



# Telecommunication Newsletter Switzerland: Federal Council Finds Room for Improvement of the Regulatory System, but Sees no Immediate Need for a Revision of the Telecommunications Act

## 1 Swiss Telecommunication Market Review by Federal Council

In September 2010, the Federal Council published its report on the telecommunications market in Switzerland.<sup>1</sup> The Federal Council reached the conclusion that although the time was ripe for a political discussion on the regulation of the telecommunications market in the future, it found no immediate need to revise the Telecommunications Act. This conclusion comes rather as a surprise, given the fact that the Federal Council has identified several areas where the market and regulatory system could be improved.

## 2 Particular Findings of the Federal Council

### 2.1 Fixed Net Market

In the fixed net market the federal council found no particular area where corrective measures are required, except for the high termination fees to the mobile networks.

### 2.2 Mobile Market

The primary concern of the Federal Council, according to the report, is the increasing market share of Swisscom, the former monopolist, whose market share stands at 62%. The Federal Council is of the view that the Regulator should have been given a more proactive role for instance in the determination of the mobile termination fees. In addition, the Federal Council finds international roaming costs for Swiss subscribers travelling in the EU to be excessive.

### 2.3 Access Regulation

The Federal Council criticises the lack of flexible intervention measures, since there is no clear distinction between markets, regulated products and regulatory intervention. The lack of a clear distinction makes it impossible for the Regulator to develop adequate solutions in cases where a softer regulation than the determination of the terms and conditions for the access would suffice. The Federal Council also noted the criticism that has been raised in relation to the calculation model used to determine cost-oriented prices, in particular the MEA-approach, which results in inadequately high prices, in particular, where legacy infrastructure, such as cable ducts, forms a large part of the costs.

The limited bargaining power of non-incumbents in access proceedings and the lack of the Swiss Communications Commission's (ComCom) authority to intervene *ex officio* was seen a major soft spot in the existing Swiss regulatory system.

The Federal Council also notes that the Swiss *ex ante* system bears the risk that an alternative provider will not bring an access proceeding, because of the costs that may be imposed upon it, should it be unsuccessful. Moreover, since access proceedings easily last several years, the consumer hardly ever benefits from lower prices ordered by the ComCom for the period until the proceedings are terminated.

### 2.4 Challenges of Fibre Networks

The continuous development of new technologies and their potential regulation is seen as one of the most challenging developments. Should no sufficient infrastructure competition evolve in the area of fibre networks, the regulator should be given the authority to intervene. Currently, access to the last mile is

<sup>1</sup> <http://www.bakom.admin.ch/dokumentation/gesetzgebung/00512/03498/index.html>



limited to the copper pair. According to the Federal Council the Regulator should also be given the authority to regulate access to the fibre network, should the need arise.

### 3 Issues for a Future Regulatory System

In its report, the Federal Council identified the following issues:

- Technology neutral definition of access, which would encompass not only fibre but also access to the mobile network and which would permit the MVNO's access to the mobile networks at regulated prices;
- Differentiated calculation model for LRIC in particular in the area of cable ducts;
- Move from an *ex parte* and *ex post* system to an *ex officio* or *ex ante* regulatory system.

### 4 ComCom Requests Federal Council to Review its Position

The ComCom largely supports the findings of the Federal Council report and the proposed measures to prevent a monopoly of the fibre access providers in the future.<sup>2</sup> According to the ComCom, a regulation of the fibre access providers is at this point in time not required, however, the regulatory framework should be amended to permit a regulation should this become necessary and which also increases the legal security and predictability which is essential for investors.

The ComCom sees a particular need in the area of fibre network and for the introduction of the *ex officio* approach, which would entitle the ComCom to determine the terms and conditions for access independently of a complaint filed by an alternative provider. Under the present regulatory environment, the ComCom may only determine the prices and terms for the access upon a complaint being filed by an alternative provider.

Consequently, the ComCom invites the Federal Council to review its position.

### 5 Comment

Although the Federal Council identifies serious shortfalls in the Swiss regulatory system and provides guidance on how to resolve them, it surprisingly sees no need for a revision of the Telecommunications Act, at least not at this time.

The Federal Council stated in its report more than once that it is difficult to create a level playing field, once a monopoly has already evolved. Nevertheless the Federal Council proposes a "wait and see approach" rather than revising the law which would permit a proactive intervention by the regulator before it is too late.

The Federal Council's decision not to proceed with a revision of the Telecommunications Act, despite the obvious flaws identified, appears not unbiased. The Swiss Government continues to own a majority interest in Swisscom and, therefore, profits as its majority shareholder also from a strong market position. This very interest appears now to conflict with the interests of the consumers, employees, investors and alternative providers in the creation of a genuine level playing field by strengthening the regulator's position.

For as long the Swiss Government maintains its majority interest in Swisscom, which also limits Swisscom's investments abroad, the political will to create a true level playing field for all telecommunication providers will stay short of the pecuniary interests of the Swiss Government in the former monopolist. A genuine liberalisation of the Swiss telecommunication market remains an illusion, unless the Swiss Government disposes of its majority interest in Swisscom.

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<sup>2</sup>

<http://www.bakom.admin.ch/dokumentation/medieninformationen/00471/index.html?lang=de&msg-id=36109>