



Telecommunication Newsletter Switzerland

Neither Ex Ante nor Ex Post Regulation: The New Swiss Approach or How to Avoid Touching the Hot Potato

Facts

The Competition Commission ("ComCom"), the Price Regulator and the Federal Communication Office ("OFCOM") are jointly proposing an amendment to the Swiss Telecommunication Act, which would permit the ComCom to determine network access prices independent from a request for determination by the party seeking access (see: www.bakom.admin.ch/dokumentation/medieninformationen/00471/index.html?lang=en&msg-id=20908).

Under the current regime, a party seeking access is under an obligation to first seek negotiations with the incumbent operator on access terms and conditions. Only if and when no agreement can be reached within a period of three months from the start of the negotiations or if the negotiations are abandoned, can the ComCom, upon request of a party seeking access, determine the terms and conditions.

According to the joint view of the ComCom, OFCOM and the Price Regulator, the ComCom should be able to determine the prices for access charged by the incumbent irrespective of a specific request.

Comment

Already during the process of the latest revision of the Swiss Telecommunication Act ("TCA"), the Federal Council proposed the introduction of the regulatory scheme used in the EU, which provides for an *ex ante* regulation. Unfortunately, this proposal did not find the support of the majority in Parliament and, therefore, the Swiss solution of *ex post* regulation was maintained.

It is reassuring to see that these three bodies have realized that the fiction of arm's length contract negotiations in interconnection and access proceedings with the former monopolist is just fiction

and not reality. It appears that only Swisscom, the former state monopolist, finds some merit in the Swiss solution.

Under the new proposal, the ComCom would like to be authorized to determine the prices *sua sponte*, irrespective of whether or not a complaint for determination of the prices is filed by a party seeking access.

The joint initiative is to be welcomed. However, one may be permitted to ask to what avail? The Swiss regulatory regime suffers, in the view of the author, from a great many other deficiencies which need be addressed immediately. Certainly, the delays in the determination of access prices as a result of the *ex post* regime is one, but only one of them. And, if time is of the essence, why not an *ex ante* regulation? It is questionable whether the solution proposed will lead to a significant acceleration of the proceedings.

The critical and hotly debated issues, such as the regulation of the NGN, the Swiss framework restricts access to the last mile to copper (which may be replaced by fiber rather sooner than later), protection of the investment of the new market entrants in connection with the unbundling of the local loop and separation of networks remain unaddressed.

The Swiss resistance to *ex ante* regulation is incomprehensible. Only a full *ex ante* regulation, which forces the ComCom to determine the services and the prices as well as the respective terms and conditions of an access service in advance, will help to assure a level playing field and is in the interest of the liberalization of the market and the ultimate consumer.

Under the present regime, the alternative provider filing a request for determination of access conditions with the ComCom not only has to bear the risk of the



Commission finding the incumbent operator not to have a dominant position for a particular service, but also the risk that the ComCom finds the prices charged by the incumbent to be in line with the provisions of the TCA. Interestingly, the incumbent operator takes the position that if the ComCom finds higher prices, being entitled to reclaim such difference.

The approach proposed by the ComCom, OFCOM and the Price Regulator focuses on mere formalities rather than on substantive issues and will only strengthen the position of the incumbent. The proposal is not furthering an open minded and effective revision of the TCA, which is needed dearly to prepare for the challenges that a NGN roll out will pose.

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