



## Telecommunication Newsletter Switzerland

# Federal Supreme Court Confirms Decision of Federal Administrative Court which Annulled ComCom's Record Fine against Swisscom in the Amount of CHF 333 Million

### Facts

On Mai 15, 2000 the Competition Commission's Secretariat formally opened an investigation of the mobile telecommunication market.

On February 5, 2007 the Competition Commission ("CompCom") issued an order and found Swisscom Mobile AG to have a dominant position in the mobile terminating whole sale market for the termination on its network. Swisscom was found to have abused of its dominant position in the market by imposing excessive termination charges on other telecommunication service providers and pronounced a record fine against Swisscom Mobile AG in the amount of CHF 333 Million.

Swisscom appealed the decision of the CompCom to the Federal Administrative Court which partially approved of the appeal filed by Swisscom and remanded the case to the CompCom for determination of the procedural costs.

In its decision the Federal Administrative Court confirmed that the determination of the relevant market and CompCom's finding of Swisscom's dominant position was justified. However, it quashed the imposition of the fine for lack of Swisscom having abused of its dominant position to force excessive charges on the alternative providers because the regulatory environment in Switzerland would have permitted the alternative providers to request a cost oriented determination of the mobile termination charges by the Communication Commission ("ComCom"). Hence, because of the specific legal remedies available to the alternative providers, Swisscom was found not to have been in a position to impose abusive charges on the alternative providers, who could have requested the ComCom to determine cost oriented termination charges which however they failed to do.

The decision of the Federal Administrative Court was appealed by the Department of Public Affairs as well as by Swisscom. Whereas the Department of Public Affairs argued in essence that the legal requirement for imposing a fine on Swisscom were met and that therefore the fine imposed on Swisscom should be upheld, Swisscom challenged amongst others the Federal Administrative Court's holding which stated in its operative part that Swisscom had a dominant position in the relevant market.

### Decision

In essence, the Federal Supreme Court<sup>1</sup> confirmed the findings of the lower court pursuant to which Swisscom did not abuse of its dominant position in order to impose excessive termination charges, since it would have been on the alternative providers to challenge the termination charges by requesting their determination by the ComCom.

The Federal Supreme Court argued that under the Swiss *ex post* regulatory system pursuant to which cost oriented prices are determined only at the request of the alternative providers in interconnection proceedings launched against the incumbent operator one may not conclude that a dominant position automatically leads to the imposition of abusive prices.

It would have been upon the alternative providers to commence interconnection proceedings against Swisscom for the determination of cost oriented termination charges, which - due to their own financial interests in these high charges - they did not do. Consequently, the Federal Supreme Court argued, Swisscom cannot be held to have abused of its

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<sup>1</sup> Decision of the Federal Supreme Court of April 11, 2011, 2C\_343/2010, 2C\_344/2010



dominant position in order to force excessive termination charges upon the alternative providers. The appeal by the Department of Public Affairs was therefore rejected.

As regards the Federal Administrative Court's holding that Swisscom indeed had a dominant position in the terminating market, the Federal Supreme Court found no prevailing interests in such a holding which applied to a period of the past only. Such a holding may have no relevance for periods in the future for which the question of dominant position would have to be reassessed. With the same argument, the Federal Supreme Court rejected Swisscom's motion to have it determined not to have a dominant position.

### **Conclusion**

The decision of the Federal Supreme Court is certainly a welcome Easter present to the majority state owned Swisscom. However, it also clearly demonstrates the need for a revision of the Swiss telecommunication regime.

Despite the decision of the Federal Supreme Court which upheld Swisscom's motion on formal grounds only, it will be difficult for Swisscom to successfully contest in the future its dominant position in the mobile terminating market and therefore its obligation to permit termination on its network at cost oriented prices, should a proceeding for determination of the mobile termination charges be filed with the ComCom.

Strikingly, the decision does not take into consideration the interests of the consumers who are the ultimate victims of this ill conceived regulatory system in which the authorities cannot request determination of cost oriented interconnection or access charges *ex officio*.

It is now again upon the Swiss Parliament to accelerate the long overdue revision of the Swiss Telecommunication Act.

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