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Fact sheet on characterisation as a TSP

Legal basis of the characterisation of telecommunications service providers and registration by OFCOM

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The first part of this fact sheet provides a more detailed description of the term “telecommunications service provider”, while the second part explains the requirements of the Federal Office of Communications (OFCOM) for registering as a telecommunications service provider.

The Telecommunications Act (TCA; CC 784.10) defines telecommunications services as the transmission of telecommunications information for third parties. Pursuant to the TCA, OFCOM registers and publishes the details of providers who use one of the following resources to provide telecommunications services:

- radio frequencies whose use is subject to licensing, and
- addressing elements which are managed at national level.

Telecommunications service providers which use such resources obtained from other providers already registered for the provision of telecommunications services rather than having been allocated them by OFCOM are also registered.

These providers are asked to register online¹ on the OFCOM website or to complete and submit the form for registration as a telecommunications service provider to OFCOM.

How to complete the registration form and details about the publication of certain information is described in a separate guide.

The guide and the form are available as a download from the OFCOM website². OFCOM also provides the option of registering on the website by means of an online form.

¹ www.eofcom.admin.ch

² www.bakom.admin.ch/bakom/en/homepage/telecommunication/telecommunication-services-providers.html

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1 Telecommunications service providers

Two elements are critical for the definition of the term “telecommunications service provider”; they must exist cumulatively: “telecommunications service” and “provision”.

1.1 Telecommunications service

According to Art. 3 lit. b TCA, a telecommunications service is to be understood as the “transmission of information for third parties using telecommunications”. Three preconditions must therefore be met cumulatively:

- a) “*transmission using telecommunications*”, i.e. electrical, magnetic, optical or other electromagnetic transmission or reception of information via lines or radio (Art. 3 (c) TCA). It is irrelevant whether the transport takes place via fixed point-to-point connections or via switched connections. Switching equipment is to be understood both as the circuit-switching equipment customarily in use in telephony (e.g. SS7 nodes) and as the equipment customarily used in data transmission for packet switching (routers, cross-connect, etc.) In this context, it is not significant whether the transmission takes place by radio or via physical connections;
- b) the transmission “*of information*”, i.e. of signs, signals, characters, images, sounds or representations of any kind for persons, other life forms or machines (Art. 3 lit. a TCA);
- c) “*for third parties*”, i.e. between at least between two third parties (other legal and natural persons) rather than for own use.

1.2 Provision of services

“Provision of services” includes an economic and a technical component. In economic terms, any offering and provision of a service is based on a customer relationship. In technical terms, the provision of a telecommunications service requires an appropriate infrastructure.

Whilst the law, in terms of its scope and definitions of terms, relates above all to the fact of transmitting information for third parties, it uses a concept of a service which is economically based. If this concept is applied consistently, it is therefore reasonable to define a telecommunications service provider primarily in terms of the existence of a customer relationship. Therefore, anyone who appears to customers as a provider of services, who concludes contracts, who guarantees the service (transmission of information) and charges for that service is a telecommunications service provider. In this context, customers are private individuals or legal persons (end users) or other telecommunications service providers (carriers’ carrier).

In terms of the wording, such an interpretation may coincide with the cited provisions of the law. While Art. 3 (3) TCA specifically requires “...sending or receiving of information...”, the Act does not explicitly require that the technical or other aspects of sending or receiving must be performed by the telecommunications service provider itself, nor that it needs to operate the required transmission or reception equipment. It therefore corresponds to the will of the legislators to allow certain activities to be outsourced. For example, reselling of services is also explicitly mentioned in the Federal Council’s dispatch.

This approach also corresponds to social and economic realities. Customers essentially want one contact (one-stop shopping principle), who assumes responsibility to them for the service provided, provides the service they want and answers for any shortcomings, but have little interest in the background conditions which they can neither access nor influence. Customers do not have to be concerned about how the company which presents itself as a telecommunications service provider organises itself internally in technical terms (outsourcing of transmission functions) or in operational terms (cooperation in the marketing of products).

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The partially or completely independent setup 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, cable network operators, etc.). Thus a pure service provider without their own network (e.g. a reseller of connection capacity) may also be designated as a telecommunications service provider. In brief, these considerations demonstrate that the existence of a customer relationship in which the provider offers its customers a guarantee of correct information transfer suffices to meet the definition of “provision”. The provider must therefore be in a contractual relationship under private law with at least one end user or at least one other telecommunications service provider. In this regard, essential contract elements include the description of the service to be provided, conditions and quality, prices, cancellation and liability clauses, etc.

1.3 Exceptions to the characterisation of telecommunications service provider

According to Art. 2 TSO certain forms of information transmission are not deemed to be the provision of telecommunications services. This mainly applies to in-house, small-scale and internal business applications (corporate networks). Nor does the transmission of information within and between public-law corporations count as a telecommunications service as long as the information transmission provider is itself part of the public-law corporation. No telecommunications service is provided if information is exchanged free of charge within a group lacking a central organisation for the benefit of members of that group, as may be the case, for example, with intelligent traffic systems or meshup networks.

1.4 Summary of characterisation as a telecommunications service provider

A telecommunications service provider is a natural person or legal entity that itself transmits information for or between third parties by means of telecommunications or is responsible for its transmission by third parties within the framework of a contractual relationship under private law for the provision of the agreed service.

1.5 Registration by OFCOM

OFCOM registers providers of telecommunications services who use specific resources to provide telecommunications services. The precise requirements for registration are set out in Section 2 of this document.

1.6 Scope of the TCA

Telecommunications service providers are subject to the TCA, its implementing provisions and, in the case of retransmission of radio and television programme services, the Federal Act on Radio and Television (RTVA), regardless of whether or not they are registered by OFCOM.

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2 Registration by OFCOM

2.1 General

OFCOM registers and publishes the details of providers who use one of the following resources to provide telecommunications services.

- Radio frequencies, whose use is subject to licensing, and
- addressing elements which are managed at national level.

Telecommunications service providers that make use of these resources from other already registered providers rather than having them allocated to them by OFCOM must also be registered.

In the event of such a subordinate allocation of nationally administered addressing elements or a corresponding use of licensed frequencies for the provision of telecommunications services, both the telecommunications service providers using these resources and those providers directly allocated these resources for use must be registered with OFCOM.

The use of such resources is therefore permitted only if the receiving provider has also been registered by OFCOM in advance. Providers who wish to make these resources available for their business partners to use must notify OFCOM.

OFCOM maintains and publishes a list of registered providers and the telecommunications services they offer. When registering, telecommunications service providers must provide details of all the telecommunications services they offer, rather than just those services that they use the addressing elements or frequencies to provide.

2.2 Legal basis

Art. 4 TCA sets out the principles for the registration of telecommunications service providers by OFCOM:

Art. 4 Registration of telecommunications service providers

¹ The Federal Office of Communications (OFCOM) registers and publishes the details of providers who use one of the following resources to provide telecommunications services.

- a. Radio frequencies whose use is subject to licensing;*
- b. Addressing elements which are managed at national level.*

² Registered providers may only allow other telecommunications service providers to make use of resources pursuant to paragraph 1 if the latter have been registered in advance.

³ OFCOM maintains and publishes a list of registered providers and the telecommunications services they offer.

⁴ The Federal Council regulates the details regarding registration.

The use of one of the resources mentioned in Art. 4 for the provision of telecommunications services thus requires that the telecommunications service provider be registered with and have its details published by OFCOM. To this end, telecommunications service providers must submit to OFCOM the information required for registration and publication by means of the form provided (Art. 3 Para. 1 TSO). To ensure that OFCOM is able to fulfil this task if these resources are passed on from one provider to another, the registered provider proposing to permit such usage must inform OFCOM of its intention (art. 3 para. 2 TSO). This ensures that the required registration and publication can take place even where the corresponding resources are not obtained from OFCOM, but rather the usage thereof is permitted by a previously registered provider.

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Registered providers are obliged to notify OFCOM immediately of any changes with regard to their registration (Art. 3 para. 1 TSO).

In addition, registered providers must designate a correspondence address in Switzerland to which, in particular, notices, summonses and injunctions may be legally served and provide the corresponding unique Business Identification Number (BIN) in accordance with the Federal Act on the Business Identification Number (BINA) (Art. 4 (1) TSO).

OFCOM publishes the registered providers' principal and correspondence addresses in addition to a list of the telecommunications services they provide.

2.3 Legal transfer of rights of use

The relevant national authorities are authorised to allocate rights of use of radio frequencies which are subject to licensing and of addressing elements administered at national level for the provision of telecommunications services. The law permits telecommunications service providers who have been allocated these resources to grant the corresponding right of use to other registered or not yet registered providers.

Those telecommunications service providers that are granted the legal right of use are also registered by OFCOM. This is the case in the following instances, for example:

- a) where a licensed telecommunications service provider establishes a contractual relationship that permits another telecommunications service provider to use the transmission capacities from the radio frequencies that the licensed provider has been allocated. Such constellations exist in the case of Mobile Virtual Network Operators (MVNO) and resellers who offer telecommunications services in their own name. Branded offerings by already registered telecommunications service providers are not registered (e.g. provider X has an independent offering under the "Brand name" brand, for which it acts as the customers' contractual partner).
- b) If a telecommunications service provider permits another telecommunications service provider to use addressing elements allocated to it as part of a contractual relationship, e.g. in the form of a subordinate allocation of individual numbers or extension ranges from a block of E.164 numbers (see Art. 23 OARTS) or by permitting the use of other addressing elements administered by OFCOM.

2.4 Registration-free use

In the following cases, users are not registered by OFCOM:

- **Domain names .swiss and .ch**
Although .swiss and .ch domain names are nationally administered addressing elements, they are not intended to be used to offer telecommunications services to third parties. In addition, domain name holders are registered in the RDDS database (Registration Data Directory Service; WHOIS).
- **Roaming**
Foreign providers of telecommunications services who do not offer telecommunications services in Switzerland and whose customers are logged into a Swiss network are not registered.
- **Telephone and video conferencing (access numbers)**
Providers of services which enable participants to participate in conferences via a Swiss number are not registered. The provider of the conference offer retains the right to use the corresponding resource, rather than it being transferred to the users of the offer. This provider is the end customer of the registered telecommunications service provider from which it obtains the number and the associated telecommunications service.

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References

CC 784.10

Telecommunications Act of 30 April 1997 (TCA)

CC 784.40

Federal Act of 24 March 2006 on Radio and Television (RTVA)

CC 431.03

Federal Act of 18 June 2010 on the Business Identification Number (BINA)

CC 784.101.1

Ordinance of 9 March 2007 on Telecommunications Services (TSO)

CC 784104

Ordinance of 6 October 1997 on Addressing Resources in the Telecommunications Sector (OARTS)