[CH] Swisscom Must Ensure its Competitors Have Regulated Access to Broadband

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Swisscom, the leading telecom company in Switzerland, does indeed occupy a dominant position on the market for broadband services. The Federal Administrative Tribunal (*Tribunal Administratif Fédéral* - TAF) confirmed the fact in a decision that henceforth obliges Swisscom to ensure that its competitors have regulated access to all its broadband land lines in order to enable them to deploy their own installations. Under Article 11 (1) of the Telecommunications Act (*Loi sur les Télécommunications* - LTC), those suppliers of telecommunications services that occupy a dominant position on the market are required to ensure that the other suppliers have access to their resources and to their services under conditions that are transparent and non-discriminatory and at prices that are cost-related; this refers more particularly to broadband for a period of four years. Since it did not consider itself as occupying a dominant position, Swisscom refused to comply with the obligation. This was contested by Sunrise, the second-most important telecoms operator in Switzerland, and Swisscom's refusal was held by the TAF to be unlawful.

Under Article 4 (2) of the Cartels Act, "undertakings dominant on the market" are deemed to be one or several undertakings that are in a position, in terms of supply or demand, to behave in an essentially independent fashion in respect of the other participants on the market (competitors, suppliers, and buyers). In this respect, account has to be taken of the relevant market in terms of products and geographical coverage. The market for the products includes all the products or services considered as being substitutable because of their characteristics and their intended use.

According to the TAF, wifi technologies (UMTS, WLAN, etc) and satellite cannot be considered to be real alternatives for broadband services. These technologies, which are generally marketed at prices higher than those for broadband, have a slower speed of data transfer. They also have higher risks in terms of unstable connections and data security. These constraints limit the use final users may make of them. In consequence, the determining market should be limited to those technologies that are based on data transmitted by wire.

The TAF also noted that at present there is no effective competitor on the market for broadband services capable of influencing Swisscom's behaviour and

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preventing it from acting in an independent fashion. Swisscom is indeed the only company offering broadband services covering the entire Swiss territory. Furthermore, there is no offer from other suppliers that constitutes an alternative to the services offered by Swisscom. In financial terms, Swisscom is the leading telecom company in Switzerland in terms of payroll and annual profits and turnover. The State's majority holding in Swisscom also offers the company advantages over its competitors. Lastly, with its network covering the entire country, Swisscom has the largest number of connections and broadband access.

Only cable distributors would be in a position to compete with Swisscom. Their offers, however, are broken up in terms of territory, and are not likely to have a restrictive effect on Swisscom's behaviour or affect the prices charged by Swisscom. Connections to fibre optic networks are still insignificant in terms of numbers and do not have a significant influence on competition. Consequently, competition is still too limited to prevent Swisscom behaving in an independent fashion on the determining market. The TAF therefore noted that Swisscom holds a decisive competitive advantage on the market for broadband services and occupies a dominant position within the meaning of Article 11 (1) of the LTC.

Urteil des Bundesverwaltungsgerichts Nr. A-109/2008 vom 12. Februar 2009

http://www.bundesverwaltungsgericht.ch/

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