



Telecommunication Newsletter Switzerland

Swisscom Standard Offer on Unbundling

Legal Basis for Unbundling

On April 1, 2007, the revised Telecommunication Act ("TCA") and the Telecommunication Ordinance ("TCO") entered into effect. Art. 11 para. 1 TCA mandates dominant carriers to offer access on a transparent, non-discriminatory and cost oriented basis to the following services:

- Complete unbundling of the customer telephone access line;
- Bit stream access for a period of four years;
- Resale of fixed line telephone number;
- Interconnection;
- Leased lines;
- Duct sharing, to the extent there is sufficient capacity.

According to the definition contained in Art. 3 lit. c TCA, complete unbundling of the customer access line is limited to the twin copper pair. The TCO further sets out – amongst others – the details for the access, in particular regarding non-discrimination (including adequate technical reserves for the incumbent operator), transparency, cost orientation and co-location principles.

Publication of Offer by Swisscom

In time with the promulgation of the amendments to the TCA and TCO, Swisscom Fixnet AG ("Swisscom") published its new offers. The details, except for the contract itself, are released on <http://www.swisscom.com/ws/products/FMGProdukte/index.htm>. The offer published by Swisscom includes unbundling of the twin copper pair, co-location, leased lines, resale of telephone numbers, duct sharing and new wholesale terms and conditions. Since the information exchanged in interconnection negotiations is confidential (see Art. 65 TCO), non public information, which includes the contract document proposed by Swisscom, may not be disclosed.

No Offer for Bit Stream Access

No offer is made by Swisscom for bit stream access. Apparently, Swisscom takes the position that it is not to be regarded as dominant in this market and, therefore, it is not required to offer bit stream access. Why Swisscom insisted on limitation of the period for bit stream access in the preparation of the new law remains a mystery. Since Switzerland is not an ex ante jurisdiction, a telecommunication carrier seeking bit stream access will have no other choice than commencing interconnection proceedings against Swisscom in order to compel Swisscom to grant bit stream access.

Given the past experience with interconnection proceedings, this may be a long and costly exercise, although the new TCA implemented provisions which should lead to accelerated proceedings. In particular, Art. 11a para. 3 TCA states that the ComCom should render a decision within seven months from the filing of the request.

Three Month Mandatory Negotiation Process

The TCA is based upon the concept that a telecommunication provider seeking access will first have to attempt to come to a commercial solution with the incumbent operator. Only if no agreement can be reached within a period of three months or if the incumbent operator terminates the negotiations, may the telecommunication provider seeking access to the services, file a request with the Communication Commission ("ComCom") for determination of the access conditions. It remains to be seen to what extent true negotiations will in fact be possible with the former monopolist.

No Abstract Definition of Markets Where the Former Monopolist Is Deemed Dominant

Due to the ex-post principle, the ComCom does not define in advance the markets, where the former monopolist is deemed to have a dominant position. Therefore, in a first step, the ComCom will have to determine whether or not the former monopolist has a



dominant position and the Competition Commission will render the respective expert opinion. Given this system, the former monopolist will most certainly also challenge the findings of the Competition Commission, which again does not really help to accelerate the proceedings.

Interim Relief Pending Access Proceedings

Upon filing of a request for access, the ComCom is competent to issue preliminary orders (Art. 11a para. 1 TCA). In the past, however, the Federal Supreme Court quashed preliminary relief of the ComCom by lowering interconnection charges pending the proceedings. According to the long established practice of the Federal Supreme Court, interim relief is only possible if the party seeking the relief can demonstrate that it is likely to prevail on the substance and that it will suffer a damage which cannot be easily remedied, if no interim measures are granted.

In the past, Swisscom provided interconnection based upon its standard offer, irrespective of whether or not an agreement was reached between the parties on its terms and conditions. The Supreme Court, therefore, rejected in the past the new market entrants' motions for interim relief, arguing that Swisscom can always repay the part of the interconnection charges that were excessive.

Should Swisscom, however, refuse to provide the services pending the proceedings filed with the ComCom, the party seeking access will have to also file a request for interim relief in order to obtain access to such services. It remains to be seen whether or not the ComCom will grant such relief and, if yes, whether such decision will be upheld by the Federal Supreme Court. Contrary to the previous cases, however, where the Federal Supreme Court quashed the ComCom's decision for interim relief, we are of the view that, should the former monopolist refuse to provide the services pending the proceedings, interim measures should be awarded and upheld by the Federal Supreme Court.

The need for interim relief becomes even more important, should Swisscom cancel the existing commercial carrier copper line agreements. In this case, the new market entrants would no longer be able to service their customers, until the Federal Supreme Court renders a final decision or interim

relief is granted. In the past, interconnection proceedings have lasted for more than half a decade. A lifetime in this fast moving technology sector, during which many new market entrants have already disappeared.

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