

Communications: regulation and outsourcing in Switzerland: overview

David Känzig and Dr Katia Favre
Thouvenin Rechtsanwälte

global.practicallaw.com/5-619-1741

THE TELECOMMUNICATIONS MARKET

1. Give a brief overview of the structure of the telecommunications market in your jurisdiction. Briefly set out any major recent developments, such as mergers and acquisitions, restructurings and insolvencies.

Market structure

The Swiss telecommunications market has proved dynamic. Nearly all internet users are using a broadband connection, the duration of mobile and fixnet communications increases and the turnover of telecommunications service providers is increasing.

Four major national players provide telecommunications services to private individuals, namely the incumbent operator Swisscom, Sunrise, Salt (formerly Orange) and upc-cablecom. Swisscom's established fixed network, and the cable television operators, reach about 90% of Swiss households.

Swisscom remains market leader for both fixed and mobile telephony services. The Swiss Confederation is by law required to own more than 50% of the shares in the incumbent operator. At present there is no political majority that would change this majority ownership arrangement. Consequently, there is little political interest in breaking up the former monopolist or in changing the legal environment to create a level playing field, since the Swiss Confederation profits from Swisscom's competitive advantage.

Nevertheless, various other global players are present in the Swiss market, such as Verizon, BT and Colt, focusing on business customers. Further, there are smaller local cable television providers who have also expanded into telephony and broadband services.

The past years have seen a consolidation in the market by the national players acquiring smaller providers (in particular, mobile virtual network operators (MVNOs)) and the national providers expanding their services into television services as well such as Swisscom and Sunrise. Upc-cablecom, on the other hand, which historically started out as a cable television provider, has expanded into mobile services. Telecommunications services providers have furthermore expanded into solution providers for enterprises, offering comprehensive communication and IT outsourcing solutions for small and large enterprises. At the retail level there is a tendency towards flat fees and a bundling of the services combining fixed net, mobile and broadband access, as well as radio and television.

In 2010, Sunrise and Orange (since renamed Salt) considered a merger. However, the Competition Commission did not approve the merger, arguing that a merger between the number two and three providers could result in collusive market dominance. It is unclear whether the Competition Commission would take the same view

today, given that upc-cablecom has increased its Swiss-wide presence.

Recent developments

The technological development towards an IP-based network has fundamentally changed the telecommunication sector. The traditional providers now find themselves confronted with new and often global service providers, competing with new business models. The use of comprehensive communication suites combining telephony, conference calls, messaging and document-sharing also presents a challenge from the regulatory perspective, since none of these services requires a physical presence in Switzerland, which makes regulation difficult. Although these new providers compete in the Swiss market, it is often not clear whether or to what extent the providers fall under the Swiss Telecommunications Act, or how the regulations can be successfully enforced against a foreign-based provider.

Revision of the Telecommunications Act

On 19 November 2014 the Federal Council issued its report on the Swiss telecommunication market, providing an overview of developments and the regulatory challenges. The report concluded that the Telecommunications Act does not adequately address many of the questions that have arisen due to the rapid technological development, and that a revision will be inevitable.

The forthcoming revision of the Telecommunications Act will have to clarify its application to global providers, differentiate between the various categories of providers, and discard the registration requirement, which has become a useless administrative burden.

Technology-neutral access will also need to be introduced for the last mile (currently limited to copper), and the Swiss regulator will have to be empowered to intervene *ex officio* for the determination of cost-oriented prices. While several proceedings have been launched in the past for the determination of cost-oriented mobile termination costs, all have been withdrawn and were primarily introduced to negotiate better rates between the providers, without fully benefiting end users.

Access to cable ducts at fair market prices may be extended to include non-dominant carriers and to incorporate a wider range of passive infrastructure.

The Federal Council foresees further challenges in the use of the radio spectrum, net neutrality, consumer protection and the consumer's freedom to choose, which has become a big issue for social networks, with the ability to switch from one social network to the other and the possibility to transmit data from one provider to the other.

No immediate regulatory intervention is foreseen with regard to mobile roaming costs or the state's majority shareholding in Swisscom, the former monopolist. Provider liability is likely to be included in the revision, and the universal services obligation will also have to be revised.



The Federal Council has concluded that although the need for a revision is apparent, it may be premature to intervene at this point in time for certain aspects, and the further development of the markets will have to be monitored to determine a possible intervention by the legislator. The following topics should, however, be addressed without delay:

- Provide a clearer definition of telecommunication service providers (which will include over the top services) and discard the registration system.
- Technology-neutral access, including local loop unbundling.
- *Ex officio* intervention of the regulator.
- Flexible use of radio spectrum and introduction of joint use of network.
- Regulation regarding the ".ch" and ".swiss" internet domain.
- Enhanced regulation for network resilience, stability and security.
- Freedom to choose individual services and to facilitate a change of providers (which might also include social networks), which becomes more important due to bundled service offers.
- Obligation of service providers to provide information regarding their policy to prioritise or discriminate certain data transported over their network.
- Introduction of regulation regarding liability of providers for content (take down on governmental notice).
- Introduce precise basis for international roaming costs on actual time used and a basis for local break out.
- Increase consumer protection and protection of minors.

It remains to be seen whether the Swiss Parliament will enact further liberalisation of the Swiss telecommunication market in the interest of the consumer and the alternative service providers.

Given the pace of the Swiss legislator, we do not expect any changes to be introduced to the existing law before 2018/20.

Interconnection proceedings

Interconnection proceedings for determination of cost-oriented access costs have somewhat slowed down. The proceedings for lower access costs for interconnection as well as access to infrastructure such as ducts have been decided by the Federal Communications Commission, and prices have been substantially lowered to a level that hardly justifies new proceedings, taking into consideration the procedural costs and risk. Unlike in other jurisdictions, access charges are not determined *ex officio* but only at the request of alternative providers, who often shy away from lengthy and costly proceedings.

On 1 July 2014 the revised Telecommunication Ordinance came into effect. The changes introduced by the revision provide for:

- Clarification of the non-discrimination obligation of the incumbent operator, specifying that the price offered must permit an alternative operator to achieve at least cost-covering revenue (price margin squeeze).
- Cost-oriented price determination for access on the basis of the functional equivalent (MEA). Unless provided otherwise, the bases of the cost orientation are the relevant costs, forward-looking, modern equivalent assets, long-run incremental costs (LRIC), constant mark-up and adequate capital return.
- Jettisoning the principle of MEA determination of access cost for cable ducts, which permitted the incumbent operator to charge costs for the use of the cable ducts by the alternative operators which far exceeded the actual costs, which have been long amortised. Costs will have to be determined based on the costs for maintenance and modification of the cable ducts.

- Minimum price for access on the basis of short run incremental costs.
- Determination of access price in case of a price margin squeeze.
- Interfaces.
- Full unbundling.
- Capacity-based offer for interconnection and glide path for the functional equivalent, so that the full modern and functional equivalent costs will become relevant after only two years equivalent.
- Glide path for leased lines.

Fibre to the home

Fibre to the home is still emerging in Switzerland. In major cities, the incumbent operator and public utilities have started bringing optical fibre to homes.

To accelerate the fibre roll-out in Switzerland and to share costs, Swisscom has entered into several co-operation agreements with public utilities, which have been submitted to the Swiss Competition Commission for review. The Swiss Competition Commission found certain clauses on layer 1 exclusivity and investment protection to be against Swiss competition law. The layer 1 exclusivity clause was therefore struck from the agreement, as well as the investment protection clause.

RESTRICTIONS ON FOREIGN OWNERSHIP

2. Are there any restrictions on foreign companies entering the telecommunications market in your jurisdiction?

Foreign telecommunications service providers are free to enter the Swiss market. The Federal Communications Commission may however prohibit market entry (absent international treaties) where the country of origin does not apply the principle of reciprocity.

REGULATORY FRAMEWORK

Legislation and regulatory authorities

3. Give a brief overview of the regulatory framework for telecommunications in your jurisdiction. Which authorities regulate telecommunications services in your jurisdiction? Is there a separate regulator for competition law issues in this sector?

Regulatory framework

The provision of telecommunications services and the obligations of telecommunications service providers are in essence dealt with by the following legislation.

Telecommunications Act and implementation ordinances. The Telecommunications Act governs:

- The provision of telecommunications services by providers in general.
- The obligations of the incumbent provider.
- The management of radio communications.
- The assignment of numbering, naming and addressing resources.
- Telecommunications equipment.

The Ordinance on Telecommunications Services, the Ordinance on Telecommunications Equipment and the Ordinance on Internet Domains supplement the Telecommunications Act.

The Telecommunication Ordinance further details the determination of access costs at cost-oriented prices, based on the MEA approach and LRIC. For access to infrastructure, the MEA approach has been discarded and costs must be determined based on the costs for maintenance and modifications of the cable ducts. Article 54a of the Telecommunication Ordinance provides for detailed regulation on the calculation of amortisation, capital invested and weighted average cost of capital.

Lawful Interception Act and the implementation Ordinance. These govern the obligations of telecommunications service providers to intercept data and retain certain data for a six-month period. The Lawful Interception Act is currently under revision. It is expected that the data retention period will be increased to 12 months and that trojans for online surveillance may be used by the prosecutor under certain circumstances.

Data Protection Act and the implementation Ordinance. The Data Protection Act and other general regulations apply to telecommunications service providers when processing data of individuals and of legal entities (as opposed to most countries, where data protection only applies to data of individuals).

Regulatory authorities

The following authorities are competent to deal with regulatory issues.

Federal Communications Commission. The Federal Communications Commission is the independent regulatory authority for the telecommunications market. Its main tasks are the following:

- Granting licences for the use of frequency spectrum.
- Award of universal service licences (currently Swisscom).
- Deciding interconnection disputes.
- Approval of national numbering plans.
- Regulation of number portability and free carrier selection for national and international carriers.
- Decisions on licence violations and the law as supervisory authority over the licensees.

Federal Communications Commission has delegated several tasks to the Federal Office of Communications.

Federal Office of Communications. Primarily, the Federal Office of Communications prepares and implements business for the Federal Council, for the Federal Department of the Environment, Transport, Energy and Communications (DETEC) and for Federal Communications Commission. The main tasks of Federal Office of Communications are the following:

- Registration authority for telecommunications service providers.
- Conciliator in interconnection negotiations between the incumbent operator and new market entrants.
- Monitoring the telecommunications market and providing information on telecommunications services and providers.
- Issuance of technical and administrative requirements.
- Requiring the owners of infrastructure to share the existing infrastructure with others, where this is recommended due to reasons of public interest.
- Management of and surveillance over the spectrum frequency.
- Management and allocation of addressing resources (telephone numbers, premium rate number, domain names, and so on), whereby it has delegated the management and allocation of domain names (currently SWITCH, a new tender process to take place by 2016).
- Inspection of telecommunication equipment.

- Oversight of telecommunications service providers, administrative sanctions and recommendations to the Federal Communications Commission.

Post and Telecommunications Surveillance Service (PTSS). The Post and Telecommunications Surveillance Service is an independent service in charge of lawful interception in Switzerland. Its main tasks are the following:

- Issuance of technical, organisational and administrative requirements.
- Notification to the telecommunication service providers of lawful interception measures to be implemented.

Federal Data Protection and Information Commissioner (FDPIC). The FDPIC is in charge of data protection in Switzerland and has in particular the following main tasks:

- Supervision of companies, individual and federal authorities.
- Issuance of recommendations.
- Maintenance of data files registry.

Competition Commission (COMCO). The duty to grant interconnection is a question of dominant position in the respective markets. Where these questions are raised, the Competition Commission issues a report. The Competition Commission also has an important function in the radio spectrum auction approval process. In cases of doubt as to the independence of the candidates, the Competition Commission must be consulted.

Authorisation and licences

4. What notification, authorisation and licences are required to provide telecommunications services? What is the licence application procedure and fee?

Obligation to register for telecommunications service providers

The Telecommunications Act stipulates a registration obligation for the providers of telecommunications services.

The obligation to register also applies to telecommunications services providers located outside Switzerland, whether or not such providers own or operate infrastructure.

In 2010, the Federal Administrative Court held that Voice Over IP (VoIP) services qualified as telecommunication services, irrespective of whether or not the provider operates or is able to operate the requisite infrastructure. The decisive factor in the case was the contractual relationship with customers in Switzerland.

Therefore, telecommunications service providers are indirectly defined as individuals or companies that provide telecommunications services for their customers, whereby a telecommunications service is defined as the transmission of information for third parties by sending or receiving information either by lines or radio using electrical, magnetic, optical or electromagnetic signals. Telecommunications service providers need not necessarily possess or operate transmission infrastructure. "Providing telecommunications services" only implies a customer relationship. Customers can be private individuals, legal entities or other telecommunications services providers.

Licence for frequency spectrum

The use of frequency spectrum is subject to a licence, which is allocated by Federal Communications Commission in a tender process. Mobile telephony frequencies were last allocated by auction in 2012.

Licence for the provision of universal services

This licence is for the provision of basic telecommunications services to all sections of the population and in all the Swiss regions. Universal services must be affordable, reliable and of quality, and include:

- Telephony.
- Telefax.
- Data transmission.
- Broadband internet connections.
- Access to the emergency services.
- Public payphones.
- The provision of special services for the disabled.

The licence to provide universal services is granted in a tender process, whereby the provider can request a fee for the provision of these services. To date, the licence has been allocated to Swisscom, which has provided these services without requesting compensation.

5. How long does a telecommunications licence typically last and what are the usual conditions attached to it? Can conditions be varied? Are licences available for public inspection?

Telecommunications services are not subject to a licence, but to registration with the Federal Office of Communications (see *Question 4*). Telecommunications service providers can register online.

The main topics covered by the registration are the following:

- General information about the telecommunications service provider.
- Type of telecommunications services provided.
- Description of the interfaces, the services and the infrastructure.

Registration remains valid until the telecommunications service provider cancels it or does not pay the annual registration fee (about CHF1,000). The registration might need to be updated from time to time, depending on the service development.

The use of the radio spectrum for mobile services is regulated by licence, which is allocated by Federal Communications Commission in a public tender. The right of use is usually granted for a period of 20 years and prohibits assignment of the licence without Federal Communications Commission's consent. A transfer of a controlling interest in the licensee also typically requires Federal Communications Commission's consent.

Penalties for non-compliance

6. What are the consequences of non-compliance with the telecommunications regulations?

In the event of non-compliance with telecommunications regulations, a provider of telecommunications services can face administrative and/or criminal sanctions.

The Federal Office for Communications can impose administrative sanctions such as:

- Request the telecommunications service provider to remedy the breach.
- Request that the revenue achieved through such a breach be remitted to the Confederation.

- Order that the telecommunications services be restricted, suspended or prohibited.
- Require the telecommunications service provider to pay an amount up to 10% of its average turnover in Switzerland in the last three financial years.
- Order preliminary measures.

In addition to the administrative sanctions, the Telecommunications Act provides for criminal sanctions. In particular, failure to register as a telecommunications service provider can be punished with imprisonment or a fine up to CHF100,000. Where companies are involved, the individuals who have committed the violation are responsible.

Enforcing a fine or an administrative sanction against a provider with no presence in Switzerland is challenging. Whether such sanctions can be enforced against the provider is in the first place determined by the laws of the place where enforcement is sought. The Swiss authorities can, however, seek to collect the fine or administrative monetary sanction by attaching assets such as the receivables from Swiss customers in Switzerland, and instruct the Swiss providers to bar any traffic from defaulting providers.

Appeals

7. Can decisions of the regulators be appealed and on what grounds?

Decisions of the Federal Communications Commission on interconnection or on granting licences can be appealed to the Federal Administrative Court, which will review incomplete or wrongful determination of the facts and wrongful application of the law. This decision is final.

Decisions of the Federal Office of Communication can be appealed to the Federal Administrative Court. The grounds to appeal are not limited. The decision of the Federal Administrative Court can in turn be appealed to the Swiss Federal Court for wrongful application of the law and arbitrary determination of the facts.

Decisions of the Post and Telecommunications Surveillance Service cannot be appealed in principle by the telecommunications service providers, as it is primarily the right of the individual against which the surveillance order has been issued. However, providers can appeal against surveillance measures which are not foreseen under the Lawful Interception Act, or against incorrect cost allocation. The appeal is filed with the Federal Administrative Court, which can be appealed to the Swiss Federal Court.

Decisions of the Federal Data Protection and Information Commissioner can be appealed to the Federal Administrative Court and then to the Swiss Federal Court. If a data processor refuses to implement a recommendation issued by the Commissioner, the Commissioner can file an action with the Federal Administrative Court.

Decisions of the Competition Commission can be appealed to the Federal Administrative Court and to the Swiss Federal Court.

Universal service obligations

8. Is the incumbent provider or other large providers with significant market power subject to specific regulations? Do universal service obligations apply? Are there provisions for the structural separation of a network?

The provider for universal services is chosen in a public tender process (see *Question 4*). To date, the universal services have been awarded to the incumbent provider, Swisscom, which has not asked for compensation for providing universal services. The next public tender will take place during 2016/2017 for the period starting 1 January 2018.

Universal services are only provided by one telecommunications service provider. Other providers are not subject to the specific regulations in this respect.

Structural separation of a telecommunication network and service provision is not foreseen.

General conditions

9. What general conditions apply to telecommunications services? Which other regulations must be complied with?

The principle of freedom of contract largely applies to telecommunications services and providers are basically free to determine the contractual conditions. The general applicable limitations apply, in particular the limitation of unfair general conditions based on unfair competition law in the case of retail customers and the limitations regarding data protection/data processing.

Except when a flat fee has been agreed, the communication details required for verification of the invoice need to be kept and provided to the customer upon request. This communication data is largely identical to the data that needs to be retained under data retention. However, the retention period for such data might be different, as the communications details must be kept for as long as the customer is entitled to contest the invoice. This duration is generally set out in the general terms and conditions of the telecommunications service provider.

Under the rules for lawful interception, identification (originator and destinator) as well as traffic data need to be retained for six months, and in case of corresponding lawful interception order, content data must be relayed to the Post and Telecommunications Surveillance Service (PTSS) in real time.

SPECTRUM USE

10. Which authorities allocate spectrum use and how is it managed?

Spectrum licences are allocated by Federal Communications Commission, usually by a tender process. Licences are granted for a definite period of time. Given the limited availability of frequency spectrum, its use is regulated in detail, also on a technical level.

11. Can spectrum use be traded or sublicensed?

The spectrum allocated to a provider cannot be traded as such, as each transfer needs to be authorised by the Federal Communications Commission. The authorisation also applies to an economic transfer of the licence, such as by a change of control.

The licence sets the terms and conditions of the spectrum. In particular, there is an obligation to use the spectrum and to co-operate when developing co-ordination processes to minimise impact on the area and landscape, and to comply with regulations regarding non-ionising radiation. The latest licence for mobile services does not prohibit sublicensing, but the authors are not aware of any sublicense agreement having been entered into.

Agreements allowing a mobile virtual network operator (MVNO) to obtain bulk access to network services at wholesale rates are not regulated. There is no obligation on licensees to provide mobile virtual network services at regulated prices.

INFRASTRUCTURE AND NETWORK MANAGEMENT

12. Do communications providers have any powers to place their equipment on third party sites?

As a rule, telecommunications service providers have no right to place their equipment on privately owned sites, nor do they have an obligation to grant access to the equipment of a third party, other than access obligations in the case of the incumbent operator.

However, the Federal Office of Communications can require providers to co-install and co-use telecommunications installations and other installations, such as cable ducts and transmitter locations, if the public interest requires it, in particular to take account of:

- Technical problems.
- Planning needs or protection of the countryside.
- National heritage.
- The environment, nature or animals.

Adequate compensation is required.

Access and interconnection

13. Does access to infrastructure and a network have to be given to other providers?

A dominant provider of telecommunications services must provide access to its infrastructure and network in a transparent and non-discriminatory manner at cost-oriented prices. In particular, it must provide the following access:

- Fully unbundled access to the copper local loop.
- Right to invoice the subscriber for the rent of the copper local loop.
- Interconnection.
- Leased lines.
- Access to cable ducts, provided these have sufficient capacity.

Currently, access obligations only apply to the incumbent operator, Swisscom.

14. Is the interconnection of networks required? Are interconnection prices regulated and how are interconnection disputes resolved?

Providers of universal services are required to assure interoperability among the users of these services. The Federal Council is also empowered to extend interoperability to other services. The interoperability obligation is not dependent on whether a provider has a dominant position or not. To date, the following services fall under the universal services for which interoperability is required:

- Telephony.
- ISDN access.
- Broadband internet access.

Interoperability charges are not regulated, except for the incumbent operator.

Data protection and security

15. What data protection or consumer privacy regulations apply to the telecommunications sector, including both generally applicable and sector-specific laws? Are communications providers required to retain communications data? If yes, which data and for how long? What are the penalties for breach of these regulations?

Like all companies, telecommunications service providers must comply with the Data Protection Act. As a rule, a provider can only process data if the customer has agreed to the processing or the processing is required by law, or if it is necessary for the provision of services to the customer.

Customers must be informed of cross-border data processing and, except when data is solely processed in countries where the data protection level is equivalent (which is not frequent, as Swiss data protection legislation protects the data of both private persons and legal entities) customers need to consent to the cross-border data processing. Such consent can be given in general terms and conditions.

Besides data protection regulation, telecommunications secrecy applies, meaning that data and content need to be protected from unauthorised disclosure.

Lawful interception is one example of data processing required by law, which is not subject to the customer's consent, when processed in Switzerland. Telecommunications service providers must comply with data retention obligations. The duration for data retention is six months, but the federal parliament is discussing increasing this period to 12 months. It is still open whether the duration will be increased, as it is expected that the Swiss population will vote on the new legislation in a referendum.

The following data are subject to data retention:

- Personally identifiable information (such as identity, address, and ID/passport number) or organisation information, associated with each service subscribed to.
- Profiles of subscriptions to various services, and assigned addresses.
- Usage data, per service retrieved from control. This usage data may include identifiers of devices (if such information is conveyed as part of control).
- Billing data created by systems for the purpose of invoicing.
- Traffic data, such as addressing resources called, successful connection or not, duration, and so on.
- Inventory data (by means of appropriate identifiers) of customer devices/devices at customers' premises owned by the customer.
- Network element data (such as network access data).

If telecommunications service providers unlawfully process data, the data subject can introduce a claim to stop or prevent or identify the unlawful processing. The data subject can petition for damages and delivery of profit.

16. What are the rules relating to the interception of calls? How and on what grounds can authorities require disclosure of communications data? What are the penalties for breach of these rules?

Lawful interception is governed by the Lawful Interception Act. Lawful interception is limited to a given list of crimes or to a search for missing persons.

The procedure for lawful interception is the following:

- At the request of the Cantonal State Prosecutor, the Cantonal Court will issue a surveillance decision against an individual, which will be forwarded to the Post and Telecommunications Surveillance Service (PTSS).
- The PTSS will then notify the telecommunications service provider and require implementation of the surveillance and relay of the data.

In the event of violation of the lawful interception obligations, the telecommunications service provider can face a fine of up to 10% of its average turnover of the last three years.

The costs for the equipment and installations necessary to lawfully intercept data, to retain data and to provide these data to the PTSS in the format foreseen by the technical regulations must be borne by the telecommunications service providers. In return, the telecommunications service providers are entitled to a fee for each lawful interception request.

The telecommunications service provider can outsource interception to another telecommunications service provider.

17. Are there any network security obligations imposed on communications providers?

Network security obligations imposed on telecommunications service provider are based on international standards, such as:

- ISO/IEC 27001:2005 Information technology - Security Techniques - Information Security Management Systems - Requirements.
- ISO/IEC 27002:2005 Information technology - Code of Practice for Information Security Management.
- ISO/IEC 27011:2008 Information technology - Security techniques - Information security management guidelines for telecommunications organisations based on ISO/IEC 27002.
- ITU-T X.1051 (02/08) Information Security Management - Guidelines for Telecommunications based on ISO/IEC 27002.
- ETSI White Paper No 1, Second Edition, October 2008.
- Security for ICT - The work of ETSI.

The Federal Office of Communications has refrained from implementing specific national standards, which helps in opening the Swiss telecommunications market to international players.

PRICE REGULATION

18. How are prices and charges regulated?

The provider of universal service, currently Swisscom, must provide the following services within the maximum prices set out below:

- Connections, include allocation of the telephone numbers and an entry in the directory:
 - CHF40 as setup fee (a one-time charge);
 - CHF23.45 per month for an analogue connection;
 - CHF40 per month for ISDN;
 - CHF55.00 per month for broadband.
- Calls, invoiced by second and rounded up to the next CHF0.10:
 - CHF0.075 per minute for fixed national calls;
 - CHF0.034 per minute for transcription services for death.

- Supplement for the use of public payphones: CHF0.19 per minute or CHF0.50 per call.

Other telecommunications service providers are free to determine their prices towards subscribers, except for premium-rate numbers and interconnection.

For premium-rate numbers, the following maximum tariffs are applicable:

- CHF100 fixed price.
- CHF10 per minute.
- CHF400 per call.

The 84x and 0878 premium-rate numbers can be charged at CHF0.75 per minute. 0800 and 00800 numbers must be free of charge.

Telecommunications service providers are also free to determine the charges for their services to other telecommunications service providers, except if the provider has a dominant position, which is the case for the incumbent provider.

Roaming charges are not regulated in Switzerland, and remain relatively high compared to EU countries.

TELEPHONE NUMBER AND SUBSCRIBER MANAGEMENT

19. How are telephone numbers allocated and managed in your jurisdiction?

The assignment of numbering, naming and addressing resources is allocated by Federal Office of Communications, whereby Federal Office of Communications has currently delegated the allocation of domain names to the foundation SWITCH. However a tender process is taking place at the beginning of 2016 to designate the new registry.

The Federal Office of Communications allocates and manages telephone numbers. It allocates number ranges and codes to telecommunications service providers who, in turn, provide them to subscribers.

Although it is unusual, subscribers can also apply directly to the Federal Office of Communications for allocation of telephone numbers.

20. Does access have to be provided to certain services, such as the emergency services and directory enquiries?

Telecommunications service providers only have to provide access to emergency services, and this must be done free of charge.

The universal service provider, currently Swisscom, needs to provide directory services. The other telecommunications service providers are not under the same obligation. However, they have to provide data for directories in a given format to the other telecommunications service providers.

21. Are there regulations relating to specific consumer services, such as acquiring and transferring subscribers, number portability, complaint handling, and nuisance and silent calls?

Acquiring and transferring subscribers is governed by general contract law. Subscribers can freely change their telecommunications service provider upon termination or expiry of their agreement. For the term of their contract, subscribers can

choose their provider for each connection by dialling the corresponding carrier selection.

Number portability is foreseen in the Telecommunications Act and it is implemented by all telecommunications service providers.

When subscriber and telecommunications service providers disagree, a complaint can be brought before a dispute resolution service called ombudscom. The resolution service is free of charge for the subscriber, except for a handling fee of CHF20.

Nuisance and silent calls are not allowed. Marketing calls are only allowed if the subscriber has not opted out. Opt-in is required for e-mail marketing, except if there is a pre-existing contractual relationship between the subscriber and the supplier of the marketed good or service. In the case of e-mail marketing, an unsubscribe button must be included.

22. Are consumer telecommunications contracts subject to specific regulations?

Consumer telecommunications contracts are subject to the general rules governing contracts. As agreements are standardised, the general rules against unfair competition apply, forbidding disproportionate rights and obligations between a consumer and the provider. Recently, Swiss legislation has been modified, and general terms and conditions are subject to an abstract content control in a similar way as foreseen in the EU.

23. Are there restrictions on the use of Voice over IP technology in your jurisdiction?

There is no restriction on the use of Voice Over IP (VoIP) in Switzerland.

Based on the user's perception, VoIP has been qualified as a telephony service (and not as internet services), so that all rights and obligations applicable to telephony services also apply to VoIP. However, due to technical difficulties in locating a caller in the case of nomadic use, the obligation to locate the caller by emergency calls has been lifted, and the home address will be relayed. The VoIP providers have to inform their customers of this.

24. Are there regulations relating to the maintenance of net neutrality in your jurisdiction?

There is currently no regulation in effect on net neutrality in Switzerland. However, Swisscom, Sunrise, upc-cablecom, Orange (now Salt) and the cable network companies' association Swisscable have formulated a code of conduct on net neutrality. They are also establishing an ombudsman's office which engages independent experts.

OUTSOURCING AND TELECOMMUNICATIONS

25. Are there specific regulations for the outsourcing of telecommunications services or the management of these services?

There are no specific regulations for outsourcing of telecommunications services or the management of these services.

Certain specific sectors, however, have regulated outsourcing. The financial services sector is the major such sector and FINMA, the Swiss financial market supervisory authority, has published a circular on outsourcing.

When considering outsourcing, attention must be paid to the employees, as outsourcing could qualify as a transfer of a business unit, in which case the employees must be notified and will be automatically transferred to the new service provider. This may also apply where the services are resourced from one provider to the other.

26. Briefly set out the current trends in outsourcing transactions in the telecommunications sector.

The main outsourcing trend is towards IP technology and cloud computing. Cloud computing in particular is provided by many providers, so that there is no clear trend as to their size and location. However, for outsourcing transactions in the telephony and related sectors, the trend is to have a single outsourcing supplier for all communications and (increasingly) IT services.

Bundling is a trend not only when it comes to major business outsourcing transaction, but also on customer agreements. There is a clear trend to bundle television, internet, landline and mobile telephony.

27. Who are the key providers of outsourced telecommunications?

With the trend to provide cloud computing in the telecommunications and IT sector, there are no longer key providers but many providers offering various services.

However, when telephony and related sectors are outsourced, only a few providers are able to manage these services, namely, on a national level, Swisscom, Sunrise, upc-cablecom, Salt, and Colt.

Major global telecommunications players like BT, Verizon, and AT&T have also become established for outsourcing transactions of a larger and international scale.

28. What are the current technologies influencing or affecting outsourcing by telecommunications operators?

Social changes, in particular mobility and changes in family structures, have led to increasing demand for flexible working models. Better data infrastructure and new technology (fibre-optic/broadband, long term evolution, and so on) have increased data availability, and the availability of cloud-based services continues to grow. These are enlarging the base of mobile data and service use.

At the same time, more services are being offered on smart devices due to their development and to the telecommunications

convergence. The trend towards outsourcing, at least part of the service allowing mobility, will continue to increase. A major downside is that control over data is given up to a large extent, and issues of data secrecy, data protection and data availability have increased.

29. From a contractual perspective, what are the key issues in a typical telecommunications outsourcing transaction in your jurisdiction?

A key issue remains the proper specification of the services (SOW). Together with the services, their availability has to be defined (SLA): ideally, the availability of each single service is specified. Service levels always have to be set out in a way that is measurable.

On the other hand, price and price calculation needs to be properly defined. While this might seem to be basic, parties to outsourcing agreements can encounter difficulty when several group companies are parties to an outsourcing agreement. Intra-group agreements need to be concluded and budgets checked beforehand.

From a more legal perspective, the outsourcing agreement needs to cover at least the following points:

- Transition services.
- Employee transfer.
- Asset/hardware transfer.
- Review meetings.
- Change request procedures.
- Confidentiality.
- Data protection.
- IP rights.
- Audit.
- Representation and warranties.
- Liability.
- Indemnities.
- Disaster recovery and protection.
- Security, including availability of data.
- Termination provision, including data portability and resourcing.
- Dispute resolution.

ONLINE RESOURCES

Swiss Federal Office of Communications

W www.bakom.admin.ch

Swiss Federal Administration

W www.admin.ch/gov/en/start/federal-law/classified-compilation.html

Description. Both websites are official websites that are up-to-date. Official texts can be found in German, French and Italian, English translations are for information purposes only.

Practical Law Contributor profiles

David Känzig, Partner

Thouvenin Rechtsanwälte
T +41 44 421 45 45
F +41 44 421 45 00
E d.kaenzig@thouvenin.com
W www.thouvenin.com

Professional qualifications. Admitted to the Bar in New York, 1991; New York University School of Law, New York, Masters in Comparative Jurisprudence (M.C.J.), 1990; Admitted to the Bar in Switzerland, 1987; University of Zurich, Master of Law (lic. iur.), 1983

Areas of practice. Technology law; corporate and M&A.

Recent transactions

- Lead counsel to buyer in a cross border acquisition of a Swiss technology company.
- Swiss counsel to the listing of a Swiss company on the New York Stock Exchange.
- Lead counsel to buyer on the acquisition of a social media monitoring company.
- Lead counsel to sellers on the sale of a 100% stake in a mobile virtual network operator.
- Lead counsel to seller on the sale of a substantial interest in a broadband network company.
- Co-counsel to buyer on the acquisition of an internet publishing platform.
- Counsel to telecommunication service provider on price issues with public utilities for the use of their infrastructure.
- Swiss counsel to provider of communications suites on data protection, licensing and lawful interception issues.
- Swiss counsel to sourcer in various multi-jurisdictional outsourcing agreements with global enterprises.
- Swiss counsel to manufacturer of gaming devices including communication facilities on data protection, licensing and lawful interception issues.
- Lead counsel to sourcer for managed services provided to Swiss financial institutions in outsourcing deals.
- Lead counsel in numerous administrative law proceedings against the Swiss incumbent operator for the determination of cost oriented charges.

Languages. German, English

Publications.

- These include:
- Various newsletters on TMT and corporate law issues (see <http://thouvenin.com>).
 - Commentary on the Hague Securities Convention, *Helbing Lichtenhahn 2012* (ISBN 978-3-7190-3088-9).
 - Co- author of Swiss contribution to *Cross Border Collateral: Legal Risk and the Conflict of Laws*, Butterworths, 2002 (ISBN 0 406 92941 6).

Dr Katia Favre

Thouvenin rechtsanwälte
T +41 44 421 45 45
F +41 44 421 45 00
E k.favre@thouvenin.com
W www.thouvenin.com

Professional qualifications. University of Zurich, J.D. (Dr. iur.) 2006; University of Fribourg, Master's degree in computer science, 2004; admitted to the Swiss Bar, 1998;

University of Neuchâtel, Master of Law (lic. iur.) 1995

Areas of practice. Technology law; data protection law; intellectual property law; contract law.

Recent transactions

- Counsel to telecommunications service providers re regulatory issues such as cost oriented access, registration and lawful interception.
- Counsel to service provider and to financial institution in various outsourcing, offshoring and nearshoring agreements.
- Technology law counsel to buyer in several acquisitions such as social media, online publishing platform, cloud services companies and industrial companies.
- Lead counsel to a major multinational technology company on the integration of a social media monitoring company.
- Lead counsel to provider of a multi-jurisdictional SAP implementation, HR-data harmonisation and migration services.
- Regularly advised national and international companies on data protection issues.

Languages. English, German, French

Professional associations/memberships

- ITechLaw, a worldwide organisation on information and communications technology.
- Information Security Society Switzerland (ISSS).
- Bar associations.

Publications

- Technology law newsletters, which provide periodic alerts to new developments in Swiss technology law.
- *Duty of Care in Data Transfers*, ZIK Publikationen aus dem Zentrum für Informations- und Kommunikationsrecht der Universität Zürich, Vol. 32, 2006.