

# Telecoms surveillance legislation: Federal Administrative Court rules instant messaging app not a telecoms service

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Tech, Data, Telecoms & Media, Switzerland

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On 19 May 2020 the Federal Administrative Court (FAC) issued a ruling concerning the status of instant messaging app Threema from a telecoms surveillance legislation perspective.<sup>(1)</sup> However, this ruling is not yet final, as the Post and Telecommunications Surveillance Service (PTSS), the entity in charge of implementing telecoms surveillance measures, has brought the matter to the Federal Supreme Court.

## Facts

Threema is an app for smartphones with an instant messaging service for messages and files as well as a voice call service. It is an over-the-op (OTT) service that relies on a third party to provide internet access.

The FAC's ruling was the result of a PTSS decision which qualified Threema as a telecoms service provider (TSP). Threema disputed this qualification, arguing that it was not a TSP, but rather a so-called 'derived communications services provider' (DCSP).

As a preliminary remark, the Swiss telecoms surveillance legislation (the Federal Act on the Surveillance of Post and Telecommunications (SPTA) and related ordinance) contains various categories of relevant parties which the PTSS may call on to obtain relevant information (eg, IP addresses and live interceptions of communications). In particular, a key distinction is between TSPs and DCSPs. This distinction, as the present case illustrates, is important, as TSPs are generally subject to more extensive cooperation obligations.

In the case at hand, the PTSS considered that Threema's services, although being OTT, were telecoms services. The PTSS wanted to qualify Threema as a TSP and therefore subject it to more extensive telecoms surveillance duties. However, these duties exist only under restrictive conditions for DCSPs, hence the importance of the party's qualification.

## Decision

Threema appealed the PTSS's decision to the FAC. The FAC interpreted the definition of a 'TSP' as not encompassing OTT services such as Threema's. The FAC based its reasoning in part on the legislative text on the drafting of telecoms legislation (eg, the 2013 official dispatch on the SPTA and the 2016 official dispatch on the revision of the Federal Telecommunications Act). These documents suggest that OTT services constitute DCSPs. The FAC appeared to give strong weight to these documents and moreover, despite their relatively old age, deemed that changes in the technological landscape did not render the categorisation as a DCSP obsolete. The FAC further considered that

Threema did not provide internet access and assumed no responsibility towards its customers for the transmission of information via the Internet, which are indicators that the provider of such services is a TSP and not a DCSP. The FAC therefore ruled against the PTSS and did not qualify Threema as a TSP but rather as a DCSP.

## Comment

The consequences of the FAC's ruling, if upheld by the Federal Supreme Court, would exonerate many OTT service providers (typically instant messaging and voice call providers) from certain obligations under telecoms legislation. Nonetheless, businesses active in the telecoms area should remain cautious. First, the Federal Supreme Court could rule against the FAC and side with the PTSS, leading to broad compliance obligations for OTT services providers, as they would qualify as TSPs in many cases. Second, even providers that qualify as DCSPs face extensive obligations under Swiss telecoms surveillance legislation, the scope of which is comparatively inclusive.

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## Endnotes

(1) A-550/2019, available here (in German).

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