



Telecommunication Newsletter Switzerland

Federal Administrative Court Upholds Appeal Filed by Swisscom regarding the Costs for Resale of Telephone Numbers

Facts

On April 30, 2010 Sunrise Communications AG ("Sunrise") filed access proceedings against Swisscom (Schweiz) AG ("Swisscom") with the Swiss Regulator ("ComCom"). In its request, Sunrise requested a determination and review of the prices for the resale of the telephone access under the principle of cost orientation and nondiscrimination under Art. 11 para. 1 Swiss Telecommunication Act ("TCA"), retroactively as per January 1, 2010. The service "resale of a telephone number" provides an alternative provider the possibility not only to provide voice services by way of carrier pre selection but also to invoice the respective pre-selected customer for the voice access and the traffic in one single invoice. In such a case, the retail customer still has a contract with Swisscom for the voice access, but the voice services and the billing are provided by the alternative carrier.

By decisions of December 7, 2011 the ComCom ruled to reduce the price charged by Swisscom for the resale of a telephone number by CHF 1.50 and adjusted the Swisscom offer accordingly. The ComCom allocated 9/10 of the costs for the proceeding (i.e. CHF 83'727) to Swisscom.

On December 23, 2011 Swisscom appealed the ComCom decision. In essence, Swisscom argued that the ComCom unjustifiably included marketing costs and wrongfully determined the costs allocated to payment by postal services and petitioned the court to reduce the reduction ordered by the ComCom from CHF 1.50 to CHF 1.40 and to review the allocation of the procedural costs.

Decision

In its decision rendered on October 10, 2012, the Federal Administrative Court largely upheld Swisscom's appeal.

The Federal Administrative Court set out the principle that it is entitled to a full review of the ComCom decision. However, where the exercise of discretion by the ComCom is the subject of the review, the Federal Administrative Court applies a certain degree of restriction, where the previous instance benefits from special expertise. In case of doubt, the Federal Administrative Court will not substitute the discretion exercised by the lower instance by its own expertise.

The Federal Administrative Court reasoned that the ComCom is not a mere enforcement agency, but an independent administrative body with special authority. As an expert body it acts as autonomous licensing authority as well as regulatory body with special responsibility. The Federal Communication Office ("OFCOM"), which acts as special instruction body has a distinctive special expertise in telecommunication matters and in the determination of its economic factors in which it may exercise a certain degree of discretion.

The court analyzed, whether the ComCom has considered marketing costs in determining the reduction from the retail price for the resale of telephone numbers.

The court found that the Telecommunication Ordinance ("TCO") addresses the details regarding the invoicing for the resale of telephone numbers. According to Art. 60 TCO the incumbent operator is required to publish in its offer the technical and commercial conditions for the access. The cost oriented price within the sense of Art. 11 para 1 TCA is to be calculated by reducing the retail price charged for the telephone number by the costs incurred by the incumbent operator for invoicing the customers, and by increasing such costs by the costs incurred for invoicing the alternative operator. It is unclear to what extent marketing costs are to be taken into consideration.



The court then proceeded to analyze, whether only the pure administrative costs for the invoicing or also the marketing costs will have to be taken into consideration in determining the costs invoiced to the alternative provider.

Looking at the wording of the TCO as well as the Report from the Federal Department for the Environment, Transportation, Energy and Communication, the court found that only the administrative costs were being discussed and not the marketing costs. The court reasoned that the resale of telephone numbers was introduced by the Parliament only and was not included in the draft legislation proposed by the Federal Council.

Its purpose was to permit an alternative provider to provide voice services from one single hand, by interrupting the direct contact between the customer and Swisscom. The very purpose of this was to prevent Swisscom from using this remaining customer relationship from including marketing material with the invoice. The court found that it was the clear intent to interrupt the direct contact between the customer and the incumbent operator.

The court summarized that it is neither evident from the history or the purpose of the legislation that marketing costs are to be taken into consideration when calculating the reduction from the retail price. The court found the wording of the TCO to limit the reduction to the pure administrative costs for the invoicing, thereby excluding marketing costs.

Accordingly the court reduced the reduction of CHF 1.50 imposed by the ComCom for the marketing costs in the amount of CHF 0.07.

As a separate item, the court analyzed the reduction for the costs incurred when customers use the postal payment services which lead to an additional charge. The court concluded that the ComCom was not entitled to assume an amount of CHF 0.05. It found that it was obvious that this figure provided by Swisscom was not final. Hence, the court found the ComCom not to have sufficiently determined the relevant facts for such reduction. According to the evidence provided by Swisscom, the Court found CHF 0.03 to be adequate and hence ordered the cost reduction for the resale of telephone numbers to be decreased by a further amount of CHF 0.03.

In total the court reduced the reduction from the retail price charged by Swisscom from CHF 1.50 to CHF 1.40 which corresponded to the Swisscom offer.

Consequently the court reallocated the procedural costs incurred by the ComCom by increasing Sunrise's share by 10%. The costs of the appellate proceeding were shared by 25% by Swisscom and 75% by Sunrise.

Comment

This decision confirms again that the Federal Administrative Court will not put its discretion in place of the discretion exercised by the ComCom.

However, it also makes it clear that the court will interfere and where necessary correct a decision rendered by the ComCom, where the court concludes that the ComCom did not correctly apply the law.

Also alternative operators will have to bear in mind the risk of procedural costs to be allocated to them which may easily reach six digit figures, in particular where extensive calculations must be performed by the OFCOM to arrive at cost oriented prices. If the court concludes that the prices offered by Swisscom comply with the requirements of Swiss law, then the alternative provider risks being invoiced for the procedural costs.

Hence prior to taking any action, Swisscom's own offer must therefore be analyzed carefully. Since for all access services the Regulator or as the case may be upon appeal the court has in the past already substantially reduced the prices charged by Swisscom, the chances that the court will find the Swisscom offered prices to meet the legal requirements have increased and consequently the risk of the alternative provider having to foot the bill for the procedural costs have increased to the same extent.

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