



# Information Sheet on TSPs and PSCSs

## Distinction between Telecommunications Service Providers (TSP) and Providers of Derived Communications Services (PDCS)

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# 1 Purpose of this Information Sheet

This information sheet serves as a guide for service providers to help them determine which of the following categories of persons obliged to cooperate (POC) they fall into as defined in art. 2 let. b and c of the Federal Act on Post and Telecommunications Surveillance (APTS)<sup>1</sup>:

- Telecommunications service providers (TSP)
- Providers of services which are based on telecommunications services and enable one-way or multipath communication (providers of derived communications services (PDCS)).

It begins by explaining the basic concepts and then provides a guide for service providers at the end.

## 2 Context

The Swiss Federal Act on Post and Telecommunications Surveillance (APTS) defines new categories of persons obliged to cooperate within the context of telecommunications surveillance. Among other things, in addition to the already familiar category of telecommunications service providers (TSP), it introduces the new category of providers of derived communications services (PDCS).

As regards the personal scope of application of the APTS, for TSP, the obligation to register as provided in the Telecommunications Act (TCA)<sup>2</sup> is no longer a determining factor. In other words, all TSP are now subject to the APTS regardless of whether or not they are required to register with the Federal Office of Communications (OFCOM). However, the APTS still contains the same definition of TSP as in the TCA. The APTS also contains a provision regulating delegation to the Federal Council, whereby TSP may be exempted from certain obligations if they offer services of minor economic importance or in the field of education and research (see art. 26 para. 6 APTS). This provision regulating delegation has been implemented in art. 51 of the Ordinance on Post and Telecommunications Surveillance (VÜPF)<sup>3</sup> and has led to the introduction of the subcategory of "TSP with limited surveillance obligations".

In the APTS, the opposite approach has been taken regarding the new category of PDCS: In principle, PDCS are merely subject to an obligation of toleration and cooperation. Above or below certain limits, which are defined in arts. 22 and 52 VÜPF, PDCS are required to notify the Post and Telecommunications Surveillance Service (PTSS) within three months. The latter will then decide, based on the relevant legal framework, whether or not the PDCS will be declared a "PDCS with more extensive obligations to provide information" (art. 22 VÜPF) and/or a "PDCS with more extensive surveillance obligations" (art. 52 VÜPF).

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<sup>1</sup> Federal Act of 18 March 2016 on Post and Telecommunications Surveillance (SR 780.1). Entry into force: 1 March 2018.

<sup>2</sup> Telecommunications Act of 30 April 1997 (SR 784.10)

<sup>3</sup> Ordinance of 15 November 2017 on Post and Telecommunications Surveillance (SR 780.11)

### 3 Telecommunications Service Provider (TSP)

Excerpts from the OFCOM Guide to the “Registration Form for Providing Telecommunications Services” (*Guide*<sup>4</sup>) in force since 1 May 2010:

- "Two elements are critical for the definition of the term 'telecommunications service provider'; they must exist cumulatively:
  - 'telecommunications service' and
  - 'provide'";
- Summary: "Provided that the corresponding business activity falls within the scope of the TCA, [...] a 'telecommunications service provider' is [...] a natural or legal person who itself transmits or arranges to transmit information using telecommunications for third parties and assumes responsibility for the provision of the promised service in respect of these third parties within the framework of a contractual relationship under private law."

#### 3.1 Concept of "telecommunications service"

According to art. 3 let. b TCA, a telecommunications service is to be understood as the “transmission of information for third parties by means of telecommunications techniques”.

The Guide specifies that the following three preconditions must therefore be met cumulatively:

1. “transmission using telecommunications” (art. 3 let. c TCA);
2. transmission “of information” (art. 3 let. a TCA);
3. “for third parties” (transmission of information for “third parties” using telecommunications).

According to art. 3 let. c TCA, “transmission by means of telecommunications techniques” means “sending or receiving of information, by lines or radio, by means of electrical, magnetic or optical signals or other electromagnetic signals”. It is not explicitly prescribed that the sending or receiving has to be carried out by the TSP itself from a technical point of view as well or that the sending or receiving facilities required for transmission are to be operated by the TSP itself. The transmission technology used is also irrelevant in this context.

The term “information” is defined in art. 3 let. a TCA. The transmission of information “for third parties” means that the information is transmitted “not for oneself (one’s own use), but for other legal or natural persons.” (*Guide*, subsection 1.2.1 let. c).

Historically, the term “telecommunications service” was long associated with telecommunications networks and network operators. The Federal Council’s message of 27 February 2013 on the APTS took the same view, which is now dated. Since then, a multitude of Internet-based services have been developed which compete with telecommunications services (over-the-top services or “OTT services”) and which, although they are provided independently of telecommunications network operators (separation of network and services), from an operational point of view are considered equivalent to the traditional telecommunications services provided by network operators.

OTT services are Internet-based services that are provided independently of the access provider. This information sheet is based on current OFCOM practice, which strives for equal treatment of “traditional” telecommunications services and OTT services, which are

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<sup>4</sup> <https://www.bakom.admin.ch/bakom/en/homepage/telecommunication/telecommunication-services-providers/registration-as-a-tsp.html>

considered equivalent to “traditional” telecommunications services from an operational point of view. It should be added that there are other OTT services that are not classified as telecommunications services.

Furthermore, the Federal Council intends to replace the general obligation for TSPs to register in accordance with the TCA with a register of TSPs using addressing resources managed by OFCOM or licensed radio frequencies managed by OFCOM for the provision of telecommunications services. These providers and providers of telecommunications services that do not require addressing resources managed by OFCOM or licensed radio frequencies managed by OFCOM to provide their services remain subject to the TCA.

OTT services considered telecommunications services include, for example, communication services for the transmission of voice, text, images, sound, videos (or any combination thereof), email, instant messaging or messaging and communication services on social media. These are considered telecommunications services regardless of the type of access (via app or web page) or type of network (landline or mobile).

## 3.2 Concept of “provision of services”

According to the *Guide*, the “provision of services” comprises two components:

1. One of an economic nature:  
Any offering of a service is based on a customer relationship. The service may be free of charge. The customer may also be another provider.
2. The other of a technical nature (infrastructure):  
The provider does not need to have its own infrastructure but may also rent, outsource or share etc. “However, it is not explicitly prescribed that transmission or reception has to be carried out by the telecommunications service provider itself, even in technical terms, and that the transmission or reception equipment necessary for transmission is to be operated by it. [...] The partially or completely independent construction or operation of a transmission infrastructure is therefore not a precondition for the qualification ‘telecommunications service provider’. A telecommunications service provider is also someone who uses an existing infrastructure (networks of other providers [for example MVNOs] or cable network operators [...]). Thus a pure service provider without their own network [...] may also be designated as a telecommunications service provider.” (*Guide*, subsection 1.2.2)

## 3.3 Exceptions

Art. 2 OTS<sup>5</sup> lists the exceptions in which persons are not deemed to provide a telecommunications service on the basis of the form of data transmission. It considers location aspects (let. a and b) and the third-party aspect (let. c and d).

Any person transmitting data:

- a. within a building;
- b. on a real property, on two adjacent or opposite real properties, separated by a road, path, railway line or watercourse;
- c. within an enterprise, between the parent company and subsidiaries or within a group;
- d. within statutory bodies and between them;

shall not be deemed to provide a telecommunications service.

Note regarding let. c: “[...] if such business structures or other business relationships or user

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<sup>5</sup> Ordinance of 9 March 2007 on Telecommunications Services (OTS, SR 784.101.1)

groups pursue the exclusive or primary aim of circumventing the obligation to register, then a third-party relationship is to be assumed.” (*Guide*, subsection 1.2.1 let. c)

## **4 Provider of Derived Communications Services (PDCS)**

As with the definition of the term “telecommunications service provider”, two elements are critical for the definition of the term “provider of derived communications services (PDCS)” and must exist cumulatively:

1. “derived communications service” and
2. “provide”.

### **4.1 Concept of “derived communications service”**

Based on the definition in art. 2 let. c APTS, derived communications services are not telecommunications services but nevertheless allow one-way or multipath communication. Derived communications services include the following in particular:

- Online storage services (cloud storage, file hosting, share hoster, online storage, file sharing)<sup>6</sup>
- Services for uploading and sharing content (e.g. videos)
- Cloud computing<sup>7</sup>
- Online marketplaces (note: communication services within an online marketplace are considered telecommunications services)
- Social media (note: communication services within social media are considered telecommunications services)
- Location-based services (localisation services)

### **4.2 Concept of “provision of services”**

See subsection 3.2

### **4.3 Exceptions**

See Subsection 3.3

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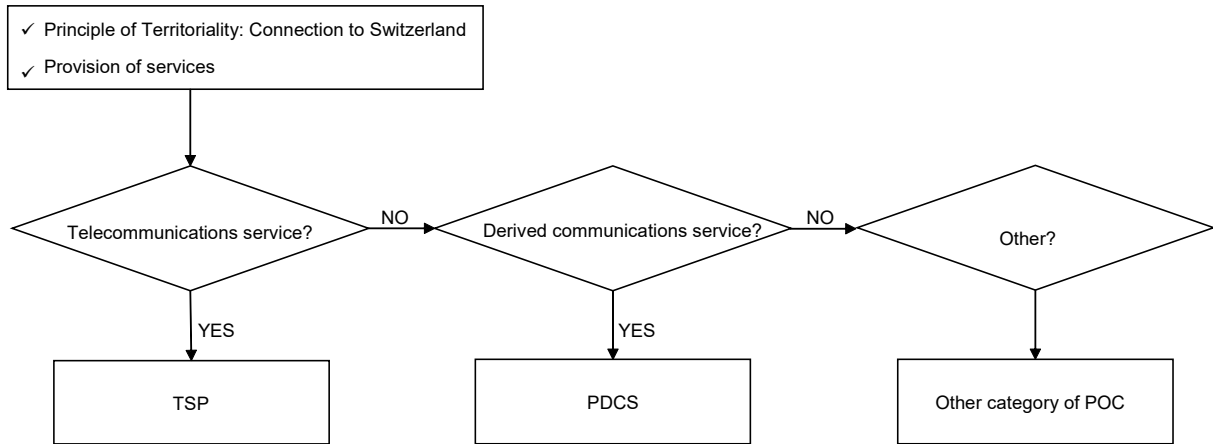
<sup>6</sup> Dispatch of 27 February 2013 on the APTS, BBI **2013** 2683, 2707

<sup>7</sup> Dispatch of 27 February 2013 on the APTS, BBI **2013** 2683, 2708

# 5 Guide for Service Providers

This guide is intended for telecommunications service providers and providers of derived communications services. Therefore, the more general concepts of “service” (instead of “telecommunications service” and “derived communications service”) and “service provider” (instead of TSP and PDCS) are used.

### Diagram:



Legend: POC = persons obliged to cooperate

## 5.1 Principle of Territoriality

Firstly and most importantly, it needs to be established whether the service provider or the service provided has a connection to Switzerland. This basic requirement arises from the principle of territoriality and must be met for the service provider to be subject to the APTS.

A connection to Switzerland exists, for example, in the following cases:

- The service provider has its registered office in Switzerland;
- The service provider has a subsidiary in Switzerland that controls, in law or in fact, communications and/or data storage;
- The service provider provides services to persons in Switzerland or services that are specifically intended for people in Switzerland;
- The service provider provides services via an infrastructure located in Switzerland that is owned by the service provider in question or in relation to which the service provider has specific rights of use (e.g. through a rental contract or an agreement similar to a rental contract regulating shared use of network elements);
- The service provider is registered with OFCOM. In particular, service providers that use addressing resources or licensed frequencies managed and allocated by OFCOM;
- The service provider is obliged to register with OFCOM and uses resources managed by OFCOM or allocated by ComCom that were not allocated to it directly by OFCOM or ComCom (sub-allocation of number blocks or use of licensed frequencies for the provision of telecommunications services by an MVNO). The decisive factor is the actual use of the allocated resources and not the fact that they have been allocated.<sup>8</sup>

<sup>8</sup> Dispatch on the revision of the Telecommunications Act, BBl 2017 6559, 6610

## 5.2 Are the criteria for the provision of services met?

It needs to be established whether the criteria for the “provision of services” in accordance with subsections 3.2 and 4.2 are met and that no exceptions apply as per subsections 3.3 and 4.3.

- If so, verification continues in accordance with subsection 5.3;
- If not, the service provider is considered neither a TSP nor a PDCS for the service examined. It will then need to be assessed whether or not the service provider falls into a different category of persons obliged to cooperate (art. 2 let. a, d, e or f APTS) for the service examined.

## 5.3 Distinction between telecommunications service and derived communications service

It is essential to verify whether the service in question is indeed a telecommunications service:

- If so, the service provider belongs to the TSP category regarding the respective service;
- If not, it is necessary to check whether or not the service is a derived communications service in accordance with subsection 4.1:
  - If so, the service provider belongs to the PDCS category for the service examined;
  - If not, the service provider will not fall into the TSP category or into the PDCS category for the service examined. It will then be necessary to examine whether or not the service provider belongs to a different category according to art. 2 let. a, d, e or f APTS.

## 5.4 Providers that provide both telecommunications services and derived communications services

In the case of providers who offer telecommunications services and derived communications services, these services must be considered separately with regard to their obligations. For the part of their activities that include telecommunications services, these providers are subject to the obligations of the TSP. It should be noted that when calculating the relevant annual turnover for the criterion under art. 51 par. 1 let. b n. 2 VÜPF in order to be considered a TSP with reduced surveillance obligations, the turnovers in Switzerland made of both the telecommunications services and the derived communications services must be added together.

Analogously, for the activities in the area of derived communications services, these providers only have to fulfil the obligations intended for this category. In order to be considered a PDCS with extensive information, respectively surveillance obligations (as noted under art. 22 par. 1 let. b or under art. 52 par. 1 lett. b VÜPF), the calculation of the relevant annual revenue must include the provider’s entire turnover generated with services offered in Switzerland. This means that not only the annual revenues generated with telecommunications services and derived communications services are taken into account, but also all other revenues generated by this provider with services in Switzerland.