



Telecommunications Newsletter Switzerland

Federal Supreme Court Remands Interconnection Dispute to ComCom: The Odyssey Continues

By decision dated April 21, 2006 the Federal Supreme Court, once again, remanded the dispute between Swisscom Fixnet AG (Swisscom Fixnet AG is the successor to the proceeding of Swisscom AG) (hereinafter "Swisscom") and Verizon Switzerland AG (formerly "MCI Communications Switzerland AG" respectively "MCI WorldCom AG") and TDC Switzerland AG to the Federal Communication Commission (hereinafter "ComCom"). Six years ago, Verizon Switzerland AG and TDC Switzerland AG filed a request for interconnection with the ComCom for determination of the interconnection charges and of the terms and conditions. On November 6, 2003, the ComCom ordered Swisscom to grant interconnection and determined the interconnection fees and terms and conditions. This decision was appealed by the parties. By decision of October 1, 2004, the Federal Supreme Court remanded the case to the ComCom to correct certain procedural flaws.

Upon remand, the ComCom remedied the procedural flaws and by decision dated June 10, 2005, Swisscom was again ordered to grant interconnection and the ComCom confirmed largely its previous order. Once again Swisscom appealed against the decision as did the other parties requesting interconnection. Swisscom argued again that the ComCom had repeatedly violated Swisscom's right to be heard, had incorrectly determined the facts and assumed that Swisscom had a dominant position for national interconnection, had committed several methodical errors and finally that the ComCom had no authority to decide upon ancillary duties to the interconnection.

In its decision of April 21, 2006, the Federal Supreme Court largely rejected Swisscom's arguments, however, did not fail to criticise the ComCom's decision which was difficult to read and to understand. With respect to one of the main issues, namely the determination of the interconnection

charges and the application of the so called "Delta X Method", the Federal Supreme Court held that the "Delta X Method" was not suitable for the determination of the interconnection charges and held that the decision of the ComCom violated Swiss law to the extent the usage charges were calculated in application of the "Delta X Method".

On two points, however, Swisscom suffered a severe set back. On one hand Swisscom challenged the authority of the ComCom to determine, in addition to the charges, the terms and conditions of the "standard offer" and on the other hand explicitly requested the ComCom to order that interconnection charges ordered shall only be valid as from the date of the order and to include a clause in the interconnection order which would have excluded the parties from claiming loss of profit. The Federal Supreme Court argued that the position taken by Swisscom was inconsistent. On the one hand Swisscom challenged the authority of the ComCom to determine the term and conditions of the "standard offer" and on the other hand Swisscom requested the ComCom to include a provision in the "standard offer" regarding the application of the ordered interconnection charges from the date of the order only and to exclude the liability for loss of profit.

The Federal Supreme Court fully rejected Swisscom's appeal in this respect and held that the ComCom was competent not only to determine the charges but also the terms and conditions of the "standard offer". The Federal Supreme Court argued that Art. 11 para. 3 Swiss Telecommunication Act has a broad application. A division of the competence between the ComCom to only determine the main issues (i.e. the interconnection charges and the obligation to interconnect) and of the civil courts to only determine the other terms and conditions would not be practical and would severely jeopardize interconnection.



As regards the application of the interconnection charges only from the date of the order, the Federal Supreme Court rejected the arguments raised by Swisscom and held that the retroactive application of the interconnection charges was in the public interest. Based upon the principle of non discrimination (Art. 11 Swiss Telecommunication Act) the incumbent operator is required to offer the same terms and conditions to all parties requesting interconnection. Smaller enterprises may not have the financial means to engage themselves in costly interconnection proceedings. They will have to rely upon the application of the interconnection charges and terms and conditions decided in proceedings initiated by their larger competitors. The retroactive application of the interconnection charges as well as of the other terms and conditions to third parties assures competition on an equal basis for all market participants and flows from the principle of non discrimination.

For further information, please contact:
David Känzig (d.kaenzig@thouvenin.com)

Lastly, Swisscom did not succeed with its request to exclude the liability for loss of profits. The Federal Supreme Court argued that an exclusion of the liability for lost profits could create an incentive on the side of the incumbent operator not to adhere to the terms of the "standard offer" and to drag on the proceedings for as long as possible. The Federal Supreme Court held that it was in compliance with Art. 11 para 3 Swiss Telecommunication Act not to include a clause which would have excluded Swisscom's liability for lost profits in the "standard offer".

Although the case has been remanded for determination of the interconnection charges, this decision is expected to have a great impact. The decision appears to make it clear that once the interconnection charges have been finally determined that they will have to apply retroactively to all competitors irrespective of whether or not they have been a party to the interconnection proceedings. It is, however, expected that Swisscom will continue to use all available remedies to further prolong the pending interconnection proceedings and to challenge the application of the "standard offer" once determined for third parties.

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David Känzig