



Telecommunication Newsletter Switzerland

Sunrise Challenges Swisscom's Bundle Mobile and Naked DSL with Competition Commission

Facts

On August 27, 2007, Swisscom announced that its customers may combine the mobile subscription with broadband access without subscribing to a telephone line. The new offer permits the customer to save the expenses for a fixed telephone line which in the case of an analogue subscriber line amounts to annual savings of approximately CHF 300.

On September 7, 2007, TDC Switzerland AG ("Sunrise") announced that it has filed a complaint against Swisscom with the Competition Commission, arguing amongst others that the bundling of the services violates the Swiss Cartel Act and discriminates against operators with no mobile services. On the retail level, Sunrise maintains that the bundle also violates the prohibition against tying arrangements, since the naked DSL is available for Swisscom mobile customers only. On September 14, 2007 Orange Communications SA the third nationwide provider of mobile telecommunication services announced to have filed a similar complaint with the Competition Commission.

Swisscom on the other hand argues that it has no dominant position in the broadband market. This argument is consistent with Swisscom's constant refusal to offer fast bit stream access as part of the unbundling of the local loop. Moreover, Swisscom argues that Sunrise could offer the same bundle.

Comments

According to Art. 12 Telecommunication Act ("TCA"), a dominant carrier may offer bundled services only if the services contained in the bundle are also offered separately.

The offering of the bundle mobile subscription combined with naked DSL could therefore create not

an unsubstantial risk for Swisscom, should the Competition Commission find Swisscom to have a dominant position in either the mobile or the broadband market.

Should the Competition Commission find Swisscom to be dominant in at least one of the markets, then Swisscom will have to offer naked DSL separately (Art. 12 para. 2 TCA; see also Federal Council Report on the Revision of the Telecommunication Act ("*Botschaft zur Änderung des Fernmeldegesetzes*"), Section 2.1.2.1, Art. 11b, November 12, 2003).

The next question that will have to be answered is whether or not naked DSL or mobile services will have to be offered also to competitors on a wholesale basis. According to the Federal Council's Report on the Revision of the Swiss Telecommunication Act, Art. 12 TCA was more intended as a customer protection rule, rather than creating additional rights for other carriers whose access rights are set out in Art. 11 TCA. In particular, access to the mobile network is not listed.

Although it had been discussed during the revision process of the TCA to open up also the mobile network and to make access technology neutral (in case of market dominance), the final wording approved by the Parliament restricts access to the complete unbundling of the twin copper pair, fast bit stream access for a period of four years, rebilling of telephone numbers, interconnection, leased lines and access to cable ducts (Art. 11 para. 1 TCA). Arguably, a mobile operator, who wishes to offer the same bundle, may achieve the same bundle by requiring Swisscom to unbundle the copper twin pair and offer its mobile services with naked DSL. However, given the costs involved with a full unbundling, it is questionable, whether a competitive offer can be made, which raises the issue of pricing.



And what are the options of a fixed net provider? Unless they can team up with a provider of mobile services, they can't make a similar offer, which puts them at a serious competitive disadvantage.

Although the Swisscom naked DSL offer is at first glance an attractive one for its customers, the question will have to be asked where this will leave the competitors, who can only offer naked DSL by requesting a full unbundling from Swisscom. Also, when analysing the case, the Competition Commission will have to address such issues as cross subsidization and prize squeeze and must analyze the bundle under Art. 7 Swiss Cartel Act, which prohibits a dominant enterprise from abusing of its market power.

Whether or not Swisscom can be compelled to make a "naked DSL" wholesale offer is in our view not entirely clear. A duty to contract of the dominant enterprise cannot be easily assumed under the Swiss Cartel Act. An exception applies to so called essential facilities.

A duty to contract, however, does exist under the TCA for access in accordance with Art. 11 TCA, as well as in the case of mandatory interoperability. Therefore, it could be argued that the access methods set out in Art. 11 TCA are exhaustive and that the dominant carrier is not required to make additional offers to its competitors.

The Federal Supreme Court held, however, in its decision of February 16, 2007 (4C.404/2006/len) that the TCA did not exclude the application of the Swiss Cartel Act. The Federal Supreme Court argued that a duty to make an offer or to sanction abusive pricing under the Cartel Act could in principle be used in parallel.

In the case cited above, the Federal Supreme Court, however, rejected the plaintiff's request, arguing that the Cartel Act cannot be used to introduce an unbundling of the local loop. In an earlier decision the Federal Supreme court has already held that the TCA did not provide for a sufficient legal basis for unbundling and that it was upon the Parliament to amend the law. The law was amended accordingly, effective April 1, 2007. Since it is arguably possible also for competitors to offer naked DSL through the unbundling, the question arises whether this is only a

pricing issue. It is unlikely that the Competition Commission will force Swisscom to open up access to its mobile network to competitors and to require them to make a wholesale mobile offer at cost oriented prices.

In view of the past experience with matters involving the competitive behaviour of Swisscom, a decision by the Competition Commission on this issue cannot be expected any time soon.

Given the difficulties and less than clear legal situation it may be more promising for the OFCOM to initiate supervisory action against Swisscom for breach of their obligation to offer the services also separately. In case the OFCOM finds Swisscom to have breached Art. 12 para 2 TCA, by not offering naked DSL to other mobile subscribers, the OFCOM could impose sanctions against Swisscom based upon Art. 58 et seq. TCA. Such sanctions can include the collection of the revenue achieved through the breach (Art. 58 para 2 lit. b TCA) as well a charge equal to 10% of the average revenue achieved during the past three business years Art. 60 para. 1 TCA).

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