Competition - Switzerland

Federal Supreme Court overturns Swisscom's record fine of Sfr333 million

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On April 11 2011 the Federal Supreme Court, as court of last instance, upheld an appeal by Swisscom – the incumbent telecommunications provider in Switzerland – against a Competition Commission decision regarding allegedly illegal mobile termination charges and overruled the record fine of Sfr333 million that had been imposed on Swisscom. The Federal Supreme Court confirmed the findings of the lower court, holding that Swisscom had not abused its dominant position in order to impose excessive termination charges, because it had been up to the alternative providers to challenge the termination charges that they felt were abusive by requesting their determination by the Communications Commission.

On February 5 2007 the Competition Commission issued a decision which assessed the fine against Swisscom Mobile AG for abuse of its dominant position in the market for mobile telecommunications termination. Swisscom – one of the three mobile telecommunication operators in Switzerland – was found to have abused it dominant position by imposing excessive termination charges on other service providers from April 1 2004 to May 31 2005.

A call made over a mobile communications network entails origination, transit and termination; termination ensures that the call is forwarded to a particular connection, where it can be picked up by the relevant end consumer. In Switzerland, each telecommunications provider is legally required to terminate calls from other telecommunications providers into its own network. In line with the market determination, as applied by the European Commission, the Competition Commission defined the relevant market for call termination as being limited to the operator making the charge. So, by definition, Swisscom was found to have a dominant position in respect of termination charges to all its users. For the period under scrutiny, Swisscom had fixed its termination charges for other telephone operators (which passed such charges on in one form or another to their own subscribers) at Sfr0.335 per minute. According to Swisscom, it applied the lowest call termination charges of the three operators. However, Swisscom was by far the largest operator in terms of both subscribers and revenue. Termination charges are justified in part by reference to costs, and Swisscom enjoyed significant economies of scale over its competitors.

The fine of Sfr333 million was the second fine that the Competition Commission had imposed since it was empowered to punish competition law violations directly in April 1 2004. It was by far the largest of the two (and the highest ever imposed in Switzerland).

Swisscom appealed the decision to the Federal Administrative Court. On February 24 2010 the court confirmed that the determination of the relevant market and the Competition Commission's finding of Swisscom's dominant position were justified. However, it quashed the imposition of the fine on the grounds that Swisscom had not abused its dominant position to charge excessive prices to alternative providers. Indeed, Swiss law permits alternative providers to request that the Communications Commission make a cost-oriented determination of mobile termination charges. Since neither Orange nor Sunrise decided to do so, Swisscom's termination fees could not be deemed to have been enforced against contract partners within the meaning of Article 7(2)(c) of the Competition Act. According to the court, such practices could not be assessed under the remit of Article 7(2)(c), even if the control of prices was insufficient in the Telecommunications Act, as the Communications Commission cannot investigate without a complaint from an operator.

The Federal Administrative Court decision was appealed by the Department of Public Affairs and by Swisscom. On April 11 2011 the Federal Supreme Court confirmed, in essence, the findings of the lower court. It considered that under the Swiss *ex-post* regulatory system, pursuant to which cost-oriented prices are determined only at the request of alternative providers in interconnection proceedings launched against the incumbent operator, Swisscom could not be deemed to have abused its dominant

position in order to force excessive termination charges on the alternative providers. Also, the Federal Supreme Court found no prevailing interest in the Federal Administrative Court's holding that Swisscom had a dominant position in the termination market.

The Federal Supreme Court's findings have been criticised – notably, for failing to take into consideration the interests of consumers. According to analysts, the decision also shows the need for a revision of the Swiss telecommunications regime.

On August 28 2008 the Competition Commission, the price supervisor and the Communications Commission jointly called for the government to introduce an efficient instrument for faster determination of network access prices charged by Swiss telecommunications companies. The Telecommunications Act should be amended so as to allow the Communications Commission to act not only on the basis of complaints from a telecommunications service provider, but also on its own initiative, if there are reasons to assume that access conditions are discriminatory or are not cost based. This specific legislative proposal relates exclusively to determination of access or interconnection prices paid from provider to provider (ie, at wholesale level); it concerns only those providers which occupy a market-dominant position as a result of their network and which can thus obstruct competition even in downstream, end-user markets.

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