



Relief for Swisscom after ruling by Federal Administrative Court

The Federal Administrative Court confirmed that the primacy of negotiation applies to the establishing of access prices and other related terms. The Federal Communications Commission (ComCom) had called for third-party providers to automatically benefit from government-imposed price cuts in spite of contractual provisions to the contrary, i.e. as if they had themselves submitted an application for the access prices to be set (direct third-party effect).

The access regulations currently in place in Switzerland are based on the primacy of negotiation. Market players are as such free to establish their own rules on network access. Only in cases where it does not prove possible to reach an agreement on individual points, e.g. prices or third-party clauses, can an application be submitted to ComCom for it to rule on the items in dispute. After a change in policy in October 2008, ComCom took the position that the prices they had imposed should by law also apply to providers which had not submitted an application for the prices to be set.

The Federal Administrative Court has now ruled that the primacy of negotiation and freedom of contract supersede the right of ComCom to officially intervene. Once the parties have reached an agreement, ComCom does not have the authority to intercede. In addition, ComCom is not authorised to intervene in agreements between parties who were not party to a lawsuit. In its ruling on the authority of ComCom, the Federal Administrative Court has made a valuable contribution to legal certainty.

The interconnection agreements from 2000-2006 with divergent regulations on third-party effect therefore remain in force, unless ruled illegal by a civil court. Since 2007 Swisscom has reached agreement with all its competitors on regulated access services, whereby they are also able to benefit from lower prices that ComCom imposed as part of a suit to which they were not party.

Berne, 19 February 2010 / 07:30