



Telecommunication Newsletter Switzerland

National Roaming Obligation: Federal Administrative Court Remands Case Back to Communication Commission

Facts

Tele2 Telecommunication Services AG ("Tele2") as well as Swisscom Mobile AG ("Swisscom"), Orange Communications SA ("Orange") and TDC Switzerland AG ("Sunrise") are all owners of a GSM mobile license.

By letter dated March 2, 2007, Tele2 requested the OFCOM to be allocated additional frequencies and, in addition, to oblige all licensees to provide national roaming at cost oriented prices. On April 2, 2007, Tele2 reiterated its request with the Communication Commission ("ComCom") and, in addition, explicitly requested to be admitted as a party to the proceedings regarding the renewal of the mobile licenses for Swisscom, Orange and Sunrise. The ComCom rejected the motions of Tele2.

By appeal dated May 15, 2007, to the Federal Administrative Court, Tele2 requested the Federal Administrative Court inter alia to (1) quash the order of the ComCom dated April 19, 2007; and (2) approve of its request to be allocated additional frequencies and to require all licensees to offer national roaming at cost oriented prices. The ComCom rejected the motions of Tele2 in full.

Decision

In its decision of June 19, 2007, the Federal Administrative Court held that whoever was a party to the proceedings, did not have the opportunity to participate in the proceedings or whose legitimate interests are concerned by the order is entitled to file an appeal with the Federal Administrative Court.

The Federal Administrative Court quashed the order of the ComCom and remanded the case to the

ComCom. The Court held that the order issued by the ComCom was made in violation of the applicable procedural rules.

Comment

The importance of this case lays not so much on the procedural issues determined by the Federal Administrative Court but rather in the question, which was not decided, of the national roaming obligation at cost oriented prices.

When applying for its GSM license, Tele2 declared that it is its policy to offer the services in cooperation with existing mobile operators on a Swiss wide basis. Its own infrastructure was to be established only in regions where a high traffic volume was expected.

This business concept obviously requires Tele2 to enter into national roaming agreements with the existing Swiss mobile operators. The request filed by Tele2 with the ComCom, namely to require the existing Swiss mobile operators to offer national roaming at cost oriented prices, seems to indicate that Tele2 was not able to obtain sufficiently commercially attractive terms from the other three mobile operators on a national roaming agreement, which would have permitted Tele2 to offer Swiss wide mobile communication services at competitive prices.

Whilst the existing GSM operators who are also in possession of a UMTS license were required to offer national roaming to other UMTS licensees, however, not at cost oriented prices (see specimen UMTS license:<http://www.bakom.admin.ch/themen/telekom/00462/00797/00883/index.html?lang=de&download=M3wBUQCu/8ulmKDu36WenojQ1NTTjaXZnqWfVpzLhmfhnpmmc7Zi6rZnqCkklN0qXqBbKbXrZ2lhtTN34al3p6YrY7P1oah162apo3X1cjYh2+hoJVn6w==.pdf>), the GSM licenses do not



provide for such an obligation (see specimen GSM license:<http://www.bakom.admin.ch/themen/telekom/00462/00797/00883/index.html?lang=de&download=M3wBUQCu/8ulmKDu36WenojQ1NTTjaXZnqWfVpzLhmfhnppmc7Zi6rZnqCkklN0gXqDbKbXrZ2lhtTN34al3p6YrY7P1oah162apo3X1cjYh2+hoJVn6w==.pdf>).

Although, it would be possible to require mobile operators to grant national roaming at cost oriented prices in the license conditions, it is questionable whether such an obligation is desirable from a competition law analysis. The impact of a decision on the national roaming obligation on infrastructure competition and service competition and on the consumers will have to be carefully evaluated (for a discussion on this topic see also the consultation of the OfTel, National roaming condition, a consultation on proposals to set a national roaming condition after July 25, 2003, May 15, 2003).

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