



## Telecommunication Newsletter Switzerland

# A New Attempt Towards a Modern, Flexible and Efficient Telecommunication Act

### **Council of States to Petition the Federal Council to Review the Present Regulatory Regime**

The most recent revision of the Swiss Telecommunication Act ("TCA") which introduced amongst other the unbundling of the local loop, entered into force on April 1, 2007 only.

Nevertheless, it appears to be the opinion not only of participants in the market but also of some politicians that the compromise found in Parliament which led to the revision of the TCA is not satisfactory and flexible enough to master the technology challenges of the future. Therefore the Commission for Transport and Telecommunication of the Council of States seeks to formally invite the Federal Council to issue a report by mid 2010 and to particularly respond to the following questions:

1. Technology neutral access regime;
2. Assessment of the adequacy of the current practice applied for cost oriented prices for the access regime;
3. Network separation;
4. Assessment of the objectives of the liberalisation of the market in connection with the revision of the TCA;
5. Assessment of the competition in the fixed and mobile sector and the need for action;
6. Assessment of NGN roll out from a competition law and regulatory perspective;
7. Adequacy of the current consumer and minority protection regime;
8. Should the ComCom be permitted to determine the conditions for the access *ex officio*.

### **Additional Changes to the TCA Requested**

At the outset it must be noted that prices have substantially decreased since the introduction of the liberalisation of the telecommunication market in 1998 and the quality of service has increased dramatically.

Since the promulgation of the revision to the TCA in April 2007, which introduced the local loop unbundling, the ComCom has had the opportunity to rule on access proceedings against the incumbent operator on various occasions. In the view of the author, the ComCom has acted surprisingly fast and has in all cases reduced the prices charged by the incumbent operator.

Shortly after the promulgation of the revised TCA in April 2007, the ComCom, the Competition Commission and the Price Control Agency, as well as alternative providers expressed their dissatisfaction with the compromise reached in Parliament. The discussion on additional regulation was furthermore increased by the roll out of FTTH. During the legislative process for the latest revision of the TCA, the requests of the alternative providers to provide for *ex ante* regulation and a technology neutral definition of the access, which would have included FTTH, as well as broadband access through cable and mobile operators could not find a sufficient majority in Parliament.

The recent discussions on FTTH roll out by the incumbent operator and the fear of permitting the creation of a new monopolistic situation have prompted the State Council's Commission of Transport and Telecommunication to review the current situation.

### **Technology Neutral Access**

Technology neutral access definition has always been an important demand of new market entrants. However, since the various operators in the market



feared that a technology neutral access definition could act also to their detriment, in particular for cable and mobile operators, it was impossible to align the various interests. In Parliament, the local loop unbundling was therefore explicitly limited to the copper pair. With the commencement of the roll out of FTTH, technology neutrality became a hot topic again, since it is generally feared that Swisscom will be able to consolidate its dominant position in the local loop area through the roll out of fibre to the home.

### **Adequacy of Current Access Price Model**

The present legal regime for regulated prices is based upon modern equivalent assets of an efficient operator. In connection with the local loop unbundling proceedings with the ComCom, the Price Control Agency has recommended to move away from modern equivalent costs, in particular in the local loop, where the incumbent operator benefits from the local loop infrastructure which has long been amortized. The modern equivalent approach leads therefore to charges which are in excess of the actual costs of the incumbent operator and in fact permits the incumbent operator to subsidize the roll out of FTTH with the proceeds from its legacy network.

Moreover, the modern equivalent approach appears to be somewhat artificial in particular in respect of the legacy network. To calculate the costs for a copper network to determine cost oriented prices, where the costs for fibre is substantially below the costs for copper and where any efficient operator would roll out fibre, is in the view of the author not permitted. The original intention to use the modern equivalent approach was to prevent the incumbent operator to overcharge new market entrants for its inefficient and outdated equipment and organisation. Since the incumbent operator has since extensively invested in its equipment and streamlined the processes, it may be permitted to question the adequacy of the modern equivalent approach for a legacy network. Care must however be taken in order not to discourage investments in new technology. This could be achieved by applying two different standards. Historical costs for legacy networks and infrastructure, modern equivalent for NGN.

### **Is Network Separation the Solution?**

The discussions on network separation seem to indicate certain uneasiness about the ability of the

regulator to efficiently enforce the law and to prevent the incumbent's 3D (deny, delay, defend) strategy. Network separation would certainly help to increase transparency. However, it is expected that network separation would be strongly challenged by the incumbent operator and is unlikely to find a majority in Parliament. For a discussion on network separation please refer to the article published in the Communications Law Committee Newsletter July 2008 ([http://www.thouvenin.com/pages\\_e/frame/05aktuell.html](http://www.thouvenin.com/pages_e/frame/05aktuell.html)).

### **Have the Objectives to be Achieved With the Revision of the TCA Been Reached**

It is undisputed that the revision of the TCA has led to increased competition in the local loop and broad band market. However, it would be premature to cast a final judgement. The challenges of the NGN have in the view of the author not yet been addressed and the roll out of FTTH, unless this will be regulated, causes a serious threat to competition. Recent statistics show that the market share of the former monopolist is indeed increasing again for various services. This will have to be monitored and the regulatory framework adjusted to permit the regulator to intervene if and when necessary.

### **Assessment of the Competition in the Fixed and Mobile Sector and the Need for Action**

In the view of the author, action is required for the regulation of the NGN through a technology neutral definition of the access, should the dynamic competition created through the liberalisation of the market and the opening up of the local loop not come to a halt.

Competition in the mobile sector could be increased by the introduction of a national roaming obligation on a national level at cost oriented prices; thereby permitting MVNO's to competitively offer services and by permitting the ComCom to determine the termination charges *ex officio*.

So far, telecommunication service providers have shied away from bringing proceedings against mobile operators for the determination of cost oriented interconnection charges (in particular termination charges). The reason behind this is that from an economical perspective there is no real benefit to an alternative provider in challenging these prices, since these costs are passed on to their customers and



permit the alternative provider to increase revenue and to a certain extent profit and margin.

In the eye of the author, the costs for mobile termination, however, if calculated at cost oriented prices, should not be in excess of the costs for the fixed termination charges.

#### **Assessment of NGN Roll Out from a Competition Law and Regulatory Perspective.**

The challenges of the NGN have not been addressed in the TCA. In order to prevent a new monopolistic situation of the former monopolist Swisscom, the TCA will need to be adapted to prepare for such challenges in particular by the introduction of the technology neutral access and a clear legal basis mandating network neutrality.

#### **Adequacy of the Current Consumer and Minority Protection Regime**

In the view of the author, the current regulatory environment offers sufficient protection for the consumer and, if adequately enforced, for minority protection.

However, since the liability of the access provider for violation of rules for the protection of minors or access to other illegal content is somewhat unclear in Switzerland, a regulation which would clearly exclude the access provider from liability would be welcome. The project to amend the Swiss Criminal Code to provide for a clear regulation was unfortunately abandoned by the Federal Council.

#### **Should the ComCom be Permitted to Determine the Conditions for the Access *Ex Officio*.**

In the view of the author, no reasonable argument can be found why the ComCom should be prevented from determining access conditions *ex officio*. Under the present legal regime, the ComCom is only permitted to act upon motion of a party seeking access and in case no agreement is found between the incumbent operator and the party seeking access.

Efforts to introduce an *ex ante* regulation in the TCA have failed because of the strong resistance from Swisscom. Although *ex ante* regulation would seem to be the preferred route, the ability of the ComCom to determine access conditions, if they deem this necessary, seems to be an acceptable compromise and improvement over the current legal situation.

#### **Balancing New Regulations and Investment Certainty**

It will be important to balance the effect of newly proposed regulations on the competition in the market with its effect on investment certainty. With billions to be spent on the NGN roll out, care must be taken not to create a disincentive for such investments. This is particularly important in the today's financial environment, where the investors have become more averse to risks.

Should the new regulations not address the need for certainty of the investors, then rather than increasing competition for the benefit of the consumer, the effect could be to slow down innovation and ultimately also competition.

February 20, 2009

David Känzig

For further information please contact:  
David Känzig ([d.kaenzig@thouvenin.com](mailto:d.kaenzig@thouvenin.com))