

NKF Client News

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Amendment to the Swiss Telecommunications Surveillance Laws Application Scope: Opening of Public Consultation

Introduction

The Swiss Federal Act on the Surveillance of Post and Telecommunications ("SPTA"; CC 780.1) and its implementing ordinances set out various surveillance obligations for providers of telecommunications services. This legal framework is an important tool for the prevention of criminal activities in Switzerland and for law enforcement.

Based on the SPTA and its implementing ordinances, providers of telecommunications services were ordered to conduct about 9,500 surveillance mandates and replied to 440,000 inquiries to deliver information in 2023.¹

As part of the revision of the Swiss Federal Telecommunications Act of March 2019 ("TCA"; CC 784.10), the Swiss Federal Council has been granted the authority to amend the personal scope of application of the SPTA by specifying the categories of providers that have a duty to cooperate under Swiss telecommunications surveillance laws and regulations, and must abide by the obligations set out in the SPTA and its implementing ordinances (the "**Affected Providers**").

Affected Providers include, e.g., certain providers of courier services, operators of telecommunications infrastructure, Internet access providers, cloud service providers, email service providers, restaurants and hotels providing wi-fi to their clients, and retailers of prepaid SIM or Internet access cards.

The Swiss Federal Council recently published for public consultation until May 2025 the draft amendment to the personal scope of application of the SPTA and its implementing ordinances (the "**Draft Amendment**"). The main changes proposed by the Draft Amendment affect the Swiss Federal Ordinance on the Surveillance of Post and Telecommunications ("SPTO"; CC 780.11).

The public consultation procedure allows stakeholders to submit views and comments on the Draft Amendment. Such feedback will then be compiled and considered as part of the legislative process.

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¹ See <https://www.li.admin.ch/fr/stats>.

1. Clarification of the Personal Scope of Application

The Draft Amendment clarifies, in particular, the concept of telecommunications service providers ("TSPs") - which is not to be defined by reference to Article 3 lit. b TCA anymore - and the concept of providers of derived communications services ("PDCSs").

TSPs are providers that, in substance, operate of a public telecommunications network, grant a direct access service to a public telecommunications network, or provide public mobile communications services or public telephone services with access to the network.

PDCSs are providers that, in substance, provide unilateral or multilateral communications services or indirect access services to public telecommunications networks.

These clarifications do not fundamentally change the general personal scope of application of Swiss telecommunications surveillance laws and regulations.

Providers such as operators of telecommunications infrastructure and Internet access providers will continue to qualify as TSPs, while providers such as cloud service providers and email service providers will continue to qualify as PDCSs.

2. Revised Thresholds for Telecommunications Surveillance Obligations

The Draft Amendment significantly modifies the thresholds beyond which certain telecommunications surveillance duties apply.

TSPs continue to be divided in two categories: (i) TSPs with limited obligations ("TSPs-LO"), and (ii) TSPs with complete obligations ("TSPs-CO").

PDCSs are divided in three categories, while the current laws and regulations distinguish only between mere PDCSs and PDCSs with extensive obligations, which are divided in two subcategories (i.e., PDCSs with extensive obligations to provide information ("PDCSs-EOPI") and PDCSs with extensive surveillance obligations ("PDCSs-ESO")); (i) PDCSs with minimal obligations ("PDCSs-MO"), (ii) PDCSs with limited obligations ("PDCSs-LO"), and (iii) PDCSs with complete obligations ("PDCSs-CO").

With the category of PDCSs-LO, the Draft Amendment introduces a new category of PDCSs that are subject to certain telecommunications surveillance duties due to their moderate, but not insignificant, userbase.

Whether a TSP or PDCS qualifies as a TSP-LO or a TSP-CO, or a PDCS-MO, a PDCS-LO or a PDCS-CO, respectively, has consequences on its telecommunications surveillance duties.

The proposed revised thresholds are further detailed in Section 4 below.

3. Revised Allocation of Telecommunications Surveillance Obligations

The Draft Amendment does not materially change the duties of Affected Providers in general, except for an obligation to remove certain encryptions other than end-to-end encryption between end users, which would be new for PDCSs.

With the changes in the thresholds triggering additional telecommunication surveillance duties that would be introduced with the entry into force of the Draft Amendment, Affected Providers might be subject to new or less obligations under the SPTA and its implementing ordinances. This is particularly the case of PDCSs, for which the thresholds triggering telecommunications surveillance duties undergo material changes in the Draft Amendment.

The Draft Amendment enhances the systematic allocation of duties among different Affected Providers. Specifically, a PDCS-LO has duties substantially similar to those of a TSP-LO, while a PDCS-

CO is subject to obligations that substantially mirrors those of a TSP-CO-CO, subject however to certain duties that are not relevant due to the nature of the services one or the other provides.

The proposed revised allocation of telecommunications surveillance obligations are further detailed in Section 4.

4. Overview of Thresholds for Qualification and Related Regulatory Obligations

Telecommunications Service Providers (TSPs)		Key Telecommunications Surveillance Obligations	Providers of Derived Communications Services (PDCSs)		
Current Regulations	Draft Amendment		Current Regulations	Draft Amendment	
<p>TSPs Other than TSPs with Limited Surveillance Obligations</p> <p>All TSPs that do not qualify as TSPs with Limited Surveillance Obligations</p>	<p>TSPs with Complete Obligations (TSPs-CO)</p> <p>All TSPs that do not qualify as TSPs-LO</p>	<p>duties</p> <ul style="list-style-type: none"> - duty to set up an on-call service - duty to retain certain additional data and certain meta data - duty to provide information through the PTSS processing system consultation interface, as applicable automatically - duty to conduct certain surveillance mandates - duty to identify users with suitable means - duty to retain certain data - duty to decrypt certain encrypted data - duty to provide certain information - duty to tolerate surveillance mandates 	<p>PDCSs with Extensive Obligations to Provide Information (PDCSs-EOPI) / Surveillance Obligations (PDCSs-ESO)</p> <ul style="list-style-type: none"> - ≥ 100 information requests / ≥ 10 surveillance orders in the past 12 months; and/or - ≥ 100 mio turnover in Switzerland in the past 2 business years, substantial part of the PDCS' business/turnover consists of/arises from the provision of DCS, and 5,000 users 	<p>PDCSs with Complete Obligations (PDCSs-CO)</p> <ul style="list-style-type: none"> - 1mio users of any provided DCS on average in the past 12 months; and/or - ≥ 100 mio turnover in Switzerland in the past 2 business years 	
<p>TSPs with Limited Surveillance Obligations</p> <ul style="list-style-type: none"> - TS excl. in the field of research or education; and - <10 surveillance orders in the past 12 months; and <100 mio turnover in Switzerland from TS and DCS in the past 2 business years 	<p>TSPs with Limited Obligations (TSPs-LO)</p> <ul style="list-style-type: none"> - TS excl. in the field of research or education; and - <10 surveillance orders in the past 12 months in connection with any TS or DCS; and <100 mio turnover in Switzerland from any business in the past 2 business years 		<p>duties</p>	<p>PDCSs</p> <p>All PDCSs that do not qualify as PDCSs-EOPI or PDCSs-ESO</p>	<p>PDCSs with Limited Obligations (PDCSs-LO)</p> <ul style="list-style-type: none"> - $\geq 5,000$ users of any provided DCS on average in the past 12 months; and - PDCS does not qualify as PDCS-CO
				<p>PDCSs with Minimal Obligations (PDCSs-MO)</p> <p>All PDCSs that do not qualify as PDCSs-LO or PDCSs-CO</p>	

Conclusion

Although the Draft Amendment does not fundamentally change the general personal scope of application of Swiss telecommunications surveillance laws and regulations and the obligations of telecommunications service providers thereunder, it significantly modifies the thresholds beyond which certain telecommunications surveillance duties apply, resulting in a broader range of providers that will have to comply with telecommunications surveillance obligations.

First, fewer TSPs (e.g., operators of telecommunications infrastructure and Internet access providers) are expected to qualify for limited obligations. Second, a greater number of PDCSs (e.g., cloud service providers and email service providers) are expected to be subject to additional telecommunications surveillance duties.

Regarding PDCSs in particular, the Draft Amendment establishes three categories of PDCSs (instead of two). This aims at a more balanced gradation of obligations across the different subcategories of PDCSs that better aligns with the principle of proportionality.

While proportionality is sought, it is not always fully achieved in practice. The thresholds triggering complete obligations for PDCSs are intended to capture large economic actors in the Swiss market, however the duty to comply with such obligations for PDCSs reaching 1,000,000 users worldwide might impose significant regulatory burdens on Swiss-based PDCSs, irrespective of their actual revenue and user base in Switzerland.

Compliance costs for these actors could become substantial, potentially disadvantaging Swiss businesses and weakening Switzerland's competitive position in the telecommunications market.

Further, the requirement for PDCSs with complete obligations to retain certain metadata of users located in Switzerland, despite not necessarily having a large revenue or userbase in the country, could undermine privacy efforts.

As mentioned, the Draft Amendment has been published for public consultation. It is not yet scheduled to enter into force and remain subject to potential substantial amendments. The public consultation process is set to end in May 2025. It is therefore unlikely that the Draft Amendment will take effect before 2026. Furthermore, if and when the Draft Amendment comes into force, a transition period of 6 to 12 months (depending on the specific obligations) allowing Affected Providers to achieve compliance with the new regulatory requirements.

Given the significant changes that the Draft Amendment would introduce regarding the thresholds at which TSPs and PDCSs become subject to additional telecommunications surveillance duties, such providers - should the Draft Amendment be set to enter into force - would be advised to reassess whether they meet the new thresholds for extensive/complete duties or, conversely, whether they would no longer fall within the scope of such obligations.

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