Thouvenin Rechtsanwälte
Klausstrasse 33
CH-8034 Zürich

Phone +41 44 421 45 45
Fax +41 44 421 45 00
E-mail info@thouvenin.com

www.thouvenin.com

Telecommunication Newsletter Switzerland

Orange and Sunrise to Merge: Invitation to the Legislator to Change the Swiss Regulatory Framework

1. Proposed Merger between Sunrise and Orange

France Telecom and TDC have announced their plan to consolidate the Swiss telecommunication operations in a new entity in which France Telecom will own 75% and TDC the remaining 25%.

The purchase price for the Sunrise shares is said to be CHF 1.5 billion plus 25% of the shares in the new entity. In 2012, 2013 and 2014 the new entity may buy back the shares from TDC. TDC may sell its shares to a third party two years from the date of the merger or the agreement. The new entity may go public after three years. France Telecom will be granted an option to acquire TDC's remaining stake for CHF 1.8 billion plus interest.

The new entity is said to have roughly 3.4 million mobile and 1.1 million fixed line and broadband internet customers which results in a market share of 38% of the mobile telecommunication market and 13% in the broadband market. The synergies between the two enterprises are expected to result in savings of CHF 570 million over the next five years.

The transaction will have to be approved by the Swiss Competition Commission. In respect of the mobile licenses, the Communication Commission will have to give its approval to the transfer or change of ownership.

2. Comment

2.1 Failed Regulation?

This consolidation in the Swiss market comes not as a big surprise. Whilst the incumbent operator Swisscom has in the past been able to again increase its market share in almost all telecommunication markets, voice, broadband and mobile, and continues to expand its services into the triple play, the alternative operators' market shares have been shrinking continuously and came under increasing pressure.

The proposed merger is in our view a clear sign that the Swiss legislator has so far not been able (or has not been willing) to create an economic and regulatory environment, which would have permitted alternative providers to effectively compete with the former monopolist Swisscom. The proposed merger is a wake-up call for the legislator to revise the current regulatory framework before it is too late.

Given the time-consuming process in Switzerland to change existing or to enact new laws, the legislator should address the revision of the telecommunication law forthwith. Such revision will have to introduce *ex ante* regulation and most importantly technology neutral access provisions. To date, access to the last mile is limited to the copper pair which will soon be replaced by fibre.

2.2 Risk of Creating a Duopoly?

Whilst a strong number two in the Swiss telecommunication market may, at first glance, help to discipline the former monopolist, it also creates the risk of a duopoly.

This risk seems to be particularly great in the mobile communication sector, where consumer and mobile termination prices in Switzerland are still substantially above European levels.[1] After the merger, there will

1 According to extract summary from the 14th European Union implementation report extended to include Switzerland (status 2008), page 41, mobile costs in Switzerland are 50 – 80% higher than the average in the European Union, depending upon the usage profile.

effectively only be two competitors left in the Swiss mobile market.

Given the small broadband market share of the combined enterprise, a disciplinary effect in the broadband market is unlikely to happen. In addition, the impact of the proposed merger on future competition in the market of fibre to the home will also need to be carefully reviewed. The assessment of the mid- and long-term effects of the proposed merger on competition in the Swiss telecommunication market is not an easy one.

Under the current legal framework, the Competition Commission may not be in a position to prevent a merger or to impose conditions to the merger, particularly in view of Swisscom's continuing strong market position.

The Communication Commission, as the licensing authority for the mobile licenses, must approve its transfer (a change in the ownership structure is, according to the standard licensing conditions, equivalent to a transfer of the license). Therefore it could impose conditions on the transfer. However, it is difficult to imagine how the Communication Commission could defend conditions being imposed upon the merger, given that no such restrictions apply to the number one competitor Swisscom.

3. Conclusion

The proposed merger is a clear indication of failed regulation in Switzerland and increases the risk of a duopoly to the detriment of the consumers.

Consequently the Swiss regulatory framework will have to be adjusted and the regulator given a quick and effective framework to interfere if and when needed.

November 30, 2009

David Känzig

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