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Telecom Service Providers have to Comply with Anti-Money Laundering Obligations

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Telecommunication Newsletter Switzerland

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Recently, the Swiss Federal Supreme Court decided a matter relating to value-added services in the telecom sector (090x numbers) and anti-money laundering obligations (2C_488/2018).

1. Facts

The underlying facts of the case were the following: The public transportation association of Zurich ("ZVV", mainly train, busses and tram) requested from its users to pay a CHF 5.00 supplement to their usual ticket when using the public transportation between 0.30 am and 5.00 am (supplement for night trains and/or night busses) and offered the users to buy the supplement through a value-added number. The users would send a text message to the value-added number and in return receive a confirmation that they have paid the supplement. The providers of telecommunication services invoiced their users the value-added service (CHF 5.00 per ticket) and ultimately paid the contractual amount to ZVV.

2. Summary

In a nutshell, the Swiss Federal Supreme Court qualified the value-added service as a payment transaction subject to anti-money laundering obligations because the provider (Swisscom) has a contractual relationship with the users (Swisscom's clients) and, within this relationship, is invoicing non-telecom services (transportation services) on behalf of a third party (ZVV). The decision does not relate to value-added voice services (such as adult entertainment), which are currently explicitly excluded from anti-money laundering obligations.

3. Actions to be taken

Most of the Swiss telecom providers (and we ourselves) are of the view that - if the provider allows its users to access non-telecom value-added services and invoices them - the provider falls under the anti-money laundering regulation and has to fulfil the obli-

gations of a financial intermediary. This means, in particular, that the telecom provider must get affiliated to a one of the self-regulatory organisations, identify its users and maintain proper files. As an exception, the provider does not have to fulfil the obligations of a financial intermediary if the services fall under the threshold of CHF 1'000 per transaction and CHF 5'000 per annum and per customer.

In order to avoid anti-money laundering obligations, we believe that the telecom providers could simply block the access to the non-telecom value-added services, despite that they have an obligation to provide service interoperability. The obligation of interoperability is set out in art. 21a TCA and 32 TCO and relates to the universal services, as defined in art. 15 TCO. Therein, the universal services are mainly defined as public telephone service that permits the conduct of national and international telephone *conversations*, internet access, entry in a directory and accessibility. Universal services do, in our view, however not include non-communication value-added services.

4. Comment

The decision of the Swiss Federal Supreme Court is currently widely discussed amongst telecom providers and within OFCOM. We assume that the players will soon advocate certain clarifications as to the anti-money laundering obligations of telecom providers as well as with regard to the interoperability. This will be necessary, because violation of anti-money laundering obligations might trigger a criminal offence.

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