



Telecommunications Newsletter Switzerland

Swiss Federal Supreme Court Rules Upon Appeal that there is no Sufficient Basis in the Swiss Telecommunication Act to Request Swisscom Fixnet AG to Grant Interconnection for Leased Lines and Bit-Stream Access

On July 29, 2003, TDC Switzerland AG filed two requests for interconnection with the Communication Commission ("ComCom") against Swisscom Fixnet AG, one for leased lines and the other one for bit-stream access. On November 30, 2004, the Federal Supreme Court held upon appeal in the proceeding between the same parties regarding shared line access and full access that there was no sufficient legal basis in the Swiss Telecommunication Act, which would permit an interconnection order for shared line access and full access.

Subsequently, by order of February 28, 2005, the ComCom rejected TDC Switzerland AG's request for interconnection for bit-stream access as well as for leased lines with the same arguments, namely that there is equally no sufficient legal basis in the Swiss Telecommunication Act to order Swisscom Fixnet AG to grant interconnection for leased lines and for bit-stream access.

In its decisions, the ComCom ordered TDC Switzerland AG to bear the costs of CHF 444'695 for the proceedings for bit-stream access and CHF 333'960 for the proceedings for leased lines. Furthermore, TDC Switzerland AG was ordered to pay an indemnification to Swisscom Fixnet AG of CHF 8'750 for each procedure.

TDC Switzerland AG filed an administrative appeal on April 18, 2005, against the two orders of the ComCom. Both appeals were rejected in substance by the Federal Supreme Court by its decisions rendered on November 22, 2005. Regarding the indemnification, which TDC Switzerland AG was

ordered to pay to Swisscom Fixnet AG, the Federal Supreme Court found no legal basis in the applicable administrative procedural laws and quashed the respective order.

Since the Federal Supreme Court has already decided in the unbundling issue that the Swiss Telecommunication Act did not provide for a sufficient legal basis for unbundling, the decision on interconnection regarding leased lines and bit-stream access does not come as a complete surprise. In the decision of the Federal Supreme Court (BGE 131 II 13), the Federal Supreme Court already ruled that there is no sufficient basis in the Swiss Telecommunication Act to request Swisscom Fixnet AG to unbundle the local loop. The Federal Supreme Court further held that the ordinance passed by the Federal Council providing for shared line access and full access lacked a sufficient legal basis in the Swiss Telecommunication Act. In the decision rendered on November 22, 2005, the Federal Supreme Court held that the same arguments apply to leased lines and bit-stream access.

Furthermore, the Federal Supreme Court found no fault in the ComCom ordering TDC Switzerland AG to pay the costs in the amount of CHF 444'695 for the proceeding regarding bit-stream access and of CHF 333'960 for the proceeding regarding leased lines. According to the decisions, the actual costs incurred by the ComCom calculated at an hourly rate of CHF 260 would have amounted to CHF 856'440 for the proceeding regarding bit-stream access and to CHF 613'080 for the proceeding regarding leased lines. Only 50% of these amounts were allocated to



TDC Switzerland AG. The Federal Supreme Court argued amongst others that the fact, that there is no *ex ante* regulation in Switzerland, does not suffice to grant an exemption from the allocation of the procedural costs to the unsuccessful party.

As regards the allocation of the party indemnification to Swisscom Fixnet AG in the amount of CHF 8'750 for each of the proceedings, the Federal Supreme Court held, however, that there is no sufficient legal basis to allocate an indemnification in the proceedings before the ComCom.

The Federal Supreme Court's decisions demonstrate once again the serious flaws of the Swiss Telecommunication Act and the urgent need for a revision. The pending debate in the Swiss Parliament, however, does not permit an optimistic view. *Ex ante* regulation did not find any support. In light of the prohibitively high procedural costs, a new market entrant will continue to be reluctant filing interconnection proceedings against the incumbent operator. The fact that there will be no award of a party indemnification in the ComCom proceedings does not really create an incentive to bring interconnection proceedings. It rather creates an incentive on the side of the incumbent operator to continue to vigorously defend all interconnection requests, hoping that the new market entrants may not have the financial muscle to follow through.

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David Käzig

For further information, please contact:

David Käzig (d.kaenzig@thouvenin.com)