



Telecommunication Newsletter Switzerland

Communication Commission Determines Prices and Conditions for Access to Swisscom's Cable Ducts

Decision

By decision of December 1, 2009, the Swiss Communication Commission has, in a partial award, determined the prices for the access to Swisscom's cable ducts.¹ In fall 2009, the Communication Commission has been petitioned by alternative providers to determine the access prices and conditions.

The Communication Commission ruled that Swisscom is required to permit access to its entire system of cable ducts at cost-oriented prices, provided sufficient capacity exists.

In its decision, the Communication Commission substantially reduced the charges quoted by Swisscom in its price manual for access to the cable ducts as well as for certain availability studies. The Communication Commission has in particular slashed the prices charged by Swisscom by about 50% for the years 2007 and 2008.

Furthermore, the Communication Commission imposed an obligation on Swisscom to provide online information about the existing availability by 2011.

The decision is subject to appeal.

Comment

The Communication Commission has, once again, substantially reduced the prices which Swisscom was seeking to impose upon the alternative providers. The Communication Commission, however, did not deviate from its long standing and established LRIC approach which is based upon the modern equivalent asset approach ("MEA").

The MEA approach has been subject to increasing criticism not only in Switzerland, but also in other European countries. It has been argued that the MEA approach discriminates against the alternative providers, because it permits the incumbent operator to charge above their actual (*i.e.* historical) costs and does not take into consideration the depreciation of the infrastructure which was built many years ago. This means that the alternative providers, in fact, pay a price for the access which is higher than the costs to Swisscom for its own use of the same services.

This result is, in our view, incompatible with the non-discrimination obligation which requires the incumbent operator to make its services available to alternative providers at cost-oriented prices and on a non-discriminatory basis. The non-discrimination obligation includes, for the purposes of the Swiss telecommunication law, Swisscom's own business units.

For infrastructure-heavy services, such as access to cable ducts, the impact of the MEA approach is considerable. The Swiss Price Control Officer has already criticised the MEA approach. However, since the MEA approach is explicitly set out in Art. 54 para. 2 Telecommunication Ordinance, the Communication Commission is of the opinion that it may not deviate from the MEA approach, unless the ordinance is revised.

The Communications Commission's conclusion, however, is in our view not convincing. The non-discrimination obligation, which is explicitly set out in Art. 11 Telecommunication Act, should prevail over the implementing ordinance. Also, we believe it would be possible to consider the incumbent operator's depreciation on the service relevant infrastructure in the price determination, without having to question the MEA approach as a whole.

¹ See: Press release of the Communication Commission dated December 2, 2009, <http://www.news-service.admin.ch/NSBSubscriber/message/en/30488>



Thouvenin attorneys at law acted as counsel to one of the alternative providers in the proceedings.

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David Känzig

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