



Telecommunication Newsletter Switzerland

Federal Administrative Court Confirms ComCom Decision Against Swisscom to Offer Bit-Stream Access at Regulated Prices

According to the press release of Swisscom dated February 19, 2009, the Federal Administrative Court has confirmed the decision of the ComCom of November 21, 2007, pursuant to which Swisscom was ordered to offer bit stream access at regulated prices. The proceeding against Swisscom was initiated by TDC (Switzerland) AG, operating under the name of sunrise.

Swisscom says in its press release to have accepted the judgement of the Federal Administrative Court and to permit bit stream access at regulated prices. With a view to the proceeding pending against Swisscom with the Competition Commission for abusive pricing of the ADSL market, Swisscom continues to maintain that it has not misused its market dominance.

The secretariat of the Competition Commission has upon investigation petitioned the Competition Commission to issue a fine against Swisscom in the amount of CHF 237 Mio. for price/margin squeeze in the ADSL market. The Competition Commission has not yet issued its verdict.

With Swisscom no longer contesting its market dominance, the only defence remaining is to argue that it did not abuse of its dominant position to engage in an illegal price/margin squeeze. It should be noted, however, that the fact that the prices offered by Swisscom on a wholesale basis were in excess of cost oriented prices as is mandated for regulated prices, is not sufficient alone for the Competition Commission to issue sanctions.

In the decision rendered by the Competition Commission in May 6, 2002 (RPW 2202/3, 446) the Competition Commission held that a dominant enterprise is required to treat competitors in the up- or downstream market equal to its own business units. It has been argued that such an obligation only applies where the dominant enterprise is under an obligation

to contract with its competitors. Such obligation can, however, not be easily assumed except where the dominant enterprise controls an "essential facility".

The duty to contract was explicitly introduced for telecommunication providers in the TCA. This duty to contract applies to services where interoperability is required, irrespective of market dominance, and to regulated access such as the unbundling of the local loop and in particular fast bit stream access (see Art. 11 TCA). Art. 52 Telecommunication Ordinance further specifies that a dominant enterprise must offer access to its infrastructure and services on a non-discriminatory basis and may in particular not discriminate against its own business units or affiliated companies.

Since the obligation to offer fast bit stream access on the incumbent operator was introduced only with the latest revision of the TCA which entered into effect on April 1, 2007, one may be tempted to argue that the non discrimination obligation applies only to the post April 1, 2007 ADSL market. However, it is established, that the sector specific regulations of the TCA were not intended to limit the application of the Swiss Competition Law, but were rather intended to supplement it.

With Swisscom no longer contesting its dominant position in the market, the chances of alternative providers successfully reclaiming excessive prices charged by Swisscom have certainly increased. It would, however, be premature to declare victory, given the legal uncertainties that continue to surround such claims for reimbursement.

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