

Highlights of pre-draft Electronic Media Act

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In June 2018 the Federal Council issued a preliminary draft of the new Electronic Media Act (EMA), which aims to ensure that media content continues to meet high journalistic standards following profound changes in media use over the past decade. The pre-draft EMA will replace the current Federal Act on Radio and Television (RTVA). **(1)**

Current act

Under the RTVA, radio and TV programme services can receive public funding from various contributions (eg, radio and TV fees). The RTVA also stipulates content requirements.

The RTVA's current scope encompasses radio and TV programme services. 'Programme services' are considered sequences of programmes which are:

- offered continuously;
- defined in time;
- transmitted using telecoms techniques; and
- intended for the public.

Notwithstanding some exceptions relating to other journalistic services provided by the Swiss Broadcasting Corporation (SRG SSR), the RTVA principally covers radio and TV programme services that are bound to a certain timeline, (ie, linear media services). Non-linear media services that are provided to individual users on request do not currently fall within the RTVA's scope of application.

Pre-draft EMA scope

As compared with the RTVA, the pre-draft EMA's scope will be enhanced to include online media and will apply to:

- SRG SSR media services;
- media services of other providers that are contracted and mandated by the government to provide journalistic services; and
- Swiss TV programmes (including time-shifted TV services).

Further, the pre-draft EMA will apply to both linear and non-linear media services that include audiovisual and audio contents. The type and means of distribution are no longer relevant in the pre-draft EMA.

SRG SSR media services

The SRG SSR fulfils a comprehensive journalistic purpose and holds a state licence from the government. Therefore, all SRG SSR operations fall within the pre-draft EMA's scope of application.

Other government-mandated media service providers

Only media services that are contracted and mandated by the government to provide journalistic

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services fall within the scope of the pre-draft EMA and profit from correlating subsidies thereunder.

'Media services' are media contributions or ads that are compiled by a media provider according to editorial criteria. Only electronic media services that are transmitted via means of telecoms techniques and addressed to the general public fall within the pre-draft EMA's scope of application.

'Means of telecoms techniques' include sending or receiving information via:

- lines or radio;
- electrical, magnetic or optical signals; or
- other electromagnetic signals.

Print media does not fall within the pre-draft EMA's scope of application. Further, only the media services of media providers that are contracted and mandated by the government to provide journalistic services fall within the pre-draft EMA's scope of application. Unless the media services are Swiss TV programmes or if an exception explicitly provided by the pre-draft EMA applies, media services which are not contracted or mandated by the government do not fall under the pre-draft EMA's scope of application. For example, radio stations that are not contracted and mandated by the government are not covered by the pre-draft EMA (as opposed to the current RTVA). In addition, video-on-demand services that are not contracted and mandated by the government do not fall within the pre-draft EMA's scope of application. This is in contrast with the EU Audiovisual Media Services Directive.

Time-shifted TV services are non-linear TV services and therefore would not fall within the pre-draft EMA's scope of application unless they are contracted and mandated by the government. However, the pre-draft EMA explicitly provides for an exception with regard to time-shifted TV services, which now fall within its scope of application.

Swiss TV programmes

Swiss TV programmes are those which are subject to Swiss jurisdiction in accordance with the applicable international law – namely, the European Convention on Transfrontier Television.⁽²⁾ TV programmes are meant to be linear audiovisual media services. Linear TV programmes are fully covered by the pre-draft EMA unless they are exempted by the Federal Council (which is possible only if they are journalistically insignificant). Thus, linear TV programmes also fall within the pre-draft EMA's scope of application without being contracted or mandated by the government.

However, the density of regulation varies: TV programmes that are not contracted and mandated by the government are subject only to certain minimum requirements which are equivalent to those set out by the European Council in the European Convention on Transfrontier Television. In particular, according to the pre-draft EMA, no notification and reporting obligations apply to linear TV programme providers that are not contracted and mandated by the government.

Time-shifted TV services are specifically regulated under the pre-draft EMA. These services are non-linear TV services and are currently unregulated in the RTVA. Protective regulations which apply to linear TV programmes (eg, advertising, sponsoring mechanisms and youth protection) will be extended to time-shifted TV services to avoid circumvention by specific forms of non-linear use via the Internet or other technologies. Therefore, under the pre-draft EMA, telecoms service providers are responsible for time-shifted TV services, rather than TV broadcasters.

Additional key aspects

Additional key aspects of and proposed changes to the existing law are as follows:

- Radio and TV sector research on the use of media in Switzerland has been abandoned in the pre-draft EMA. Previously, such data was collected by the Foundation for Audience Research as per the RTVA. Industries requiring this data must now collect it themselves.
- The different sources of funding under the RTVA (eg, radio and TV fees, concession fees and general tax funds) have been reduced to a single source – namely, a fee on and for electronic media payable by individual households and enterprises. In addition, the possibility of receiving funds for different purposes will be abandoned. Under the pre-draft EMA, a funding recipient will be entitled only to a single fund covering all rightful purposes under the law.

EU context

Given Switzerland's position outside the European Union and the European Economic Area, it has no obligation to transpose the [EU Audiovisual Media Services Directive](#) into national law. Nevertheless, there has been a certain level of alignment. To some extent, the pre-draft EMA can therefore be seen as the Swiss equivalent to the revised EU Audiovisual Media Services Directive.

Against the background of the ongoing Swiss-EU negotiations with respect to Switzerland's adherence to the EU programme to promote the audiovisual and cultural sector (so-called 'Creative Europe'), it remains to be determined whether a complete harmonisation between the pre-draft EMA and the EU Audiovisual Media Services Directive is necessary. At present, the two pieces of legislation have a number of important differences.

The main difference is the scope of application: whereas the pre-draft EMA's scope is limited to SRG SSR media services, media services of other media providers that are contracted and mandated by the government to provide journalistic services and Swiss TV programmes, the revised EU Audiovisual Media Services Directive regulates both TV broadcast and on-demand audiovisual media services. Therefore, on-demand audiovisual media services will fall under the pre-draft EMA only if they are contracted and mandated by the government, in contrast with the EU Audiovisual Media Services Directive which governs all video-on-demand media services.

Further, the EU Audiovisual Media Services Directive regulates topics that are not addressed by the pre-draft EMA, but by different Swiss laws, as well as topics that require additional regulations (by way of delegation to the Swiss Federal Council). For example:

- Youth protection principles are set out in the pre-draft EMA; however, complete adaptation to the EU Audiovisual Media Services Directive will be achieved by the new Federal Act on the Protection of Minors in respect of Films and Video Games. The consultation procedure on this new act will begin in February 2019.
- With regard to advertising, the Federal Council will be competent to enact time requirements for non-linear media services that are contracted and mandated by the government. In contrast, the EU Audiovisual Media Services Directive does not provide for any restrictions in terms of time requirements relating to advertising.
- In terms of product placement, the EU Audiovisual Media Services Directive provides stricter obligations than the pre-draft EMA (eg, by prohibiting product placements in consumer affairs programmes).

Relevant provisions and revisions

In regard to electronic media services, the following additional legal provisions and ongoing revisions (in addition to the pre-draft EMA) are relevant:

- The transmission of information by means of telecoms techniques will be governed by the Telecommunications Act, **(3)** unless the pre-draft EMA provides otherwise. Therefore, the Telecommunications Act may apply in addition to the pre-draft EMA. A revised version of the Telecommunications Act is being discussed by Parliament in order to accommodate recent technological advancements. As a result of current debates before Parliament concerning the revision of the Telecommunications Act, it is likely that the RTVA will be partially amended before the pre-draft EMA enters into force. In particular, Parliament will most likely adopt a regulation of time-shifted TV services in the current RTVA.
- The Swiss-EU negotiations regarding Creative Europe may trigger additional harmonisation with the EU Audiovisual Media Services Directive .
- Electronic media services may be subject to new legislation (eg, the new Federal Act on the Protection of Minors in respect of Films and Video Games) in addition to existing regulations (eg, the Federal Law against Unfair Competition **(4)** and the Federal Act on Copyright and Related Rights **(5)** (including the tariff by the collective rights management organisations)).
- The Federal Office of Culture **recently called for an amendment** of the Federal Act on Film Production and Film Culture. **(6)** In particular, it proposed that streaming service providers such as Netflix and Amazon must reinvest 4% of their income generated in Switzerland in independent Swiss productions and dedicate at least 30% of their content catalogue to films and TV shows made in Europe.

Outlook

The consultation period on the pre-draft EMA ended in October 2018. The report and all of the comments received are publicly available on the Federal Office of Communications [website](#). Based on these consultations, the Federal Council will draw up a draft EMA and a corresponding dispatch to submit to Parliament. The draft and corresponding dispatch may include modifications to the pre-draft EMA, particularly in view of the consultation results and the final version of the EU Audiovisual Media Services Directive , which has now entered into force. However, it remains unclear when the newly drafted EMA and corresponding dispatch will be submitted to Parliament.

Comment

Replacing the current RTVA with a new EMA is necessary in light of recent technological changes and reflects the broader adaptation of the Swiss regulatory framework. While regulatory

harmonisation with respect to audiovisual media services has been achieved in the European Union by the enactment of the EU Audiovisual Media Services Directive, Swiss law deviates from the directive in a number of ways. Before the new EMA enters into force, the RTVA and related legislation are likely to be partially revised. Electronic media service providers should therefore pay close attention to the upcoming changes in order to prepare for Switzerland's new regulatory framework in the media sector.

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Endnotes

(1) SR 784.40.

(2) SR 0.784.405.

(3) SR 784.10.

(4) SR 241.

(5) SR 231.1.

(6) SR 443.1.

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