption key. Furthermore, the ordinance concerning the Export, Import, and Transit of Dual-Use Goods and Specific Military Goods from June 25 1997 does not stipulate any licensing obligation for the import of products, including cryptographic hardware and software. The only rules applicable in this context are those relating to the Import Certificate (IC). The export and re-export of cryptographic hardware, software, and technology requires an individual validated licence.

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

The telecommunications service providers have the obligation to retain, for at least six months, the data related to the identification of users and the data related to the data flow and to the invoicing. This includes the IP address for Internet access providers.

For the data related to the buying of a SIM card with a prepaid plan, the telecommunication services providers shall retain it for two years.

5 Distribution of Audio-Visual Media

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

According to the Federal Act on Radio and Television, the following categories of broadcasters have a licence:

- The SRG SSR, the national public broadcaster, has a programme service mandate. It has to execute the obligations set in this mandate and in the licence especially about the quality and the diversity of the programmes.
- The other broadcasters with a mandate and fee-splitting: this includes the regional radio stations and TV channels that have a performance mandate and that receive a part of the radio and television licence fees (“*la redevance*”).
- The other broadcasters with a mandate, but without fee-splitting: local radios and TV channels that do not fulfil the conditions to get a part of the radio and television licence fees.

The other broadcasters that do not have any performance mandate must only register with the Federal Office of Communications.

5.2 Is there a distinction between the linear and non-linear content and/or content distributed over different platforms?

There are no distinctions between content distributed over different platforms.

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

As seen in the answer to question 5.1, there are three different types of licence: the specific licence for the SRG SSR; the licence for broadcasters with performance mandate with or without fee-splitting. They have the obligation to fulfil the obligations specified in the Federal Act on Radio and Television, such as providing comprehensive information, particularly on political, economic and social matters and which contribute 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?

The transfer of the licence must be notified to the Federal Department of the Environment, Transport, Energy and Communications, which will have to approve the transfer. The department examines whether the licence requirements are also met after the transfer. It may refuse approval within three months of receipt of notification. The same procedure applies for the change of control (if more than 20% of the share capital is transferred).

6 Internet Infrastructure

6.1 Are conveyance services over the internet regulated in any different way to other electronic communications services? Which rules, if any, govern access to the internet at a wholesale (i.e. peering or transit) and/or retail (i.e. broadband access) level? Are internet service providers subject to telecommunications regulation?

The telecommunications regulations apply to any kind of telecommunication service.

6.2 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?

The Internet service providers and telecommunications operators can not be found liable for infringements committed on their network by a third party unless they were aware of the infringement.

6.3 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?

The telecommunications operators and Internet service providers do not have the obligation to assist content owners by disclosing the information registered in their network or by deleting such information. However, as seen in question 6.2, they can be held liable if they were aware of the fact that an illicit action was being committed on their network and if they have not taken the necessary actions to stop this illicit action. In this situation, a Court may consider that they have been informed by the content owner of the infringement.

6.4 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?

Competition law applies to telecommunications operators and internet service providers.

Network neutrality issue is currently being debated in Switzerland. Among other things, the debate focuses on a general obligation on telecommunications operators to disclose information, and seek to impose a non-discrimination obligation. In the course of the present legislative terms, the Swiss Federal Council plans to draw up a draft partial revision. It will also make suggestions on network neutrality.

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

Yes, if a court requests to do so.

6.6 How are 'voice over IP' services regulated?

The Swiss legislation governing telecommunications do not contain specific definitions referring to VoIP. The regulation of VoIP services is therefore based on the existing telecommunications legislation. In Switzerland, it is authorised to provide commercial VoIP services. A licence may be necessary. All telecommunications service providers who independently operate a large part of the telecommunications equipment are subject to the regime of licensing according to Article 4 of the LTC. OFCOM cannot decide if a telecommunications service provider is subject to the licensing regime until it receives a notification form, correctly completed, and a description of the services the provider is offering.



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Sébastien Fanti is one of the founders of the Lexing Network, which is the first international network of lawyers dedicated to advanced information technology law. He graduated from Fribourg and Neuchatel University, where he studied law and computing network. In addition, he completed training from the WIPO academy in the area of electronic commerce, arbitration, mediation, and intellectual property. He is a member of the Swiss Arbitration Association.

Sébastien Fanti was designated one of the 100 personalities of French-speaking Swiss in 2010. He has been described as a "Web watchdog", one of the pioneers and the first in French-speaking Swiss to have understood the new stakes of the Internet, anticipating the birth of the Pirate Party or the recent position of the Federal Data Protection and Information Commissioner with respect to Logistep and Google Street View. He is now writing a Ph.D. in advanced technology law (cloud computing) under the direction of Pr. Bertil Cottier, Université de Lausanne.

Sébastien Fanti publishes many articles (www.sebastienfanti.ch/publications) on privacy, media, telecom, IP and IT issues. He is also editor within the "Revue du Droit des Technologies de l'Information" International Committee (www.rdti.be) published by the University of Namur.



The Sébastien Fanti law firm is made of legal specialists with technical competencies in a wide range of areas such as information technology, criminal law, privacy, arbitration, contracts and intellectual property. Sébastien Fanti is committed to values such as a client-oriented relationship, efficiency, excellence and elegance. In order to defend and assist clients in the best possible way, he acquired solid, specialised skills and knowledge in various practice areas. Sébastien Fanti is also a senior notary.

The firm regularly takes part in national and international calls for tenders, within the framework of complex legal questions in specific areas submitted by governments and/or international organisations. It represents its clients in Switzerland and abroad before various jurisdictions. The main working languages of the firm are French and English, but lawyers may also work in German and Italian. Member of the Lexing Network, the Sébastien Fanti law firm will soon be designated by the name of Lexing Switzerland law firm.