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Federal Administrative Court Holds that a Change to the MEA Approach as Applied by the Com-Com Requires a Change of the Telecommunication Act

Telecommunication Newsletter Switzerland

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Facts

On November 30, 2007 Sunrise Communications AG ("Sunrise") filed a request with the Communication Commission ("ComCom") for determination of cost oriented access charges to cable ducts against Swisscom (Schweiz) AG.

By order dated December 1, 2009 the ComCom determined amongst others the monthly price chargeable by Swisscom for the use of the cable ducts.

ComCom's decision was appealed by both Swisscom and Sunrise. For the purpose of this news letter only the appeal filed by Sunrise shall be considered. In its appeal Sunrise argued that the cost allocation method applied by the ComCom violated the statutory non discrimination obligation. Swisscom is in a position to use its own infrastructure on terms that are much more favorable to them than the ones offered to Sunrise, since the incumbent's infrastructure has already been depreciated to a large extent. Sunrise argued that the respective provision in the ordinance which provided for the application of the Modern Equivalent Asset approach (Art. 54 para. 2 Telecommunication Ordinance "TCO") must be applied non discriminatory. Therefore, Sunrise argued, the depreciation must be deducted from the Modern Equivalent Asset costs.

Decision

In its decision of April 8, 2011, the Federal Administrative Court[1] rejected Sunrise's appeal and found the application of gross Modern Equivalent Asset Costs by the ComCom to be in line with the historical interpretation of the Telecommunication Act and its Ordinance.

The court also did not find that Art. 11 para 1 Telecommunication Act which sets out the non discrimination obligation *per se* asked for the calculation of the net Modern Equivalent Asset costs (*i.e.* after deduction of depreciation) when determining cost oriented charges and found that the Federal Council acted within the limits determined by the law and the constitution when promulgating the TCO. The Federal Administrative Court, however, conceded that the application of Art. 54 TCO may lead to a certain disparity but that such disparity was well founded on reasonable grounds such as infrastructure competition. It is not its duty to interfere with the political and legislative process where a large degree of discretion is vested with the Federal Council.

Conclusion

Although the Court conceded that the application of the Modern Equivalent Asset approach as applied by the ComCom leads to a disparity of the costs allocated to the alternative providers and the incumbent's actual costs, it did not find itself in a position to reverse ComCom's decision on such grounds.

In our view this is another example on how the legislator law contains the regulator in a rigid regulatory framework in an environment that is constantly changing.

In the today's fast moving technological environment, the legislator should have the ability to look into the future and anticipate new market developments or at

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1 Decision of the Federal Administrative Court of April 8, 2011, A-300/2010

least create a flexible regulatory frame work which permits the regulator to adapt quickly to the challenges and opportunities of a new technological environment. It is time to give the regulator such a flexible tool for the benefit of the consumers, competitors as well as the incumbent operator.

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