

# Providers of OTT services qualify as DCSPs

04 June 2021 | Contributed by [Walder Wyss](#)

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The Federal Supreme Court recently confirmed<sup>(1)</sup> a lower-instance court's decision<sup>(2)</sup> that over-the-top (OTT) service providers do not qualify as telecoms service providers (TSPs) but rather as derived communications service providers (DCSPs) under the Federal Act on the Surveillance of Post and Telecommunications (SPTA) and its ordinances.

## Facts

Threema is a smartphone app created by Threema GmbH. It includes an instant messaging service for messages and files as well as a voice call service. The service is provided via the Internet but does not constitute an internet access service itself. Such a service is generally known as an 'OTT service'.

The Post and Telecommunications Surveillance Service (PTSS), which is in charge of the implementation of post and telecoms surveillance measures in Switzerland, decided that Threema GmbH qualified as a TSP. On this ground, the PTSS required Threema GmbH to perform real-time surveillance of secondary telecoms data for telephony and multimedia services. Threema GmbH appealed against this decision to the Federal Administrative Court (for further details, please see "[Telecoms surveillance legislation: Federal Administrative Court rules instant messaging app not a telecoms service](#)"). The Federal Administrative Court overruled the PTSS's decision and held that Threema GmbH was not a TSP under the applicable telecoms surveillance legislation. The Federal Supreme Court confirmed that decision on appeal.

## Legal context

TSPs are subject to more extensive cooperation duties than DCSPs under the applicable telecoms surveillance legislation (the SPTA and its ordinances). If it qualified as a TSP, Threema GmbH would have had to have complied with abundant cooperation duties (eg, the real-time surveillance of secondary telecoms data for telephony and multimedia services, as instructed by the PTSS).

## Decision

However, the Federal Supreme Court, in line with the Federal Administrative Court, disagreed with this qualification and clarified in its recent decision that providers of OTT services are not TSPs. The Federal Supreme Court emphasised in particular the following points in its interpretation of the law:

- A 'TSP' is a provider which offers the transmission or reception of information by wire or radio. OTT service providers neither directly nor indirectly offer internet access and do not assume any responsibility towards their customers for the transmission of the information via the Internet. The mere feeding of information into a network should not be understood as a transmission of information for third parties since the transmission of information generally comprises the entire information transmission from the sender to the natural or legal recipient. Indeed, this would otherwise constitute an overly broad interpretation of the law and hardly any services would not qualify as telecoms services offerings. In other words, the definition of 'derived communications services' would be devoid of any substance.
- Notoriously, there has never been a close link between the network and the communication service. Thus, there have not been significant technical developments or novel facts since the enactment of the SPTA which would justify another interpretation of the law.
- From a teleological point of view, the existing legislation takes into account the broader purpose of the fight against crime and the investigation of criminal acts. To that end, the legislature has given the Federal Council the competence and flexibility to broaden the duties of DCSPs – namely, the Federal Council may

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require DCSPs which offer services either of major economic importance or to a large number of users to retain and supply all or some of the information required of TSPs. By contrast, TSPs may also be exempted from certain statutory obligations. Accordingly, there is no need to subsume OTT services under the definition of 'TSPs' in telecoms surveillance legislation.

## **Comment**

This decision provides a welcome clarification on the qualification of OTT service providers as DCSPs under the telecoms surveillance legislation. However, OTT service providers are not completely exonerated from any obligations; they must adhere to various obligations in their role as DCSPs.

Further, with this decision and the ongoing revision of the Telecommunications Act (TCA), the term 'provider of telecoms services' is no longer used consistently within the SPTA and the TCA, leading to a discrepancy in the definition of the same term under the two acts. Whereas OTT service providers do qualify as DCSPs under the SPTA, they may be considered as TCPs in the context of the revised TCA, according to the dispatch thereto. Thus, OTT service providers are advised to reassess their role on a case-by-case basis to determine which laws and related obligations apply to them.

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## **Endnotes**

(1) Federal Supreme Court Decision 2C-544/2020, 29 April 2021, available [here](#) (in German).

(2) Federal Administrative Court Decision A-550/2019, 19 May 2020, available [here](#) (in German).

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