



Telecommunication Newsletter Switzerland

Federal Administrative Court Rules that Customer Relationship is Decisive for Qualification as Telecommunication Service Provider

Facts

The Swiss Office for Communication (OFCOM) has issued an invoice for administrative fees to Meritus Cooperative (Meritus) as a telecommunication service provider.

Meritus, who offers VoIP as well as SMS and MMS services to its customers, has challenged the invoice, arguing that it does not qualify as a telecommunication service provider under Swiss law. According to Meritus, Meritus does not operate any infrastructure on its own and does not have the requisite technical expertise to offer communication services.

The transmission services are provided by a third party (Winet Network Solutions AG) who administers the telephone numbers and implements the services. Meritus has no means to control the transmission of data.

Ruling

In its decision of December 12, 2010¹, the Federal Administrative Court rejected Meritus' arguments and confirmed the decision of the OFCOM which qualified Meritus as a telecommunication service provider under Swiss law.

The Federal Administrative Court held that whoever offers telecommunication services will need to register with the OFCOM. Telecommunication services are defined as transmission of data (Art. 3 lib. b Telecommunication Act ("TCA")). According to Art. 3 lit. c TCA, transmission of data is defined as the sending or receipt of information by means of electronic communication.

The fact that Meritus does not operate any part of the infrastructure required for the transmission of data is, according to the Federal Administrative Court, not of any relevance. What is relevant, however, is that Meritus has a contractual relationship with its customers who use the services and, therefore, Meritus qualifies as a telecommunication service provider according to Swiss law.

The decision is still subject to appeal.

Conclusion

The decision of the Federal Administrative Court, if not reversed upon appeal, will have a wide impact. Pure VoIP providers having a contractual relationship with their customers would qualify as telecommunication service providers under Swiss law according to the decision of the Federal Administrative Court and would, therefore, also have to comply with the requirements of lawful interception.

The fact that a service provider does not operate any part of the transmission infrastructure would not exonerate it from the registration requirement as a telecommunication service provider and, consequently, from its obligation to comply with lawful interception requests.

December 20, 2010

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¹ http://relevancy.bger.ch/pdf/azabvger/2010/a_00459_2010_2010_11_12_t.pdf