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THE TECHNOLOGY,  
MEDIA AND  
TELECOMMUNICATIONS  
REVIEW

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FOURTH EDITION

EDITOR  
JOHN P JANKA

LAW BUSINESS RESEARCH

# THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

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THE TECHNOLOGY,  
MEDIA AND  
TELECOMMUNICATIONS  
REVIEW

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Fourth Edition

Editor  
JOHN P JANKA

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# CONTENTS

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<b>Editor's Preface</b> .....	vii
<i>John P Janka</i>	
<b>List of Abbreviations</b> .....	ix
<b>Chapter 1</b> COMPETITION LAW OVERVIEW .....	1
<i>Abbott B Lipsky, Jr with John D Colahan</i>	
<b>Chapter 2</b> AUSTRALIA.....	15
<i>Anthony Lloyd, Paul Kallenbach and Paul Schoff</i>	
<b>Chapter 3</b> BRAZIL .....	34
<i>André Gomes de Oliveira, Renato Parreira Stetner and Tiago Franco da Silva Gomes</i>	
<b>Chapter 4</b> CANADA .....	46
<i>Hank Intven and Grant Buchanan</i>	
<b>Chapter 5</b> CHINA.....	61
<i>Jihong Chen</i>	
<b>Chapter 6</b> EGYPT .....	73
<i>Aly El Shalakany and Omar Sherif</i>	
<b>Chapter 7</b> EUROPEAN UNION.....	85
<i>Maurits J F M Dolmans, Francesco Maria Salerno and Federico Marini-Balestra</i>	
<b>Chapter 8</b> FINLAND .....	120
<i>Mikko Manner, Anna Haapanen and Suvi Laes</i>	

<b>Chapter 9</b>	FRANCE .....	132
	<i>Myria Saarinen and Jean-Luc Juhan</i>	
<b>Chapter 10</b>	GERMANY .....	151
	<i>Laura Johanna Reinlein and Gabriele Wunsch</i>	
<b>Chapter 11</b>	HONG KONG .....	167
	<i>Simon Berry and Viola Jing</i>	
<b>Chapter 12</b>	INDIA .....	184
	<i>Atul Dua, Salman Waris and Arjun Uppal</i>	
<b>Chapter 13</b>	ITALY .....	197
	<i>Stefano Macchi di Cellere</i>	
<b>Chapter 14</b>	JAPAN .....	211
	<i>Hiroki Kobayashi, Richard Fleming, Saori Kawakami and Chiyo Toda</i>	
<b>Chapter 15</b>	KOREA.....	225
	<i>Wonil Kim and Kwang-Wook Lee</i>	
<b>Chapter 16</b>	LEBANON.....	237
	<i>Souraya Machnouk, Rania Khoury and Ziad Maatouk</i>	
<b>Chapter 17</b>	LUXEMBOURG .....	249
	<i>Linda Funck</i>	
<b>Chapter 18</b>	MEXICO .....	269
	<i>Jaime Deschamps and Andoni Zurita</i>	
<b>Chapter 19</b>	NORWAY .....	279
	<i>Olav Torvund, Jon Wessel-Aas and Magnus Ødegaard</i>	
<b>Chapter 20</b>	PORTUGAL.....	287
	<i>Joana Torres Ereio, Joana Mota and Raquel Mauricio</i>	

<b>Chapter 21</b>	ROMANIA .....	303
	<i>Cosmina Simion and Laura Leancă</i>	
<b>Chapter 22</b>	SINGAPORE .....	317
	<i>Ken Chia and Koh See Khiang</i>	
<b>Chapter 23</b>	SOUTH AFRICA.....	340
	<i>Zaid Gardner</i>	
<b>Chapter 24</b>	SPAIN .....	351
	<i>Pablo González-Espejo and Leticia López-Lapuente</i>	
<b>Chapter 25</b>	SWEDEN .....	367
	<i>Erik Ficks and Björn Johansson Heigis</i>	
<b>Chapter 26</b>	SWITZERLAND .....	377
	<i>Michael Isler</i>	
<b>Chapter 27</b>	TAIWAN .....	392
	<i>Arthur Shay and David Yeh</i>	
<b>Chapter 28</b>	TURKEY .....	405
	<i>Serra Başoğlu Gürkaynak, Begüm Yavuzdoğan and M Onur Sumer</i>	
<b>Chapter 29</b>	UNITED ARAB EMIRATES.....	420
	<i>Joby Beretta</i>	
<b>Chapter 30</b>	UNITED KINGDOM.....	434
	<i>Omar Shah and Gail Crawford</i>	
<b>Chapter 31</b>	UNITED STATES .....	454
	<i>John P Janka and Jarrett S Taubman</i>	
<b>Appendix 1</b>	ABOUT THE AUTHORS.....	473
<b>Appendix 2</b>	CONTRIBUTING LAW FIRMS' CONTACT DETAILS ...	497

# EDITOR'S PREFACE

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The pervasive influence of internet and wireless-based communications continues to challenge existing laws and policies in the TMT sector. Old business models fall by the wayside as new approaches more nimbly adapt to the shifting marketplace and consumer demand. The lines between telecommunications and media continue to blur. Content providers and network operators vertically integrate. Many existing telecommunications and media networks are now antiquated – not designed for today's world and unable to keep up with the insatiable demand for data-intensive, two-way, applications. The demand for faster and higher-capacity mobile broadband strains even the most sophisticated networks deployed in the recent past. Long-standing radio spectrum allocations have not kept up with advances in technology or the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum. The geographic borders between nations cannot contain or control the timing, content and flow of information as they once could. Fleeting moments and comments are now memorialised for anyone to find – perhaps forever.

In response, lawmakers and regulators also struggle to keep up – seeking to maintain a 'light touch' in many cases, but also seeking to provide some stability for the incumbent services on which many consumers rely, while also addressing the opportunities for mischief that arise when market forces work unchecked.

The disruptive effect of these new ways of communicating creates similar challenges around the world: the need to facilitate the deployment of state-of-the-art communications infrastructure to all citizens; the reality that access to the global capital market is essential to finance that infrastructure; the need to use the limited radio spectrum more efficiently than before; the delicate balance between allowing network operators to obtain a fair return on their assets and ensuring that those networks do not become bottlenecks that stifle innovation or consumer choice; and the growing influence of the 'new media' conglomerates that result from increasing consolidation and convergence.

These realities are reflected in a number of recent developments around the world that are described in the following chapters. To name a few, these include liberalisation

of foreign ownership restrictions; national and regional broadband infrastructure initiatives; efforts to ensure consumer privacy; measures to ensure national security and facilitate law enforcement; and attempts to address 'network neutrality' concerns. Of course, none of these issues can be addressed in a vacuum and many tensions exist among these policy goals. Moreover, although the global TMT marketplace creates a common set of issues, cultural and political considerations drive different responses to many issues at the national and regional levels.

This fourth edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs that govern these types of issues in 30 jurisdictions around the world. In the space allotted, the authors simply cannot address the numerous nuances and tensions that surround the many issues in this sector. Nevertheless, we hope that the following chapters provide a useful framework for beginning to examine how law and policy continues to respond to this rapidly changing sector.

**John P Janka**

Latham & Watkins LLP

Washington, DC

October 2013

# LIST OF ABBREVIATIONS

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3G	Third-generation (technology)
4G	Fourth-generation (technology)
ADSL	Asymmetric digital subscriber line
AMPS	Advanced mobile phone system
ARPU	Average revenue per user
BIAP	Broadband internet access provider
BWA	Broadband wireless access
CATV	Cable TV
CDMA	Code division multiple access
CMTS	Cellular mobile telephone system
DAB	Digital audio broadcasting
DECT	Digital enhanced cordless telecommunications
DDoS	Distributed denial-of-service
DoS	Denial-of-service
DSL	Digital subscriber line
DTH	Direct-to-home
DTTV	Digital terrestrial TV
DVB	Digital video broadcast
DVB-H	Digital video broadcast – handheld
DVB-T	Digital video broadcast – terrestrial
ECN	Electronic communications network
ECS	Electronic communications service
EDGE	Enhanced data rates for GSM evolution
FAC	Full allocated historical cost
FBO	Facilities-based operator
FCL	Fixed carrier licence
FTNS	Fixed telecommunications network services
FTTC	Fibre to the curb

*List of Abbreviations*

---

FTTH	Fibre to the home
FTTN	Fibre to the node
FTTx	Fibre to the $x$
FWA	Fixed wireless access
Gb/s	Gigabits per second
GB/s	Gigabytes per second
GSM	Global system for mobile communications
HDTV	High-definition TV
HITS	Headend in the sky
HSPA	High-speed packet access
IaaS	Infrastructure as a service
IAC	Internet access provider
ICP	Internet content provider
ICT	Information and communications technology
IPTV	Internet protocol TV
IPv6	Internet protocol version 6
ISP	Internet service provider
kb/s	Kilobits per second
kB/s	Kilobytes per second
LAN	Local area network
LRIC	Long-run incremental cost
LTE	Long Term Evolution (a next-generation 3G and 4G technology for both GSM and CDMA cellular carriers)
Mb/s	Megabits per second
MB/s	Megabytes per second
MMDS	Multichannel multipoint distribution service
MMS	Multimedia messaging service
MNO	Mobile network operator
MSO	Multi-system operators
MVNO	Mobile virtual network operator
MWA	Mobile wireless access
NFC	Near field communication
NGA	Next-generation access
NIC	Network information centre
NRA	National regulatory authority
OTT	Over-the-top (providers)
PaaS	Platform as a service
PNETS	Public non-exclusive telecommunications service
PSTN	Public switched telephone network
RF	Radio frequency
SaaS	Software as a service
SBO	Services-based operator
SMS	Short message service
STD-PCOs	Subscriber trunk dialling-public call offices
UAS	Unified access services
UASL	Unified access services licence

*List of Abbreviations*

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UCL	Unified carrier licence
UHF	Ultra-high frequency
UMTS	Universal mobile telecommunications service
USO	Universal service obligation
UWB	Ultra-wideband
VDSL	Very high speed digital subscriber line
VHF	Very high frequency
VOD	Video on demand
VoB	Voice over broadband
VoIP	Voice over internet protocol
W-CDMA	Wideband code division multiple access
WiMAX	Worldwide interoperability for microwave access



## Chapter 26

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# SWITZERLAND

*Michael Isler*<sup>1</sup>

### I OVERVIEW

Fast-moving convergence of technologies and contents of electronic communications is setting the pace for the evolution of the regulatory landscape in Switzerland. Less than three years ago, the Swiss government still denied the need to adapt the legislative framework accordingly. However, in a supplementary analysis published in March 2012, the Swiss government (the Federal Council) concluded that the current regulatory instruments were insufficient to cope with emerging technological trends. In particular, the access regulation is likely to be converted into a technology-neutral and more interventionist framework. Whilst related preparatory works have commenced behind the scenes, the regulatory waters remained relatively calm during the past year, which permitted the telecom sector to build upon major achievements in 2012, above all the completed reallocation of mobile radio frequencies as the starting signal for LTE roll-out by all mobile carriers. Thereby, the incumbent telecommunications service provider (Swisscom) continued to successfully sustain and strengthen its dominant presence by setting the benchmarks in future-proof technologies, subscription models and services, leaving its contenders behind.

The most obvious effect of convergence in electronic media, apart from the quadruple play (fixed and mobile voice services, internet connection and IPTV) meanwhile offered by all major carriers, is arguably the legislative project to replace the current public funding system of national and regional radio and television programme services with a blanket levy on households and enterprises. At present, the scheme is based on charges applied on traditional receivers. Related to that, the new national audience measurement system launched in 2013 was supposed to take account of convergence in tv consumption. However, a small private station managed to put a spoke in that wheel

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1 Michael Isler is a senior associate at Wenger Plattner.

after having paralysed the TV advertisement market with injunctions on the publication of viewing data.

## II REGULATION

### i The regulators

The regulatory authority for the Swiss telecommunications market is the Communications Commission (ComCom), as established by virtue of Article 56 et seq. of the Swiss Federal Telecommunications Act (TCA).<sup>2</sup> The most prominent powers of ComCom include the granting of licences for the use of mobile radio frequencies,<sup>3</sup> the award of universal service licences,<sup>4</sup> and decision-making powers on disputes among operators regarding access conditions to their network infrastructure.<sup>5</sup> Detailed implementing regulations are laid down in the Ordinance on Telecommunications Services (OTS),<sup>6</sup> which is currently in the process of being revised with respect to the pricing of access to network infrastructure (see Section III.iii, *infra*).

ComCom delegates some of its functions to the Federal Office of Communications (OFCOM). OFCOM maintains the register of telecommunications service providers,<sup>7</sup> manages the radio frequency spectrum<sup>8</sup> and assumes some other ancillary tasks as delegated to it by ComCom. Further, OFCOM is the surveillance authority on telecommunications installations and supports ComCom in its fact-finding and decision-making processes. As a new task, OFCOM will assume the role of registry for the operation of the new generic top-level domain name ‘.swiss’ in 2014 (see Section III.i, *infra*).

At the juncture of telecommunications and antitrust regulation, the Competition Commission (ComCo) comes into play, acting on the basis of the Swiss Federal Act on Cartels and other Restraints on Competition (CartA).<sup>9</sup> As a general rule, there is no hierarchy between the two regulatory regimes, but if the dominant position of a service provider is contested in the context of an access dispute, ComCom must seek ComCo’s opinion.<sup>10</sup> Further, intervention by ComCo requires a coercive behaviour by a dominant competitor, which is absent in cases where disputes on commercial interconnection terms may be brought before ComCom.<sup>11</sup> Such repartition of competences may result in a total absence of regulatory intervention where interconnection needs between operators’ networks are mutual and none of the involved parties is interested in adjudication, as

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2 [www.admin.ch/opc/en/classified-compilation/19970160/index.html](http://www.admin.ch/opc/en/classified-compilation/19970160/index.html).

3 Article 24a of the TCA.

4 Article 14 of the TCA.

5 Article 11a of the TCA.

6 [www.admin.ch/opc/en/classified-compilation/20063267/index.html](http://www.admin.ch/opc/en/classified-compilation/20063267/index.html).

7 Article 4 of the TCA.

8 Article 25 of the TCA.

9 [www.admin.ch/opc/en/classified-compilation/19950278/index.html](http://www.admin.ch/opc/en/classified-compilation/19950278/index.html).

10 Article 11a of the TCA.

11 Federal Court of Justice, 11 April 2011, 137 II 199, p. 213, cons. 5.4 et seq. (*Federal Department of Economic Affairs v. Swisscom*).

has been the case in the field of mobile termination fees. The CartA is currently in the process of being substantially revised.

Broadcasting, processing, transmission and reception of radio and television programme services are governed by the Swiss Federal Act on Radio and Television (RTVA)<sup>12</sup> and the corresponding ordinance (RTVO).<sup>13</sup> An amendment of the RTVA aiming at implementing a new universal radio and television fee is currently in the legislative process (see Section V.ii, *infra*).

## ii Regulated activities

The provision of telecommunications services requires prior notification to OFCOM.<sup>14</sup> Businesses and other non-public communications services are not qualified as telecommunications services.<sup>15</sup> Article 3 of the OTS exempts certain providers from the notification duty, among foreign operators entrusting termination of their connections in Switzerland to other notified providers. On the other hand, MVNOs are considered as telecommunications service providers even if they do not operate their own core network infrastructure.<sup>16</sup> The use of the radiocommunications frequency spectrum<sup>17</sup> (see Section IV.iv, *infra*) and the provision of universal service<sup>18</sup> (see Section III.ii, *infra*) are further subject to a licence granted by ComCom in a public tender process.

Broadcasting of Swiss radio or television programme services requires a notification to OFCOM.<sup>19</sup> The broadcasting of radio or television programmes by wireless terrestrial means is subject to a licence awarded by the Federal Department of the Environment, Transport, Energy and Communications (DETEC),<sup>20</sup> which is subject to an annual fee.<sup>21</sup> As a general rule, licences are publicly tendered, but the authority enjoys a great margin of discretion in the selection of candidates. Under certain conditions, broadcasters of local-regional programme services may be subsidised by a portion of the reception fees subject to their compliance with a performance mandate specified in the licence.<sup>22</sup>

## iii Ownership and market access restrictions

The Swiss telecommunications market is open to domestic and foreign providers alike, and the entry threshold is rather low. Apart from the notification to OFCOM pursuant to

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12 [www.admin.ch/opc/en/classified-compilation/20001794/index.html](http://www.admin.ch/opc/en/classified-compilation/20001794/index.html).

13 [www.admin.ch/opc/en/classified-compilation/20063007/index.html](http://www.admin.ch/opc/en/classified-compilation/20063007/index.html).

14 Article 4 of the TCA.

15 Article 2 of the OTS.

16 OFCOM: Guide to the Registration Form for Providing Telecommunications Services, p. 4, available in English at [www.bakom.admin.ch/themen/telekom/00462/00796/index.html?lang=en](http://www.bakom.admin.ch/themen/telekom/00462/00796/index.html?lang=en).

17 Articles 22 et seq. of the TCA.

18 Articles 14 et seq. of the TCA.

19 Article 3 of the RTVA.

20 See Article 45 of the RTVA.

21 Article 22 of the RTVA.

22 Articles 38 et seq. of the RTVA.

Article 4 of the TCA, the service providers must have sufficient technical capabilities and comply with the regulatory framework.<sup>23</sup> Last, the granting of a radiocommunications licence must not eliminate or seriously impair competition.<sup>24</sup>

Natural or legal persons holding a licence for the broadcasting of Swiss radio and television programmes must be incorporated in Switzerland, and applicants under full or partial foreign ownership may in principle be excluded; further, the maximum number of licences that may be acquired by the same entity or group is limited to two radio and two television licences.<sup>25</sup>

#### iv Transfers of control and assignments

Merger control in Switzerland is governed by Article 9 et seq. of the CartA. Planned concentrations of undertakings must be pre-notified to ComCo if certain financial thresholds are met.<sup>26</sup> They will be scrutinised if a preliminary assessment, to be completed within one month,<sup>27</sup> reveals that they create or strengthen a dominant position.<sup>28</sup> In principle, the in-depth investigation must be completed within four months.<sup>29</sup>

Transfer of licences for universal service<sup>30</sup> and the use of radiocommunications frequency spectrum<sup>31</sup> require ComCom's prior consent. This also applies to the economic transfer of the licence, which occurs when a company has acquired control of a licensee in accordance with the CartA.<sup>32</sup>

Pursuant to Article 48 of the RTVA, licences for radio or television programme services are transferable only with prior approval by the licensing authority (DETEC). This also applies if more than 20 per cent of the capital or voting rights in the licensee are being transferred (economic transfer). DETEC may refuse approval within three months of receipt of notification.

### III TELECOMMUNICATIONS AND INTERNET ACCESS

#### i Internet and internet protocol regulation

Telecommunications services are defined as wired or wireless sending or receiving of information for third parties by means of electrical, magnetic, optical or other electromagnetic signals.<sup>33</sup> Given its technology-neutral conception, the regulatory regime in Switzerland has proven capable of absorbing the emergence of IP-based voice and

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23 For details, see Articles 6 and 47 of the TCA.

24 Article 23 of the TCA.

25 Article 44 of the RTVA.

26 Article 9 of the CartA.

27 Article 32 of the CartA.

28 Article 10 of the CartA.

29 Article 33 of the CartA.

30 Article 14 et seq. of the TCA.

31 Article 22 et seq. of the TCA.

32 Articles 19a and 24d of the TCA.

33 Article 3 of the TCA.

data services irrespective of the contents of the transmission and the access or transport networks used.

VoIP services featuring freedom of connection (freedom of connection being defined as the guaranteed transmission of speech between two connection points in the network) and allowing for transmission of speech in real time are qualified as public telephone services and are subject to a variety of additional functional and quality requirements.<sup>34</sup> Some technical shortcomings of VoIP services as against traditional telephony have been tackled by the regulator in a rather pragmatic manner. As an example, if correct routing of emergency calls and the identification of subscriber's location is technically not possible for every location, it is to be guaranteed only for calls stemming from the main location of the subscriber as specified in the subscription contract.<sup>35</sup>

Further, the chapter of the TCA dealing with addressing resources<sup>36</sup> also applies to the allocation and management of second level domain names under the national country code top-level domain (.ch). The corresponding domain names are managed by the private foundation Switch, which recently celebrated its 25th anniversary and accomplishes its tasks under the surveillance of OFCOM by virtue of an administrative agreement valid until 31 March 2015 and Article 28 of the TCA as implemented by Article 14 et seq. of the Ordinance on Addressing Resources in the Telecommunications Sector.<sup>37</sup> In February 2013, the Swiss Confederation adopted a strategy for the operation of internet domain names.<sup>38</sup> One of its main objectives is to safeguard public interests in view of the emergence of new generic top-level domain names (gTLD). Accordingly, applicants to second-level domain names under the new gTLD .swiss, which ICANN provisionally attributed to the Swiss Confederation in April 2013, will have to demonstrate a connection with Switzerland.

## ii Universal service

By virtue of Article 14 of the TCA, ComCom periodically grants one or more universal service licences in order to ensure a nationwide universal service. The present universal licence was awarded to Swisscom in June 2007 and expires at the end of 2017. The current scope encompasses a public telephone service, wired broadband internet connectivity, access to emergency services, public telephones in sufficient numbers and access to the Swiss directories of subscribers.<sup>39</sup>

The obligation imposed on the carrier to provide nationwide wired broadband internet access is unique in Europe and reaches 98 per cent of the Swiss population. As of March 2012, the prescribed minimum throughput increased to 1,000/100kb/s compared with the 600/100kb/s that had originally been foreseen.

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34 Article 26a et seq. of the OTS.

35 Article 30 of the OTS.

36 Article 28 et seq. of the TCA.

37 [www.admin.ch/opc/de/classified-compilation/19970410/index.html](http://www.admin.ch/opc/de/classified-compilation/19970410/index.html) (not available in English).

38 [www.bakom.admin.ch/themen/internet/00468/04168/index.html?lang=en](http://www.bakom.admin.ch/themen/internet/00468/04168/index.html?lang=en).

39 Article 16 of the TCA.

Since 2011, Switzerland has assumed first position within the OECD when it comes to wired broadband penetration, which reached 43.4 per cent by the end of 2012. When looking at the bandwidths that are actually available, however, there is still room for improvement.

Wireless broadband subscriptions are currently increasing in double-digit iterations each year, resulting in a penetration rate of 58 per cent by the end of 2012, which is, however, still mediocre compared with other OECD countries. All mobile carriers are currently investing in the expansion of their network capacities – mainly through LTE – in order to cope with the growing demand for mobile broadband. 70 per cent of the population should have access to LTE by the end of 2013.

The deployment of high-speed broadband optical-fibre networks is on the investment agenda of private undertakings, municipalities and utility companies alike. At present, the share of FTTH subscriptions is still marginal. Initially utility companies advocated a single-fibre model, while Swisscom aimed at joining forces and strongly preferred the implementation of a multi-fibre solution. In order to facilitate a coordinated deployment of FTTH and avoid investments in redundant infrastructure, a round-table discussion was called in 2008 on the initiative of ComCom. Its main achievement was the adoption of a multi-fibre FTTH model as standard in October 2009. The round table was dissolved in January 2012 saying it had achieved its goals. Swisscom made the most of its competitive advantage given its already existing optical-fibre backbone and FTTN network and conquered all major cities, either as sole supplier or in cooperation with local power utility companies. An attempt to unite forces of local power utility companies by forming the joint venture Swiss Fibre Net Ltd as a counterbalance to Swisscom did not yield the desired response. Other forms of deployment, such as by coaxial cable operators refurbishing their own cable ducts, are confined to rural areas save for one exception (Lausanne). Whenever semi-governmental entities are involved in FTTH deployment, the projects are usually subsidised by the local government. However, the initial optimism tends to give way to more sceptical views on the retail market potential of FTTH.

The contract terms of several FTTH joint ventures between municipal power utility companies and Swisscom had been notified to ComCo, which initiated a preliminary investigation in accordance with Article 26 of the CartA. According to ComCo's view, the agreements were potentially impairing competition in several respects. As a reaction to ComCo's preliminary assessment, the involved parties amended the agreements in line with the regulator's recommendations.

### iii Restrictions on the provision of service

#### *Retail markets*

Telecommunications service providers are in principle free to determine their retail prices. An exception is made for the holder of the universal service licence (see Section III.ii, *supra*), which prescribes, *inter alia*, a ceiling on the charges for establishing and running a wired telephone and internet connection and the price of national calls to fixed-network

connections.<sup>40</sup> The maximum price for a broadband internet connection (including a voice channel) was lowered from 69 to 55 Swiss francs per month in March 2012. In addition, value-added services are subject to the price ceilings set out in Article 39 of the OTS. Further, certain transparency rules are laid down in Articles 10 et seq. of the OTS and Article 11a et seq. of the Ordinance on the Publication of Prices,<sup>41</sup> including a requirement to alert mobile phone users upon establishment of an inter-network call if the prices charged are higher than the intra-network call rates. In case of international roaming, subscribers must be informed free of charge of the costs of the most frequently used roaming services. Political attempts to regulate international roaming prices following the example of the European Union failed, the regulator apparently lacking the power to cap inter-operator tariffs with territorial effect beyond Switzerland.

In cases of abusive prices applied by dominant undertakings beyond the scope of application of Article 7 of the CartA, the Federal Price Supervisor may intervene on the basis of the Swiss Federal Price Supervision Act.<sup>42</sup>

Contrary to the must-carry obligations imposed upon cable operators as per Article 59 of the RTVA for electronic media programme services (see Section V.i, *infra*) telecommunications service providers are not obliged to treat transported packet data on a non-discriminatory basis. Arguably, network neutrality must be ensured within the scope of the universal service licence.<sup>43</sup> The supplementary report on the telecommunications market (see Section VII, *infra*) seizes the discussion and proposes to evaluate the introduction of transparency and non-discrimination duties on carriers. However, in the absence of examples of apparent discrimination given the luxury of massive investments in network capacity, the political debate remains flawed.

### *Wholesale markets*

On the level of the wholesale market, access services and corresponding pricing is exhaustively governed by Articles 11 et seq. of the TCA and Article 51 et seq. of the OTS. Pursuant to Article 11 of the TCA, telecommunications service providers having a dominant position are required to provide access to other providers for the following facilities and services:

- a* fully unbundled local loop (copper line only);
- b* fast bitstream access to the local loop (restricted to four years from the time of effective availability of a nationwide offering meeting the legal requirements in order to afford competitors time to establish a fully unbundled access);
- c* interconnection, consisting of the following minimum service portfolio:
  - origination;
  - termination and transit of calls;
  - identification of the calling and the connected line and suppression thereof;

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40 Article 22 of the OTS.

41 [www.admin.ch/opc/de/classified-compilation/19780313/index.html](http://www.admin.ch/opc/de/classified-compilation/19780313/index.html) (not available in English).

42 [www.admin.ch/opc/de/classified-compilation/19850345/index.html](http://www.admin.ch/opc/de/classified-compilation/19850345/index.html) (not available in English).

43 Simon Schlauri and Michael Vlcek, 'Netzneutralität – Eine Analyse mit Schwerpunkt auf dem geltenden Schweizer Kartell- und Telekommunikationsrecht', *sic!*, 2010, pp. 137–157, p. 152.

- access to value-added services provided by 08xx and 09xx numbering; and
- physical connection between operators' network infrastructure as necessary for the connection of services;

*d* rebilling for fixed network local loops;

*e* leased lines; and

*f* cable ducts.

Network access must be granted by dominant providers at cost-based prices in a transparent and non-discriminatory manner. If the service providers involved cannot agree on conditions of access within three months, ComCom will render a decision on one party's application (Article 11a of the TCA). The concept of *ex post* regulation leads to lengthy proceedings in all areas of access services, the incumbent provider thereby frequently contesting its (apparent) dominant position.

The recent technological developments have brought increased dynamism to the methods of price calculation for access services. Pursuant to Article 54 of the OTS, the calculation of such prices is based on the replacement costs for a new network on the basis of the most recent available functionally equivalent technology (modern equivalent assets doctrine).<sup>44</sup> ComCom, in a decision handed down on 7 December 2011, purported to determine interconnection and access prices on the basis of replacement costs for NGN (in the transport network) and optical-fibre technology (in the access network) starting from 2013. This new approach would result in a mitigating effect on access pricing given the price erosion on new technologies. However, in July 2012, ComCom suspended its plans, since the Federal Council initiated a revision of the access pricing regime that is expected to be introduced by 2014. The proposed concept stands on four main pillars:

*a* access prices to cable ducts will no longer be calculated on the basis of replacement costs, but rather on the cost associated with the maintenance and demand-driven expansion of such infrastructure;

*b* the modern equivalent assets doctrine will be endorsed, but mitigated by a gradual adjustment over a transitional period of three years;

*c* with respect to local loop unbundling, where access regulation is confined to the copper line, the price calculation method takes further account of the performance delta between modern optical-fibre and copper access networks when determining the costs of replacement with modern equivalent assets; and

*d* the difference between the dominant provider's wholesale and retail prices must be such as to allow the competitors to pursue a sustainable business without being dumped out of the market.

#### iv Security

The Federal Council's strategy for an information society adopted in 1998 and updated twice (2006 and 2012)<sup>45</sup> identifies three priorities of governmental policy in the field

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44 Endorsed by Federal Administrative Court, 8 April 2011, A-300/2010 (*Sunrise Communications v. Swisscom*).

45 [www.bakom.admin.ch/themen/infosociety/00695/index.html?lang=en](http://www.bakom.admin.ch/themen/infosociety/00695/index.html?lang=en).



of ICT security: promotion of security literacy, protection from cybercrime, and increase of integrity and resilience of critical ICT infrastructure. In a response to a parliamentary interpellation in May 2013, the Federal Council further acknowledged a risk of unauthorised data processing and disclosures when using social media and cloud services. The Federal Council announced that it would analyse whether the pertinent legal remedies and enforcement mechanisms are sufficient in the course of the forthcoming revision of the federal data protection legislation.

Personal data of natural persons and legal entities are protected by virtue of the Federal Act on Data Protection<sup>46</sup> and telecommunications secrecy is enshrined in Article 43 of the TCA. Telecommunications secrecy provides that no person entrusted with providing tasks pertaining to telecommunications services may disclose information relating to subscribers' communications or give anyone else the opportunity to do so. The range of addressees of telecommunications secrecy is very broad and does not only encompass telecommunications service providers as such, but all stakeholders that are active in the delivery of telecommunications services, including any auxiliaries. Telecommunications secrecy not only forbids disclosure of the content of communications (including peripheral data) to third parties, but also the interception of such content by the addressees of the telecommunications secrecy themselves, subject to the following exemptions:

- a* lawful interception;
- b* filtering of malicious content causing damage to the telecommunications network (viruses, etc.) and unsolicited mass advertising;<sup>47</sup> and
- c* processing of peripheral data for billing and debt-collection purposes.

The prerequisites and means of lawful interception of voice and data communications are set out in the Federal Act on the Surveillance of Postal and Telecommunications Traffic (SPTT)<sup>48</sup> and the corresponding ordinance (SPTTO).<sup>49</sup> The obligation to provide the technical means for lawful interception is also imposed on internet access providers,<sup>50</sup> that need to envisage the surveillance of the following internet applications: synchronic (e.g., instant messaging) and asynchronous (e.g., e-mail) electronic communications, and telecommunications services based on digital media.<sup>51</sup> The transitional period for IAPs to procure the necessary technical installations expired on 31 December 2012.<sup>52</sup> Mere internet application providers (such as Skype or social media platforms) are completely exempt from the SPTTO's scope of application. This will change with the projected

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46 [www.admin.ch/opc/en/classified-compilation/19920153/index.html](http://www.admin.ch/opc/en/classified-compilation/19920153/index.html).

47 Article 45a of the TCA and Article 83 of the OTS in conjunction with Article 3 of the Swiss Federal Act against Unfair Competition (the UCA): [www.admin.ch/opc/de/classified-compilation/19920251/index.html](http://www.admin.ch/opc/de/classified-compilation/19920251/index.html) (not available in English).

48 [www.admin.ch/opc/de/classified-compilation/20002162/index.html](http://www.admin.ch/opc/de/classified-compilation/20002162/index.html) (not available in English).

49 [www.admin.ch/opc/de/classified-compilation/20002506/index.html](http://www.admin.ch/opc/de/classified-compilation/20002506/index.html) (not available in English).

50 Article 26 of the SPTTO.

51 Article 24 of the SPTTO.

52 Article 36b of the SPTTO.

revision of the SPTT, which further aims at enabling the application of 'GovWare' and extending the storage period for peripheral data from six to 12 months.

Rules aiming at the protection of children and consumers are scattered over the OTS and UCA. Pursuant to Article 41 of the OTS, telecommunications service providers are bound to bar access of minors under the age of 16 to erotic or pornographic value-added services. Article 3 of the UCA combats unfair mass advertisement (spam) roughly in the same way as Article 13 of the European Directive on Privacy and Electronic Communications.<sup>53</sup> Complementary thereto, Article 83 of the OTS obliges telecommunications service providers to bar unfair mass advertising, as far as the state of technology permits. As of 1 April 2012, Article 3 of the UCA also provides for imprint and other transparency obligations in e-commerce and prohibits cold calls.

## IV SPECTRUM POLICY

### i Development

The radio frequency spectrum is managed by OFCOM and subject to an annual frequency allocation plan to be approved by the Federal Council.<sup>54</sup> The frequency allocation plan also sets out the national frequency spectrum strategy, which endorses the principle of moving further away from the 'command and control' principle towards market-controlled instruments of frequency allocation, more flexibility and neutrality in terms of technology and services, paired with the possibility of acquiring frequencies on the secondary market without regulatory intervention.

### ii Flexible spectrum use

The demand for greater flexibility in spectrum use is recognised by the regulator as the driving force in frequency spectrum management, however not at the price of interference with adjacent frequency bands. Inband interference on the other hand may be tolerated, particularly where coexistence of different systems can be achieved by technical means. The current spectrum use policy and envisaged strategies are laid down in the national frequency allocation plan.<sup>55</sup>

### iii Broadband and next-generation mobile spectrum use

In the field of mobile radio communication, Switzerland is committed to adhering to the frequency bands to be harmonised at a European level. Given the trend of HDTV reception via cable and satellite, the relevance of terrestrial broadcasting of digital television is decreasing rapidly, leading to the possibility of freeing up the corresponding frequency band (694–790Mhz) for mobile radio in the nearer future (Digital Dividend 2', as resolved by the World Radiocommunication Conference 2012). For spectrum

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53 Directive 2002/58/EC, as amended.

54 Article 25 of the TCA, [www.bakom.admin.ch/themen/frequenzen/00652/00653/index.html?lang=en](http://www.bakom.admin.ch/themen/frequenzen/00652/00653/index.html?lang=en).

55 See footnote 54, *supra*.

efficiency reasons, digital audio broadcasting will further coexist with DAB and DAB+ in the same frequency band. Hence, Switzerland may be inclined to open parts of the frequency band reserved for broadcasting to other services (including public mobile radio), provided that European harmonisation goes in the same direction.

#### iv Spectrum auctions and fees

As a rule, radiocommunications licences are granted on the basis of a public invitation to tender.<sup>56</sup>

In November 2010, ComCom resolved to auction at the same time the free mobile radio frequencies (2.6GHz) and those that were to become available by 2014 (GSM) and 2017 (UMTS) respectively, including the former broadcasting frequencies in the 800MHz band constituting the 'Digital Dividend'. This band will be used for the deployment of the LTE standard, although the terms of the frequency spectrum licences do not prescribe the transmission technology to be used.

The auction took place in February 2012 between the three existing mobile carriers Swisscom, Sunrise Communications and Orange Switzerland, resulting in proceeds amounting to 996.27 million Swiss francs. The awards became final and binding in July 2012, and the corresponding licences last until 2028.

At the end of 2012, Swisscom Broadcast prematurely returned the licence for DVB-H obtained in 2007 due to lack of market demand and availability of mobile devices supporting the failed standard.

## V MEDIA

### i Restrictions on the provision of service

The mere transmission of radio and television programmes by means of telecommunications techniques is regulated in accordance with the provisions of the TCA. The respective radio frequency licences are awarded without charging a fee.<sup>57</sup>

All other regulatory aspects are governed by the RTVA. Media oversight is split between OFCOM and the Independent Complaints Authority (ICA). OFCOM makes sure that the general legal requirements and licence terms are being complied with,<sup>58</sup> and complaints pertaining to programme content are handled by the ICA.<sup>59</sup> The complaint procedure before the ICA is compulsorily preceded by a report to the ombudsman service established pursuant to Article 91 of the RTVA. The national broadcaster (Swiss Broadcasting Corporation) finally enjoys special treatment in many respects.<sup>60</sup>

Content, advertising and sponsoring of radio and television programmes must comply with the following main requirements:

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56 Article 24 of the TCA.

57 Article 39 of the TCA.

58 Article 86 of the RTVA.

59 Article 94 of the RTVA.

60 Article 23 et seq. of the RTVA.

- a* respect of fundamental rights and fairness;<sup>61</sup>
- b* protection of young people through choice of transmission time or other measures;<sup>62</sup>
- c* identifiability of advertising;<sup>63</sup> and
- d* bans on advertising and limitations on interstitials and sponsoring.<sup>64</sup>

Further, minimum quotas for Swiss or other European works apply to broadcasters of national and regional-language television programmes.<sup>65</sup>

Must-carry rules apply on cable operators reaching at least 100 households with respect to the radio and television programmes of the following groups of broadcasters:<sup>66</sup>

- a* Swiss Broadcasting Corporation (SRG SSR);
- b* Swiss broadcasters vested with a performance mandate according to Chapter 3 of the RTVA;
- c* foreign broadcasters transmitting programmes in a Swiss national language and fulfilling certain content-related criteria, as laid down in Article 52 of the RTVO and its annex; and
- d* any broadcaster operating in a niche and serving a specific public interest, subject to prior application to OFCOM and sufficient capacity.

## ii Digital switchover

The transition from analogue to digital transmission led to the cut-off of numerous television programmes through the analogue cable networks. Whereas in March 2012, the Federal Court of Justice still enjoined cable operator UPC Cablecom to reinsert the small youth niche programme called 'Joiz' into its analogue portfolio,<sup>67</sup> DETEC – almost unnoticed by the general public – resolved to lift the must-carry obligations on the analogue services in two steps by 1 June 2013 with respect to foreign programmes and 1 January 2015 with respect to domestic programmes.<sup>68</sup> The Federal Price Supervisor<sup>69</sup> also contributed to facilitating the transition by achieving a settlement with UPC Cablecom to provide for unencrypted reception of a wide range of digital channels, thereby rendering the purchasing or hiring of set-top boxes by its customers obsolete.

As a side-effect of the digital switchover, as of 1 March 2013 regional television programme services subsidised by fee-splitting (see Section II.ii., *supra*) may also be

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61 Article 4 of the RTVA.

62 Article 5 of the RTVA.

63 Article 9 of the RTVA.

64 Articles 9 to 13 of the RTVA.

65 Article 7 of the RTVA, as further specified in Article 5 of the RTVO.

66 Article 59 et seq. of the RTVA.

67 Federal Court of Justice, 22 March 2012, 2C\_790/2011 (*UPC Cablecom v. Joiz*).

68 Article 8a of the DETEC Ordinance on Radio and Television, [www.admin.ch/opc/de/classified-compilation/20071544/index.html](http://www.admin.ch/opc/de/classified-compilation/20071544/index.html) (not available in English).

69 For its function, see Section III.iii, *supra*.

broadcast by wire in digital format outside their allocated coverage areas.<sup>70</sup> The technical implementation of the previous territorial broadcasting restriction proved almost impossible. With the next RTVA revision, said restriction will most likely be abolished all together.

The technical convergence of internet and broadcasting further led to project to amend the RTVA. Under the current public funding scheme, each owner of a receiver is obliged to notify the fee collection agency thereof and to pay a reception fee.<sup>71</sup> The increasing availability of multifunctional devices has stretched the categories of receivers under the legacy system to an extent hardly compatible with the rule of law, and widespread deficiencies in enforcement further undermine compliance by the general public. According to the proposal, fees shall be charged per household and per undertaking, irrespective of ownership of a receiver. The actual implementation of the new model will not take place before 2017 though.

### iii Internet-delivered video content

The European Court of Justice's *TVCatchup* ruling<sup>72</sup> qualified the simultaneous and unabridged retransmission of television programmes over the internet as an exclusive right of communication to the public within the meaning of Article 3(1) of the Information Society Directive,<sup>73</sup> thereby distinguishing between IP-based retransmission and content distribution by coaxial cable facilitated by the Satellite and Cable Directive.<sup>74</sup> The judicial throwback cast a new light on the technology-neutral concept adopted by the Swiss legislator. While the simultaneous and unabridged retransmission of television programmes and their content remains in principle an exclusive right by virtue of Articles 10, 33 and 37 of the Federal Copyright Act (FCA),<sup>75</sup> their exploitation is compulsorily assigned to the competent collecting societies.<sup>76</sup> The remuneration applicable to the retransmission of electronic media programmes is laid down in judicially enforceable collective tariffs approved by the Federal Commission on the Exploitation of Copyrights and Neighbouring Rights. The collecting societies must uniformly heed the tariffs and are deprived from imposing a prohibition on retransmission on general or individual scale.<sup>77</sup> Such a 'one-stop shop' for the procurement of retransmission rights irrespective

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70 Article 37 para. 2 of the RTVO.

71 Article 68 of the RTVA.

72 ECJ, 7 March 2013, C-607/11.

73 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

74 Directive 93/83 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, p. 15).

75 [www.admin.ch/opc/de/classified-compilation/19920251/index.html](http://www.admin.ch/opc/de/classified-compilation/19920251/index.html) (not available in English).

76 Article 22 of the FCA.

77 Federal Court of Justice, 9 July 2007, 133 III 568 (*BBC and Swissperform v. GGA-Maur*). This far-reaching practice was adopted prior to the entry into force of WCT, WPPT and TRIPS in

of the technology used is unique in Europe and renders Switzerland an attractive location for IPTV businesses.

The leasing or sale of set-top boxes, including virtual video recorders, featuring a copying and storage function, is also subject to a collective tariff. The tariff also defines the maximum extent of storage for time-delayed viewing permissible under the private use exemption pursuant to Article 19 of the FCA (30 hours or seven days respectively, depending on the remuneration).

## VI THE YEAR IN REVIEW

In the telecommunications sector, the completion of the mobile radio spectrum auction (see Section IV.iv, *supra*); ComCo's intervention in the current optical-fibre deployment activities (see Section III.ii, *supra*); and significant progress made in access disputes, all happening in 2012, have eventually brought about a fairly stable framework in the mid-term. The relative calmness on the regulatory side has stimulated mobile operators to focus on the end-user market. Swisscom singled itself out by launching a flat-fee mobile subscription offer that is not priced on data consumption, but on offered download speed. The novel approach received international attention by peers and OECD. Orange Switzerland, that was sold by France Télécom to Apax Partners LLP in 2012 but still uses the Orange brand, differentiated by partnering with the music streaming service Spotify and the internet television provider Zattoo. In doing so, it also provoked mild protests from advocates of net neutrality.

In many other respects, the incumbent provider Swisscom dominated the headlines. First, it had to bury its plan to acquire a majority stake in Telecom Liechtenstein, the national operator of the Principality of Liechtenstein, due to opposition by the Liechtenstein parliament. Second, it launched its own mobile messaging and voice application called 'iO' to compete with established services such as WhatsApp, Viber and Skype. Third, its successful and well-respected CEO, Carsten Schloter committed suicide in July 2013.

The electronic media sector was paralysed during the entire first half of 2013 by an intractable battle sparked by the private television station 3 against the new method of audience measurement. Mediapulse, the entity entrusted with the measurement of electronic media usage in Switzerland,<sup>78</sup> deployed a new metering system in 2013 that was supposed to better reflect new patterns of media usage. In particular, it should also cover computer-only and time-delayed TV consumption. Initially, teething troubles caused Mediapulse to postpone the publication of the data twice, then 3+ obtained ex parte injunctions to have the data published, first by a civil court and later by the Federal Administrative Court. Albeit both preliminary injunctions were eventually reversed, the parties' settlement achieved at the end of July 2013 left 3+ as the clear winner. Notably, the coverage of computer-only households is being suspended until 2015, when measurement of mobile TV consumption is projected to be introduced. This

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Switzerland and may therefore be vulnerable under the premises of the three-steps test.

78 See Article 78 of the RTVA.

is a remarkable and surprising outcome of the dispute, given that Switzerland is an all but fertile ground for private nationwide television broadcasters.

In the aftermath of the dispute between the Swiss Broadcasting Corporation and (print) media publishing houses regarding the extent that the former is permitted to tailor its online news portal, where the publishing houses won the day, the Federal Council in May 2013 fulfilled its promise to review the national broadcaster's licence. The amended terms afford slightly greater flexibility as to the publication of online content, but keep the ban on related advertisement and sponsoring.

## VII CONCLUSIONS AND OUTLOOK

In the aftermath of the Swiss Federal Council's publication of a report on the evaluation of the Swiss telecommunications market on 17 September 2010,<sup>79</sup> a supplementary report<sup>80</sup> was published on 28 March 2012 on parliamentary initiative. While in the initial conclusion – despite identified shortcomings – a need for a revision of the regulatory framework had been denied, the approach was reversed only 18 months later. On a motion of the Federal Council, OFCOM is currently in the process of preparing a partial revision of the TCA. It is expected that the legislative proposal will, *inter alia*, promote a technology-neutral unbundling of the access networks (currently this is confined to the copper line) and aim to expedite the effect of regulatory interventions in interconnection disputes (currently dominant competitors are subject to *ex post* regulation only).

Whilst legislation in the sector remains a moving target in Switzerland, with the TCA and the RTVA – to name a few – being subject to a revision process, the past twelve months have proved to be relatively calm on the regulatory front. However, the project of a new asset valuation method for access service pricing, that will most likely become effective in 2014, may soon spark a new wave of interconnection disputes. Whatever the outcome of all these projects, their impact on the competitive landscape in the telecommunications market is likely to be marginal. The prohibition of the *Sunrise/Orange* merger by ComCo in April 2010 prevented the formation of a strong challenger of the incumbent provider. It seems though that the competitors have dealt well with the situation, most of them still generating sustainable profits despite a modest market share. An upside of the relatively comfortable situation in the absence of fierce price competition is the emphasis on network quality and performance, particularly in the mobile sector.

In the electronic media domain, technical evolution and ensuing new media usage patterns seem to be capable of silently wiping aside long-defended regulatory cornerstones, such as the must carry-obligation on analogue services incumbent on cable operators. It is submitted that this type of decreed changes induced by rapid technical evolution will continue shaping the regulatory landscape, thereby largely anticipating the outcome of the more ponderous legislative revision processes.

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79 [www.bakom.admin.ch/dokumentation/gesetzgebung/00512/03498/index.html?lang=en](http://www.bakom.admin.ch/dokumentation/gesetzgebung/00512/03498/index.html?lang=en).

80 See footnote 79, *supra*.

## Appendix 1

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# ABOUT THE AUTHORS

### **MICHAEL ISLER**

*Wenger Plattner*

Michael Isler is a senior associate with Wenger Plattner, practising in the firm's Zurich and Basle offices in the fields of ICT, intellectual property, unfair competition and life-sciences law. He was educated at the Universities of Zurich and Louvain and also holds a doctoral degree from the University of Lucerne. Prior to joining Wenger Plattner, Dr Isler worked as in-house counsel for a multinational telecommunications infrastructure supplier and service provider, where he negotiated several network outsourcing deals, and acquired his expertise in the technical and regulatory aspects characterising the sector. Apart from continuing transactional work of the same type, Dr Isler frequently advises on data protection, licensing, trademark and advertising matters with a particular focus on regulated markets.

### **WENGER PLATTNER**

Goldbach Center

Seestrasse 39

8700 Küsnacht-Zurich

Switzerland

Tel: +41 43 222 38 00

Fax: +41 43 222 38 01

[michael.isler@wenger-plattner.ch](mailto:michael.isler@wenger-plattner.ch)

[www.wenger-plattner.ch](http://www.wenger-plattner.ch)