



e-Commerce 2014

in 26 jurisdictions worldwide

2014

Contributing editor: Robert Bond



Published by
Getting the Deal Through
in association with:

- Addisons
- Angeles & Lugo Lovatón
- B+B Law Firm
- Bühlmann Attorneys at Law
- Dimitrov, Petrov & Co
- Ferrere
- Foyen Advokatfirma AB
- García Magliona y Cía Abogados
- Ichay & Mullenex Avocats
- Iriarte & Asociados
- Karniol Malecki i Wspólnicy Sp.k.
- Kochhar & Co
- Martí & Associats
- Noerr LLP
- Orsingher Ortu Avvocati Associati
- Robins, Kaplan, Miller & Ciresi LLP
- Sorainen
- Speechly Bircham LLP
- Stibbe
- Vitale, Manoff & Feilbogen
- WH Partners
- Yuasa and Hara
- Zhong Lun Law Firm

10th anniversary
edition

e-Commerce 2014

Contributing editor
Robert Bond
Speechly Bircham LLP

Publisher
Gideon Robertson

Business development managers
Alan Lee
George Ingledew
Dan White

Account manager
Megan Friedman

Trainee account managers
Cady Atkinson
Joseph Rush
Dominique Destrée

Media coordinator
Parveen Bains

Administrative coordinator
Sophie Hickey

Trainee research coordinator
Robin Synnot

Marketing manager (subscriptions)
Rachel Nurse
subscriptions@gettingthedealthrough.com

Head of editorial production
Adam Myers

Production coordinator
Lydia Gerges

Senior production editor
Jonathan Cowie

Subeditor
Davet Hyland

Director
Callum Campbell

Managing director
Richard Davey

e-Commerce 2014
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2013

No photocopying: copyright licences do not apply.

First published 2004
Tenth edition

ISSN 1473-0065

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of August 2013, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law
Business
Research

Argentina Héctor Ariel Manoff, Nicolás Matías Czejer and Vanesa Balda Vitale, <i>Manoff & Feilbogen</i>	3
Australia Jamie Nettleton and Justine Munsie <i>Addisons</i>	9
Belarus Alexey Anischenko, Marina Golovnitskaya and Natalia Yurieva <i>Sorainen</i>	19
Bulgaria Veneta Donova <i>Dimitrov, Petrov & Co</i>	24
Chile Claudio Magliona <i>García Magliona y Cía Abogados</i>	31
China Jihong Chen <i>Zhong Lun Law Firm</i>	36
Dominican Republic Jaime R Ángeles <i>Angeles & Lugo Lovatón</i>	41
Estonia Kaupo Lepasepp and Mihkel Miidla <i>Sorainen</i>	47
France Annabelle Richard and Diane Mullenex <i>Ichay & Mullenex Avocats</i>	53
India Stephen Mathias and Phillip Ninan <i>Kochhar & Co</i>	61
Italy Marco Consonni <i>Orsingher Ortu Avvocati Associati</i>	68
Japan Koza Yabe and Masakazu Hoshino <i>Yuasa and Hara</i>	76
Latvia Agris Repšs and Valts Nerets <i>Sorainen</i>	82
Lithuania Renata Beržanskienė and Laurynas Ramuckis <i>Sorainen</i>	89
Luxembourg Dirk Leermakers and Nicolas van Heule <i>Stibbe</i>	95
Malta Olga Finkel and Karl Gonzi <i>WH Partners</i>	102
Peru Erick Iriarte Ahón and Ruddy Medina Plasencia <i>Iriarte & Asociados</i>	109
Poland Robert Malecki <i>Karniol Malecki i Wspólnicy Sp.k.</i>	114
Spain Joan Ramon Miquel Torrents and Laura Oteros Gibert <i>Martí & Associats</i>	120
Sweden Peter Dyer and Sara Malmgren <i>Foyen Advokatfirma AB</i>	126
Switzerland Lukas Bühlmann <i>Bühlmann Attorneys at Law</i>	132
Turkey Sıdıka Baysal Hatipoğlu, Gökhan Uğur Bağcı, Benan İlhanlı <i>B+B Law Firm</i>	139
Ukraine Mansur Pour Rafsendjani and Volodymyr Yakubovskyy <i>Noerr LLP</i>	144
United Kingdom Robert Bond <i>Speechly Bircham LLP</i>	149
United States Hillel I Parness <i>Robins, Kaplan, Miller & Ciresi LLP</i>	160
Uruguay Alejandro Alterwain and Martín Cerruti <i>Ferrere</i>	170

Switzerland

Lukas Bühlmann

Bühlmann Attorneys at Law

General

- 1 How can the government's attitude and approach to internet issues best be described?

Switzerland has one of the highest percentages of internet usage in Europe, 89 per cent of the population use the internet. E-commerce sales continue to grow rapidly as customers are getting more and more familiar with purchasing goods and services online. Swiss consumers are used to ordering online in a cross-border context. In addition, Switzerland has one of the highest densities of mobile devices as well as mobile networks providing for high-speed internet access. Switzerland is therefore a very attractive environment not only for e-commerce but also for m-commerce.

The Swiss government's approach to internet issues has been positive, activities focusing on the prevention of internet crime, data protection and consumer protection while at the same time promoting the growth of the e-economy.

Legislation

- 2 What legislation governs business on the internet?

As a general principle, online business is governed by the same rules that apply elsewhere (offline). Consequently, courts equally apply those rules in the online context. There are some provisions that specifically apply to business on the internet, usually related to consumer protection. For example, the Act against Unfair Competition (UCA) provides that companies or persons offering goods or services by way of e-commerce are obliged to:

- clearly and completely indicate his or her identity and contact address, including an e-mail address;
- indicate the different technical steps that lead to the conclusion of the contract;
- provide appropriate technical means allowing a purchaser to identify and correct input errors prior to the placing of an online order; and
- acknowledge the receipt of the purchaser's order without undue delay and by electronic means.

As an exception, these requirements do not apply to contracts that are concluded via voice telephony or exclusively by exchange of e-mail or by similar individual communication.

Further, specific internet-related provisions include the prohibition of 'spamming' (advertising by e-mail without the consent of the recipient) or electronic submissions to courts (see questions 7 and 14).

Regulatory bodies

- 3 Which regulatory bodies are responsible for the regulation of e-commerce and internet access tariffs and charges?

There is no specific regulatory body that solely deals with the regulation of e-commerce. The authority responsible for any specific field (eg, data protection, unfair competition, etc) is also competent for requests regarding e-commerce and internet issues relating to that specific field. For example, the regulatory body dealing with complaints based on the Act against Unfair Competition (UCA) is the State Secretariat for Economic Affairs. Issues regarding data protection are dealt with by the Federal Data Protection and Information Commissioner. Supervising authorities for gambling, lotteries or betting in an online context are the Federal Gaming Board and Comlot.

With regard to tariffs and charges for internet access, the Swiss government has a responsibility to provide basic access to the internet (ie, to ensure that infrastructure is in place that allows residents to use the internet at a certain transmission speed). The Federal Council may determine maximum prices for such basic access to the internet. The speed of basic internet access, however, only covers a low transmission speed. Consequently, customers usually choose a high-speed broadband internet access for which there is no price-cap.

Jurisdiction

- 4 What tests or rules are applied by the courts to determine the jurisdiction for internet-related transactions (or disputes) in cases where the defendant is resident or provides goods or services from outside the jurisdiction?

The jurisdiction of Swiss courts and the applicable law in international transactions and disputes are determined by the Swiss Code on International Private Law (CPIL), provided that no international treaties are applicable (eg, the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

As a general rule, the CPIL provides that Swiss courts at the defendant's domicile will have jurisdiction unless provided otherwise by the Act. In contract as well as in tort matters, jurisdiction may be established at the defendant's domicile or, in the absence of a domicile, at the place of habitual residence of the defendant. Alternatively, jurisdiction may be established at the place of performance.

Parties may agree in writing on a forum for an existing or a future dispute concerning pecuniary claims arising from a specified legal relationship. In consumer contracts, however, a consumer may not waive in advance the venue of his or her domicile or place of habitual residence. Jurisdiction may be established before a Swiss court at the domicile or, in the absence of domicile, at the place of habitual residence of the consumer. Further, at the election of the consumer, jurisdiction may be established at the domicile of the supplier or, in the absence of domicile, at the place of habitual residence of the supplier.

With regard to the applicable law, the CPIL stipulates that contract matters are governed by the law chosen by the parties. In the absence of a choice of law, the law of the state with which it is most closely connected is applicable. The Act makes the presumption that the closest connection exists to that state in which the party who performs the characteristic obligation is habitually resident or has its place of business.

In consumer contracts, a choice of law by the parties is precluded. The law of the state applies in which the consumer is habitually resident, if:

- the supplier has received the order in that state;
- the conclusion of the contract was preceded in that state by an offer or an advertisement and the consumer performed the necessary acts to conclude the contract; or
- the consumer was induced by the supplier to go abroad to place his or her order there.

In e-commerce transactions the above-mentioned provisions on consumer contracts usually result in the applicability of Swiss law. If a foreign provider directs an offer or advertisement on his or her website at Swiss consumers and Swiss consumers have the option of concluding a contract on that particular website, Swiss law is generally applicable.

In matters of unfair competition, the CPIL provides that the law of that state is applicable in whose market the effects occur. According to this effects doctrine, the Unfair Competition Act also applies to foreign firms when their behaviour or transactions have an 'effect' within the territory of Switzerland – but also to domestic firms located outside the state's territory that have an effect within the territory of Switzerland. Consequently, the nationality of companies is irrelevant for the purpose of preventing unfair competition and the effects doctrine covers all market players irrespective of their nationality.

Contracting on the internet

- 5** Is it possible to form and conclude contracts electronically? If so, how are contracts formed on the internet? Explain whether 'click wrap' contracts are enforceable, and if so, what requirements need to be met?

Swiss contract law provides for the freedom of form. This means that contracts may be concluded without any specific form and are valid unless the law requires a specific form (eg, written form or notarised form). In the absence of specific form requirements, contracts may be concluded electronically and 'click-wrap' agreements are valid and enforceable.

With respect to the different steps that lead to the conclusion of the contract, however, the Act against Unfair Competition (UCA) provides that an e-commerce seller has to indicate the different technical steps that lead to the conclusion of the contract. Also, a seller has to confirm an order to the buyer without delay by e-mail (article 3, lit. s UCA). Further, as a general rule of contract law, a customer must at least have the opportunity to acknowledge the content of the terms and conditions. This means that a customer has the option to read the terms and conditions. In practice, online dealers provide the option to save a copy of the terms and conditions on a customer's computer (eg, under a separate link). Terms and conditions may be reviewed regarding their impact on the contractual equilibrium under the Unfair Competition Act. The use of general terms and conditions is prohibited if such terms cause a significant and unjustified imbalance between contractual rights and contractual obligations – to the detriment of consumers and contrary to the requirement of good faith. If such terms and conditions are found to be inconsistent with these rules, they are null and void. However, this provision only applies in a consumer relationship (B2C contracts).

- 6** Are there any particular laws that govern contracting on the internet? Do these distinguish between business-to-consumer and business-to-business contracts?

Contracting on the internet is governed by the same rules as they apply elsewhere. In e-commerce transactions, a seller has to indicate the different steps that lead to the conclusion of the contract and confirm an order by e-mail (see question 5). Swiss law does not distinguish between B2C or B2B with respect to the formation of the contract (ie, these rules that govern contracting apply to both B2C and B2B contracts).

- 7** How does the law recognise or define digital or e-signatures?

Digital signatures are governed by the Federal Act on Certification Services in the Area of Electronic Signatures (ZertES). The Act distinguishes between 'electronic signatures', 'advanced electronic signatures' and 'qualified electronic signatures'. Qualified electronic signatures are treated like personal signatures and have the same legal status. Consequently, a qualified electronic signature provides proof of the identity of the signatory and the authorship of a digital document.

The ZertES Act is currently being revised. The aim of the revision is to broaden the practical applicability of electronic signatures.

- 8** Are there any data retention or software legacy requirements in relation to the formation of electronic contracts?

Swiss law does not specifically provide for such requirements in relation to the formation of the contract. For the purpose of evidence, however, it is advisable to store the data providing proof of a customer's acceptance of the contract and its content, acceptance of general terms and conditions as well as, if applicable, the opt-in to receive advertising or other commercial communication by e-mail. Further, in view of company and tax law, Swiss companies have to abide by specific book-keeping requirements and therefore have to keep the accounts and preserve accounting records for 10 years. This does naturally cover data concerning electronic contracts as well. The extent of the relevant book-keeping obligation is regulated in detail in specific statutory provisions.

Security

- 9** What measures must be taken by companies or ISPs to guarantee the security of internet transactions?

There is no specific law concerning the security of internet transactions. However, the general contractual duty of care requires anyone engaged in internet transactions to take reasonable steps to protect those transactions. In addition, the Federal Act on Data Protection (DPA) requires companies or ISPs to protect personal data against unauthorised processing through adequate technical and organisational measures. In particular, they must ensure that data systems are protected against unauthorised or accidental destruction or loss, technical faults, forgery, theft or unlawful use, unauthorised alteration, copying, access or other unauthorised processing. All technical and organisational measures must be adequate and, for example, must take into account the purpose of the data processing as well as the nature and extent of the data processing. The technical measures must be reviewed and an assessment of the possible risks to the data subjects must be carried out periodically.

10 As regards encrypted communications, can any authorities require private keys to be made available? Are certification authorities permitted? Are they regulated and are there any laws as to their liability?

There is no specific legislation providing for authorities to have access to private encryption keys. However, there may be an obligation in civil or criminal proceedings to make information accessible in a specific case. If this information entails encrypted communications, it has to be made accessible and readable as a result of this case-specific disclosure obligation.

Data protection law (regulation on data protection certification) provides for the certification of products relating to the processing of personal data. To improve data protection and data security, the manufacturers of data processing systems or programs as well as private persons or federal bodies that process personal data may submit their systems, procedures and organisation for evaluation by recognised independent certification organisations. Encryption is usually part of such certification. The organisations that carry out data protection certification in accordance with the Federal Act on Data Protection (certification organisations) must be accredited. There are no specific provisions on the liability of such certification organisations. Consequently, the general provisions of liability of tort, contract or public law apply.

Domain names

11 What procedures are in place to regulate the licensing of domain names? Is it possible to register a country-specific domain name without being a resident in the country?

'Switch' is the registry for domain names under the country-specific top-level domain '.ch'. Accordingly, Switch registers and administers '.ch' domain names on behalf of the Swiss Federal Office of Communications (OFCOM). The registration of a domain name is carried out on a 'first come, first served' basis. Anyone may apply for a domain name (ie, individuals, companies, private or public undertakings or organisations). There are no restrictions with regard to residency of an applicant.

Currently, there are a number of applications pending at ICANN for new generic top-level domains by Swiss applicants. Several Swiss companies or states have applied for their own top-level domain. For example, the Swiss government has applied for the top-level domain '.swiss'.

In case of an alleged infringement of a third party's rights (ie, a third party's pre-existing trademark), such conflict has to be resolved either via the dispute resolution procedure organised by Switch or by submitting it to an ordinary court. There is no legal obligation to first make use of the dispute resolution procedure.

12 Do domain names confer any additional rights (for instance in relation to trademarks or passing off) beyond the rights that naturally vest in the domain name?

Domain names do not confer additional specific rights to the domain name holder. However, a domain name holder may have defensive rights under the Unfair Competition Act (UCA) against the use of designations causing confusion with the domain name. A precondition is that the domain name has some individualising and characterising function. This not only confers protection against a confusing domain name used at a later date but also against the use of other designations such as company names or products as long as the confusing use is made in the course of a business. Further, a domain name may also be protected against confusing use of a latter trademark.

13 Will ownership of a trademark assist in challenging a 'pirate' registration of a similar domain name?

Switch does not investigate whether a domain name infringes trademark rights or any other rights of any third persons. Trademark law, however, grants protection to trademark owners if a domain name is identical or may be mistaken for a specific trademark in connection with the sale of goods or services for which the trademark is the intended distinctive sign. If a domain name is not used in connection with the sale of goods or services, and a domain name was registered for the sole purpose of 'grabbing' a specific domain name, a trademark owner may challenge the domain name registration based on the Unfair Competition Act.

The protection of famous trademarks is even more extensive – the owner of a famous trademark may prohibit third parties from using a domain name for goods or services if such use would jeopardise the distinctive character of the trademark or would otherwise undermine the reputation of a trademark. Rights acquired before the brand acquired its reputation are reserved (see question 12). Further, the trademark-corresponding use of a domain name already in use when a trademark is registered may be excluded from challenge based on trademark law.

Advertising

14 What rules govern advertising on the internet?

There is no law that exclusively regulates advertising on the internet, despite the fact the sources of advertising law in Switzerland are widespread. Of particular relevance is the Act against Unfair Competition (UCA): as a general principle, advertising must not be inaccurate or misleading. Comparative advertising is permitted but only under certain circumstances taking into account the general principle that comparative advertising must also be accurate and not misleading. Mass advertising by way of e-mail, SMS or other means of telecommunication without the consent of the recipient (spam) is prohibited. Certain exceptions apply if the sender receives the contact details in the course of selling goods or services and has informed the consumer of the possibility of the rejection of mass advertising.

Advertising that includes games or competitions as purchase incentives may fall under the Lottery Act, particularly if participation in a game or competition is connected to a purchase of goods or services and the prize to be won is of value. According to the Lottery Act such games and competitions are lotteries or lottery-like events that are prohibited. There is further legislation that applies to advertising on the internet, imposing restrictions in advertising certain products or services (see question 15).

Finally, many forms of online advertising may raise particular issues or concerns under Swiss data protection law.

15 Are there any products or services that may not be advertised or types of content that are not permitted on the internet?

In general, the same rules apply as they apply in the offline context. Consequently, illegal goods or illegal activities are prohibited from being advertised on the internet and doing so may be an offence under the Swiss Penal Code.

There is a multitude of special provisions relating to the advertising of certain products or services including prescription drugs, alcoholic beverages, foodstuffs, cosmetics, poisons, precious metals, etc. According to these rules there are total bans or partial bans on advertising. For example, advertising for alcohol and tobacco products aimed at underage individuals is prohibited. This principle equally applies to advertising on the internet. As a further example, prescription drugs may not be publicly advertised. The Federal Administrative Court has held that pharmaceutical companies advertising their prescription drugs on the internet must

password-protect such advertising. This means that pharmaceutical companies must ensure that such internet advertising is not publicly accessible and consequently only professionals may have access to such advertising.

Infringement of the above-mentioned provisions may result in criminal liability or civil lawsuits (eg, based on the Act against Unfair Competition).

Financial services

- 16** Is the advertising or selling of financial services products to consumers or to businesses via the internet regulated, and, if so, by whom and how?

Financial service activities, for example banking, insurance and brokerage services, are regulated by the relevant financial market legislation and any rules have to be respected equally when using the internet as a sales or marketing channel. For example, banking, insurance and brokerage services or collective investment funds are subject to a licence of the Swiss Financial Market Supervisory Authority (FINMA). Consequently, advertising for such financial products may only be offered and advertised by licensed companies. There is no specific legislation regarding the advertising of financial services or products to consumers through the internet. However, FINMA has published guidelines regarding the criteria that apply to public advertising of collective investment products. These guidelines are particularly targeted at foreign collective funds. FINMA stipulates the criteria as to whether or not particular advertising on the internet for a specific collective investment product may be found to have been conducted in Switzerland and therefore may be subject to Swiss law and the supervision of FINMA.

Defamation

- 17** Are ISPs liable for content displayed on their sites?

There is no specific legislation for the liability of ISPs for content displayed on their websites in Switzerland. In a recent decision, the Federal Supreme Court has held that an ISP is liable to remove content that infringes personality rights – irrespective of whether the ISP was aware of such content or was previously requested to remove such content by the infringer. The Federal Court has held that defensive actions based on personality rights may be brought against anybody who is involved in a violation of personality rights irrespective of fault, knowledge of unlawfulness or whether lawful behaviour would have been reasonable.

The Federal Supreme Court, however, is silent with regard to injunction suits and damages claims. It seems, however, to successfully claim damages, the fault of the ISP is required. ISPs should not be obliged to monitor the content of their customers' websites for illegal content as a precautionary measure to avoid liability for damages. However, should the ISP receive a justified notification of any illegal content, the provider has to react and remove any illegal content in order to avoid criminal liability or liability for damages.

- 18** Can an ISP shut down a web page containing defamatory material without court authorisation?

From the above-mentioned explanations (see question 17), it follows that an ISP must shut down a website that contains defamatory material if an ISP wants to avoid liability. Having said that, an ISP may also be liable to his or her customer in case of a wrong legal assessment (ie, that the shut-down of a website was unlawful and has caused damage to the customer). To prevent liability in such situations, ISPs provide the exclusion of liability in their general terms, allowing an ISP to shut down a website upon sufficient suspicion of illegal content.

Intellectual property

- 19** Can a website owner link to third-party websites without permission?

Hyperlinks on websites that direct users to third-party websites without the consent of the operator of the linked website are permitted in Switzerland. A hyperlink would not constitute an infringement of the Copyright Act or trademark law. This applies to links both to a homepage (surface-linking) or to other pages of such a website (deep-linking). Links to illegal content may be a punishable offence under the Swiss Penal Code or special legislation (see question 23). For embedded third-party content (inline links or frames) in a website, different principles apply (see question 20).

- 20** Can a website owner use third-party content on its website without permission from the third-party content provider?

Third-party content that is copyright protected requires the copyright owner's consent prior to any use on another website. Unauthorised use of content including protected trademarks constitute a trademark infringement. Furthermore, if such use of third-party content may mislead the visitor of a website about the origin of the content or with the third-party's company or products arises, it may infringe the Act against Unfair Competition. This Act also prohibits the use of someone else's marketable work result without reasonable own investment through the use of technical means of reproduction.

- 21** Can a website owner exploit the software used for a website by licensing the software to third parties?

Software is protected by copyright. Consequently, website owners may exploit the software used for their website as long as they do not infringe third-party intellectual property rights. Providing that the website owner has ownership of the copyright or an appropriate licence for the use of the software including the right to sub-license the software, the owner may exploit the software by licensing it to third parties. Otherwise, the software owner must consent to the exploitation of the software.

- 22** Are any liabilities incurred by links to third-party websites?

As a general rule, there is no liability for the content of third-party websites linked by simple links. However, links to illegal activities or services such as racial discrimination, gambling or betting, the download of copyrighted works, counterfeit goods etc, may be a punishable offence and may be prosecuted under criminal law provided that the linking website contains positive comments about the link or the context of the linking website constitutes a positive attitude towards the content of the linked website.

Data protection and privacy

- 23** How does the law in your jurisdiction define 'personal data'?

The Federal Data Protection Act (DPA) defines 'personal data' as 'all information relating to an identified or identifiable person'. A 'person' within the scope of protection of the DPA may be both a natural person (individuals) as well as a legal person (companies).

- 24** Does a website owner have to register with any controlling body to process personal data? May a website provider sell personal data about website users to third parties?

Website owners will not have to register with any controlling body to process personal data unless they regularly process sensitive personal data or personality profiles or they regularly disclose personal data to third parties. Sensitive personal data is data relating to religious, ideological, political or trade union-related views or activities,

health, the intimate sphere or the racial origin, social security measures or criminal proceedings and sanctions. A personality profile is defined by the DPA as a collection of data that permits an assessment of essential characteristics of the personality of a natural person.

As an exception, the controller of data files is not required to register his or her files if they are processing the data under a statutory obligation or if the data files relate to suppliers or customers as long as they do not contain any sensitive personal data or personality profiles. There are a few other exceptions, particularly for journalists or for companies that choose to designate an internal data protection officer.

In general, personal data may only be processed for the purpose indicated at the time of collection, which is evident from the circumstances, or is provided for by law. Therefore, a sale of personal data to third parties is only permitted if the website users could – at the time of collection – at least have realised that their data may be sold to a third party or have consented to the sale of personal data. If sensitive personal data or personality profiles are to be sold, the controller of the data has a duty to inform the data subject at the latest on its first disclosure to a third party. Additionally, there is generally no breach of privacy if the data subject has made data generally accessible and has not expressly prohibited its processing. However, whether such data may be sold to third parties must be evaluated considering the circumstances of the specific case, particularly whether the sale of such data may – under the circumstances – require the consent of the person affected.

25 If a website owner is intending to profile its customer base to target advertising on its website, is this regulated in your jurisdiction? In particular, is there an opt-out or opt-in approach to the use of cookies or similar technologies?

The profiling of customers to target advertising on a website is not explicitly regulated by Swiss law. However, the general principles of the DPA apply. The Telecommunications Act (TCA) contains provisions on the use of cookies and similar technologies such as web bugs or spyware. Cookies are personal data according to the DPA if they relate to an identified or identifiable person, which may be the case if the cookie can be linked to a customer ID or an e-mail address. The TCA stipulates that the processing of data on external equipment by means of transmission using telecommunications techniques is permitted only for telecommunications services and charging purposes or if users are informed about the processing and its purpose and about the possibility of refusing to allow processing. Website owners are thus obliged to inform their customers about the storing of cookies or similar technologies and inform them about how to deactivate the storing of cookies in their browser. There is no legal requirement for the form of this information. Therefore, a reference in a privacy policy or in the terms and conditions is sufficient. However, the information must be comprehensive and clear for users. This means that website owners must provide the information in writing. Users do not need to be actively informed before storing cookies as Swiss law uses an opt-out approach for the use of cookies or similar technologies.

26 If an internet company's server is located outside the jurisdiction, are any legal problems created when transferring and processing personal data?

Personal data may not be disclosed abroad if the privacy of the data subjects would thereby be seriously endangered, in particular due to the absence of legislation that guarantees adequate protection. Among the countries providing adequate protection are the member states of the European Union, Canada and the United States (given that the data recipient has signed up to the Safe Harbour Regime).

In the absence of legislation that guarantees adequate protection, personal data may be disclosed abroad only if:

- sufficient safeguards, in particular contractual clauses, ensure an adequate level of protection by the data recipient abroad;
- the data subject has consented to the specific disclosure;
- the processing is directly connected with the conclusion or the performance of a contract and the personal data is that of a contractual party;
- disclosure is essential in the specific case in order either to safeguard an overriding public interest or for the establishment, exercise or enforcement of legal claims in court;
- disclosure is required in the specific case in order to protect the life or the physical integrity of the data subject;
- the data subject has made the data generally accessible and has not expressly prohibited its processing; and
- disclosure is made within the same legal person or company or between legal persons or companies that are under the same management, provided those involved are subject to data protection rules that ensure an adequate level of protection.

27 Does your jurisdiction have data breach notification laws?

There is no specific statutory provision regarding data breach notification. However, personal data must be protected against unauthorised processing through adequate technical and organisational measures. In addition, considering that data processing must be carried out in good faith and be proportionate and personal data may only be processed for the indicated or evident purpose, there might be a notification obligation derived from the general principles of Swiss data protection law.

Taxation

28 Is the sale of online products subject to taxation?

Yes. As Swiss tax law does not distinguish between the channels of distribution, goods purchased online are subject to duties and taxes in accordance with the general regulations, particularly VAT and special taxes (eg, beer and tobacco taxes). However, goods sold to companies or private persons abroad are exempt from said domestic taxes if they are also used abroad.

Foreign companies without any permanent establishment in Switzerland are liable to VAT if they provide telecommunication services or electronic services (such as web-hosting, remote software or hardware maintenance, and software-as-a-service) to customers in Switzerland that are not liable for VAT.

Moreover, all profits made from online transactions by companies based in Switzerland or by permanent establishments of foreign companies in Switzerland are subject to taxation.

29 What tax liabilities ensue from placing servers outside operators' home jurisdictions? Does the placing of servers within a jurisdiction by a company incorporated outside the jurisdiction expose that company to local taxes?

Servers as well as websites located in Switzerland are not deemed to be permanent establishments. Therefore the placement of a server or the operation of a website in Switzerland does not lead to exposure to Swiss taxation.

Generally speaking, only a place of business on Swiss territory or domestic permanent establishments of foreign companies constitute Swiss tax responsibility. Therefore, the placement of the server abroad has no influence on the tax liability in Switzerland. Profits remain taxable even if the transactions leading to the profits are carried out by servers outside Switzerland.

- 30** When and where should companies register for VAT or other sales taxes? How are domestic internet sales taxed?

Online sales by domestic companies or by permanent establishments of foreign companies in Switzerland are subject to value added tax (VAT). Irrespective of legal form, any person who objects and intends to make a profit is liable for VAT if that person carries on a business and is not exempt from tax liability. Companies need to register with the Federal Tax Administration (FTA) within 30 days from the date on which they fulfil the prerequisites for VAT liability. Businesses generating a turnover of less than 100,000 Swiss francs on Swiss territory are exempt from tax liability. Any person who carries on a business based abroad that supplies telecommunication or electronic services on Swiss territory to recipients who are not liable to the tax is, however, not exempt from tax liability.

In addition, Swiss-based companies or companies with a permanent establishment in Switzerland are liable to pay tax on earnings.

Due to the size of Switzerland, a substantial part of online purchase of Swiss customers is made cross-border. For this reason, the legal situation of cross-border sales is briefly described: the Federal Customs Administration (FCA) charges physical imports with customs duties as well as import taxes. Customs duties are generally calculated according to the gross weight of the imported goods, and are often less than 1 Swiss franc per kilo. Particularly, alcoholic beverages, tobacco goods, foodstuffs, textiles and jewellery items are subject to higher customs duties or other special taxes (eg, beer tax or monopoly duties for alcoholic beverages). The regular import tax rate is 8 per cent. For some products such as food and drink (excluding alcoholic beverages), medication, books and newspapers, a reduced rate of 2.5 per cent is applicable.

- 31** If an offshore company is used to supply goods over the internet, how will returns be treated for tax purposes? What transfer-pricing problems might arise from customers returning goods to an onshore retail outlet of an offshore company set up to supply the goods?

If goods previously imported into Switzerland are returned unaltered by the recipient, import duties and taxes may be reimbursed if certain requirements are met. Reimbursement may be requested at the time of the export assessment. Since reimbursement is only possible if the goods are physically re-exported, no refund will be made if the goods are returned to a company located in Switzerland.

Transfer prices between business entities in different tax jurisdictions have an impact on income and expenses and therefore taxable profits. Transfer-pricing rules in Switzerland are based on the 'arm's-length principle' (ie, to establish transfer prices based on analysis of pricing in comparable transactions between two or more unrelated third parties dealing at an arm's length). Consequently, refunds of an onshore company to a customer for returned goods must be reimbursed by the offshore company at arm's length. The offshore company's profit from the particular sale is neutralised accordingly. Further, the offshore company is also obliged to pay arm's-length prices for customer support services rendered by the onshore company in connection with transactions of the offshore company.

Gambling

- 32** Is it permissible to operate an online betting or gaming business from the jurisdiction?

The federal laws dealing with gambling and betting are the Federal Act on Gambling and Casinos (the Casino Act) and the Federal Act on Lotteries and Professional Betting (the Lottery Act).

Gambling services may only be offered by licensed casinos that are Swiss-based corporations. The Casino Act expressly prohibits online gambling services in Switzerland. According to the Lottery Act, lotteries and commercial betting services are prohibited and

subject to criminal prosecution. The prohibition also entails activities that serve to support illegal lotteries or betting, such as the advertising and sale of lottery tickets. The Act provides for certain exceptions (ie, cantonal authorities may grant licences for lottery services if lotteries are carried out in the territory of the respective canton). There are only two providers offering lottery services based on such a licence at present. They may also provide their services through the internet.

At present, there is an ongoing revision of the Lottery Act as well as a debate on whether online gaming, gambling and betting should be legalised to some extent.

- 33** Are residents permitted to use online casinos and betting websites? Is any regulatory consent or age, credit or other verification required?

Online casinos or betting providers offering their services in Switzerland are liable to prosecution under Swiss criminal law. However, the participation of residents in illegal online betting or gambling is not a punishable offence under Swiss criminal law. Winnings, in contrast, may be confiscated according to the Lottery Act.

Outsourcing

- 34** What are the key legal and tax issues relevant in considering the provision of services on an outsourced basis?

The main issues with regards to outsourcing are in the area of:

Employment contracts

Outsourcing transactions usually qualify as the transfer of a business unit, which triggers several obligations of the transferor (for more detailed information see question 35).

Data protection

The outsourcing company has to respect all relevant data protection legislation, particularly in cross-border outsourcing transactions. Consequently, two legal systems have to be followed, first legislation in the country of residence of the outsourced unit as well as in the country of the company that benefits from the outsourced service. Under Swiss data protection law, personal data may only be disclosed abroad if the legislation of that foreign country guarantees adequate protection (ie, similar protection as under Swiss law). In the absence of legislation that guarantees adequate protection, specific safeguarding measures have to be provided for (eg, an agreement to ensure an adequate level of protection (article 6 DPA)).

Protection of shareholders or creditors

The transfer of a business unit to the outsourcing provider usually falls under the relevant provisions of the Swiss Merger Act. Under the Merger Act, outsourcing transactions are usually carried out as an asset deal or as a share deal. In an asset deal it is possible to transfer all or selected assets and liabilities to another party in a single act. In practice, such transfers also include the assignment of all relevant contracts of the outsourced business unit. To carry out the transfer of assets pursuant to the Merger Act, the executive bodies of the entities involved must conclude the transfer contract and register the transfer in the Commercial Register. In a share deal of a (subsidiary) business unit, the majority of shareholders have to consent to the transfer.

Competition law

In certain outsourcing transactions the transfers of a business or parts of a business unit or shares of a company may be qualified as an acquisition of a controlling majority that is subject to merger control and antitrust law. The same rules may be applicable if the transfer is effected by way of a joint venture.

Update and trends

Switzerland – contrary to neighbouring EU countries – has not established by law a right of revocation in distance contracts (eg, e-commerce transactions). Following a parliamentary initiative, the law committee of legal affairs of the council of states has drafted an amendment to the Swiss Code of Obligations dealing with the right of revocation in distance contracts.

According to this draft, a consumer has the non-waivable right to withdraw from distance contracts within 14 days after the contract was concluded. The draft follows the relevant EU legislation to some extent; however, certain provisions are more extensive than EU

legislation. For example, the draft provides that a consumer may use the goods without losing his or her right to withdraw from the contract. In such a scenario, the draft merely provides that the buyer has to pay 'appropriate compensation' to the vendor for the use of the product but may otherwise claim back the purchase price.

The draft legislation has been criticised and was rejected by experts when it was announced because it goes further than European legislation and contains some severe provisions to the detriment of online dealers. The exact outcome and wording of the draft legislation remains to be seen.

Taxes

In a fiscal sense, a business or operational unit is any complex of assets and liabilities. Assets that are transferred to the outsourcing provider may trigger tax on earnings for the Swiss transferor. If real estate is also transferred, such transaction may trigger cantonal real property tax. If all parties involved are liable to pay VAT then such transactions are usually also liable for VAT. Should the newly incorporated company issue shares in Switzerland, such issue will be subject to Swiss securities issuance tax.

- 35** What are the rights of employees who previously carried out services that have been outsourced? Is there any right to consultation or compensation, do the rules apply to all employees within the jurisdiction?

An outsourcing transaction usually qualifies as the transfer of a business unit as provided in article 333 of the Swiss Code of Obligations (CO). As a principle, the employment relationship and all attached rights and obligations pass to the acquirer as of the day of the transfer, unless the employee refuses such transfer. If an employee declines to accept the transfer, he or she does not remain with the former employer. The rejection means that the employment contract is terminated on expiry of the statutory (rather than the contractual) notice period, but at the earliest on the date of transfer.

The employer effecting the transfer must inform the employees of the reason for the transfer and its legal, economic and social consequences. This information must be provided in a reasonable time before the transfer is carried out.

Online publishing

- 36** When would a website provider be liable for mistakes in information that it provides online? Can it avoid liability?

According to the general principles of tort or contract law, mistakes in information on the internet may lead to liability of the website

provider if such erroneous information causes damages due to fault (intentional or negligent) on the part of the website provider.

Website providers usually try to avoid or limit liability for mistakes in information in their general terms and conditions. However, according to contract law, liability for loss or damage caused either intentionally or through gross negligence may not be limited or excluded.

- 37** If a website provider includes databases on its site, can it stop other people from using or reproducing data from those databases?

There are no specific legal provisions dealing with database protection.

However, databases may be copyright-protected if they meet the requirements of the Swiss Copyright Act (ie, if they are creations of an individual nature with regard to their selection or arrangement). These requirements are generally not met unless a database is structured in a protectable way. Therefore, databases which are structured using simple classification principles (eg, alphabetically or in chronological sequence) are generally not protectable by copyright. Notwithstanding the protection of the database itself, parts of its content can be protected by copyright law if the aforementioned requirements are fulfilled.

Further, the Unfair Competition Act prohibits taking over a marketable work result (ie, a database) of a third party using technical reproduction without adequate investment by the exploiting party.

- 38** Are there marketing and advertising regulations affecting website providers?

Apart from the provisions described in questions 14 and 15, there are no specific marketing or advertising regulations that affect website providers. Website providers are obliged to comply with the general rules on advertising issued by Swiss Commission of Fair Trading.



Lukas Bühlmann

buehlmann@br-legal.ch

Neustadtgasse 7
PO Box 755
8001 Zurich
Switzerland

Tel: +41 43 500 62 90
Fax: +41 43 500 62 99
www.br-legal.ch

Annual volumes published on:

Acquisition Finance
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Data Protection and Privacy
Dispute Resolution
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign
Judgments
Environment
Foreign Investment Review
Franchise
Gas Regulation
Insurance & Reinsurance
Intellectual Property &
Antitrust
Labour & Employment
Licensing
Life Sciences
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Shipbuilding
Shipping
Tax Controversy
Tax on Inbound Investment
Telecoms and Media
Trademarks
Vertical Agreements



**For more information or to
purchase books, please visit:
www.gettingthedealthrough.com**



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



The Official Research Partner of
the International Bar Association