



Telecommunication Newsletter Switzerland

Federal Administrative Court holds that parties not privy to the access proceedings cannot automatically request the retroactive application of lower charges determined by the Communication Commission

Decision

In several appellate proceedings against decisions rendered by the Communication Commission ("ComCom"), the Federal Administrative Court had to rule on the question, whether the ComCom was competent to impose contractual changes on parties not privy to the proceedings and whether such third parties are entitled to automatically benefit from a retroaction application of lower charges determined by the ComCom.

The ComCom has in various decisions ordered the incumbent operator to remove or replace contractual clauses not only in relation to the party that has initiated a proceeding for determination of cost oriented charges and/or the determination of contractual clauses for access but also in relation to third parties not privy to the proceedings.

At the very heart of the issue is the question, whether or not parties not privy to the actual proceedings and who have not agreed upon a clause with the incumbent operator calling for the direct retroactive application of lower prices or beneficial terms and conditions determined by the ComCom in third party proceedings are also entitled to benefit from lower prices ordered by the ComCom ("Direct Retroactive Application Clause").

This question is of particular importance for smaller providers who did not challenge the incumbent operators' charges and who have not been successful in negotiating or have failed to negotiate such Direct Retroactive Application Clause. This was primarily the case in the first half of the decade following the liberalization of the Swiss telecommunication market in 1998.

This issue which had to be determined by the court is certainly a peculiarity of the Swiss *ex post* system, i.e. where the prices and terms and conditions for regulated services are not determined in advance or *ex officio* but only at the request of an alternative provider. Not surprisingly, it was Swisscom (Schweiz) AG who was actively promoting the *ex post* system and was successful with its efforts even during the latest revision of the Telecommunication Act ("TCA") which became effective on April 1, 2007 and where the serious deficits of the *ex post* system were already readily apparent. In an *ex ante* system this issue does not arise, since the terms and conditions are determined in advance and apply to all the parties.

The Federal Administrative Court found that the precedents available and legal doctrine do not permit reaching a clear conclusion in respect of the direct third party application. In a previous decision BGE 132 II 284, the Federal Supreme Court upheld the introduction of a contractual clause to an access agreement at the request of the alternative provider. Such clause provided for the direct and retroactive application of the access charges determined by the ComCom in third party proceedings to the alternative provider. The Federal Supreme Court did argue that such a clause was in line with the legislative intent and in the public interest, but did not decide, whether such lower charges apply by virtue of direct application of the TCA or only if and when foreseen in the access agreement with the incumbent operator.

In its decision rendered on February 1, 2010, the Federal Administrative Court went at length in analyzing the content, legislative intent and reach of



the non discrimination obligation which is set out in art. 11 para. 1 TCA. Although the court concluded that the law mandated equal terms and conditions for all providers (at least on a forward-looking basis), it did reject the notion of a direct retroactive third party application of the terms and conditions decided by the ComCom to parties not privy to the proceedings by virtue of mandatory law. However, the court also held that the law does not exclude a contractually agreed upon clause providing for such retroactive third party application which, if awarded to all parties to access proceedings, very much is in line with the legislative intentions.

The Federal Administrative Court argued, however, that parties not privy to the proceedings may base a claim for reimbursement on tort or unjust enrichment, provided all the respective legal requirements for such claims are met.

In the same decision, the Federal Administrative Court held that the ComCom is not competent to require the incumbent operator to alter contractual clauses in access agreements with third parties not privy to the proceedings.

Conclusion

The Federal Administrative Court brings about a cessation to the scholarly disputes as to the direct and retroactive application of the terms and conditions ordered by the ComCom to third parties not privy to the proceedings.

Although the court left the door open for third parties to bring proceedings against the incumbent operator based upon unjust enrichment or tort, the bar has been set pretty high. Whereas in the case of a direct retroactive third party application the third party could have simply claimed reimbursement of the excess charges paid, in the case of tort or unjust enrichment, the situation is more complex.

In the case of a tort claim, the plaintiff will have to prove (i) that the excessive charges were illegal, which according to the decision of the Federal Administrative Court is likely to be the case, (ii) fault on the side of the incumbent operator, i.e. the plaintiff will have to prove that the incumbent operator acted at the least with negligence in charging excessive fees and (iii) that it has suffered a damage which is the adequate cause of the tortuous act.

Where the plaintiff has passed on excessive termination fees to its own customers, the incumbent operator can most probably successfully raise the passing on defense. However, where such excess costs could not be passed on to the customer, as it is the case for transit fees and other fees, the passing on defense will unlikely be upheld. Nevertheless, it will be incumbent upon the plaintiff to prove the damage and that the damage was the adequate cause of the tortuous act.

In the case of a claim brought on the basis of unjust enrichment, the plaintiff will need to prove that:

(i) the incumbent operator is enriched from the plaintiff's net worth. This appears to be a given, where the plaintiff has paid excessive charges. Since according to legal doctrine, a claim based on unjust enrichment can not exceed the damage suffered by the plaintiff, the passing on defense will also likely be applicable in this case.

(ii) the plaintiff erred, when making the payment. Since the incumbent operator was under a legal obligation to only charge cost-oriented prices, this element is most likely given. The incumbent operator may, however, raise the defense that the plaintiff did not in fact err and was at least in default about the legitimacy of the fees charged and has abstained from legal proceedings challenging excessive charges in order to save costs. Therefore, it could be argued that the plaintiff was at least in doubt as to the adequacy of the prices charged and unless the plaintiff specifically stated that the payments are made subject to a claim for reimbursement, there is a risk that a court will find such payments not having been made erroneously and that, therefore, the excess charges paid can not be reclaimed. Since, the incumbent operator, however, has in the past always claimed that the prices charged corresponded to the legal requirement of cost orientation, this risk is somewhat mitigated.

Finally, both in the case of a tort claim or a claim based upon unjust enrichment, the claim will have to be filed within one year from the date the plaintiff became aware of the tortuous act or unjust enrichment. Unless the plaintiffs have systematically interrupted the statute of limitation in the past, there is a risk that a court will find the claims time-barred.



In the light of the latest decision of the Federal Administrative Court, providers negotiating access agreements are advised to ensure that such agreements contain a clause permitting them to retroactively benefit of lower charges as determined by the Communication Commission in third party proceedings.

Further, the decision of the Federal Administrative Court demonstrates, once again, the severe pitfalls of the Swiss *ex post* system, where the access charges are only reviewed in court proceedings. At the end of the day, this system benefits the incumbent operator and the alternative providers; consumers are left out in the rain. It is time to change this.

March 12, 2010

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