

**SUBMISSION OF  
CABLE & WIRELESS GLOBAL (SWITZERLAND) AG**

**TO**

**ÄNDERUNG DES FERNMELDEGESETZES UND SEINER  
AUSFÜHRUNGSBESTIMMUNGEN**

**PART A: GENERAL**

**INTRODUCTION**

1. Cable & Wireless Global (Switzerland) AG (**C&W**) welcomes the revision of the Swiss telecommunications laws and looks forward to further liberalisation and competition in the Swiss telecommunications market.
2. C&W especially welcomes the proposed changes that bring Swiss telecommunications laws in line with European Union (**EU**) directives, particularly regarding unbundling the local loop, the subjugation of leased lines to the interconnection regime and ex-ante regulation.
3. C&W is an active member of the Verband Inside Telekommunikation (**VIT**) and supports the submission of the VIT in respect of the proposed changes to the telecommunications laws. In addition, C&W submits the following comments to the proposed changes.

**SUMMARY**

4. The proposed changes to the Swiss telecommunications laws are complex and often issues are interlinked. However, in all cases where possible, each proposal must be considered separately thereby allowing appropriate individual recommendations to be made.

**Competition**

5. Changes to the Swiss telecommunications laws that bring Swiss laws in line with EU directives means that global and Europe-wide companies, such as Cable & Wireless, are in a better position to operate and invest in Switzerland with certainty and consistency. This will also guarantee that Switzerland will be able to benefit from the harmony created by the EU directives in the pan-European telecommunications market.

6. The proposed changes such as unbundling the local loop, the subjugation of leased lines to the interconnection regime and ex-ante regulation ensure the necessary conditions for a highly competitive, open, viable and evolving Swiss telecommunications market. This means reduced prices for end users and a greater choice of more innovative products and services. This also means that Switzerland has in place the necessary prerequisites for ensuring that all Swiss people can access and participate in the Information Society, and for access to developments such as e-commerce, e-education, e-health and e-government, etc. Therefore, not only will the Swiss telecommunications market be more competitive but also other Swiss industries and markets (e.g. banking, insurance, pharmaceuticals, etc) that rely on telecommunications.

### **Technology neutral**

7. C&W fully supports the application of telecommunications regulations, where the market conditions justify this, on a technology neutral basis. Particularly, ex-ante regulation of dominant operators in relevant markets must be on a technology neutral basis to ensure effective competition and consequent realisation of benefits for all Swiss end users and the Swiss economy. Technology neutral telecommunications laws are consistent with EU directives and with Switzerland's commitments in the World Trade Organisation agreement on basic telecommunications.

## **PART B: VERORDNUNG ÜBER FERNMEDLEDIENSTE (FMV)**

8. C&W welcomes the changes to the FMV and makes the following comments.

### **Leased lines and unbundling (Art. 43)**

9. C&W fully supports the requirement that market dominant providers must offer leased line services and unbundled local loop services subject to terms and conditions requiring transparency, non-discrimination and cost-based pricing. These initiatives are important for viable competition in the Swiss telecommunications market and the realisation of benefits by the end user and the Swiss economy.
10. C&W submits that regulations subjugating leased lines to the interconnection regime and regulations unbundling the local loop impact different markets within the overall Swiss telecommunications market. Therefore, these initiatives are separate and they must be considered independently.
11. Furthermore, C&W submits it is legally supportable that each of the proposed leased lines and unbundling regulations may be introduced by change of the FMV. There is no legal basis to support the need to change the FMG.

## **PART C: FERNMELDEGESETZ (FMG)**

### **DEFINITIONS (Art. 3)**

#### **Access**

12. For the reasons discussed above, C&W submits that the definition of access in Art. 3 should be the same as the definition of access in the EU Directive on

access to, and interconnection of, electronic communications networks and associated facilities (2002/19/EC; OJ L 108, 24.4.2002, p. 7) (**Access Directive**).

13. Particularly, C&W submits that the definition of access should be technology neutral consistent with the Access Directive. This is imperative for ensuring that all markets in the Swiss telecommunications market are open and competitive and that benefits are realised by consumers. In no way should the definition of access be drafted to exclude a particular market.
14. Furthermore, for consistency, the definition of telecommunications installations in Art. 3, Abs. d should be amended as follows:  
„*Fernmeldeanlagen: Geräte, Leitungen oder sonstige Einrichtungen, die zur ....*“
15. C&W supports the following definition of access for Art. 3, Abs d<sup>bis</sup>:  
„*Zugang: ausschliessliches oder nicht ausschliessliches Bereitstellen von Einrichtungen und/oder Diensten zur Erbringung von Fernmeldediensten für eine andere Anbieterin von Fernmeldediensten. Darunter fallen unter anderem: Zugang zu Netzkomponenten und zugehörigen Einrichtungen, wozu auch der feste oder nicht feste Anschluss von Einrichtungen gehören kann (dies beinhaltet insbesondere den Zugang zum Teilnehmeranschluss sowie zu Einrichtungen und Diensten, die erforderlich sind, um Dienste über den Teilnehmeranschluss zu erbringen); Zugang zu physischen Infrastrukturen wie Gebäuden, Leitungen und Masten; Zugang zu einschlägigen Softwaresystemen, einschliesslich Systemen für Betriebsunterstützung; Zugang zur Nummerumsetzung oder zu Systemen, die eine gleichwertige Funktion bieten; Zugang zu Fest- und Mobilfunknetzen, insbesondere um Roaming zu ermöglichen; Zugang zu Diensten für virtuelle Netze.*“

### **Interconnection**

16. For the reasons discussed above, C&W submits that the definition of interconnection in Art. 3, Abs. e, should be the same as the definition of interconnection in the EU Access Directive. Aligning the definition of interconnection with that in the Access Directive ensures certainty of regulations across Europe and that all markets within the Swiss telecommunications market are subject to the same regulatory regime.
17. At least, C&W supports the following change to Art. 3, Abs. e:  
„Sonderfall des Zugangs, der durch die Verbindung der **Netze** und Dienste zweier Anbieterinnen von Fernmeldediensten hergestellt wird und ....“

### **EX-ANTE REGULATION (Art. 10a)**

18. The 1997 FMG aimed to establish conditions under which market dominant providers must grant interconnection so that competition may be realised. However, it is clear from the many interconnection disputes in Switzerland in

recent years that the current law is not satisfactory and falls short of its aim. This has the effect of putting “new operators” at a significant competitive disadvantage compared with market dominant operators. “New operators” do not have financial or other resources for complex and drawn out disputes and are not able to react efficiently to address advantages naturally available to market dominant operators (such as first-mover advantages).

19. Therefore, the introduction of ex-ante regulation - the determination of relevant markets, the determination of market dominant operators, the requirement for market dominant operators to submit a standard offer which is examined by ComCom - is very welcome and will ensure further liberalisation and competition in Swiss telecommunications.

### **Standard Offer**

20. It is important that the standard offer contain all essential terms and conditions. The standard offer must specify not only cost-oriented prices but also all technical and commercial conditions including quality requirements such as delivery times, availability, and maintenance and repair times, etc. Further, compliance with all essential terms and conditions must be ensured through the application of sufficient penalties for non-compliance. This is necessary to ensure that market dominant providers do not restrain effective competition.

### **Benchmarking**

21. The matter of proving the costs upon which prices are based in the standard offer requires special consideration. In this regard, it is critical to consider the views of other operators and to compare the disclosed costs with the costs of other efficient operators.

### **Timeframes**

22. A necessary requirement to ensure the effectiveness of ex-ante regulation in introducing competition is to enforce strict procedural timeframes. C&W submits that a time limit of 4 months must be applied to interconnection procedures, as is the case in the EU. ComCom must take all steps to ensure it can meet this timeframe and a penalty system must be applied where an operator deliberately delays the procedure.

### **Art. 10a, Abs. 1**

23. C&W makes the following comments regarding Art. 10a, Abs. 1:
  - a. It is clear from the Explanatory Report that it is intended that other operators and associations will be consulted regarding market dominance. To ensure transparency, C&W proposes that this extension be specified in Art. 10a.
  - b. For certainty, C&W proposes that the basis upon which decisions of market dominance will be made, the Swiss Law on Cartels, should be specified.

- c. In order to enable efficient use of resource and certainty in investment and strategy, C&W proposes that Art. 10a require the prioritisation of the markets to be considered by ComCom.
  - d. C&W submits that Art. 10a needs to be clarified regarding the process for determining market dominance and the status of decisions on market dominance.
24. Therefore, C&W supports the following changes to Art. 10a, Abs. 1:  
 „Nach Konsultation ..... interessierten Kreise, **namentlich der in den untersuchten Märkten tätigen Unternehmen und deren Verbände**, bestimmt die ... einnehmen. Die Kommission veröffentlicht ihre **Verfügungen. Die betroffenen Anbieterinnen sind Verfügungsadressatinnen. Bei ihren Verfügungen orientiert sich die Kommission an den Grundsätzen des Kartellgesetzes. Sie erlässt hierzu sowie zur Priorisierung der zu untersuchenden Märkte innerhalb von spätestens 3 Monaten nach Inkrafttreten dieses Gesetzes zusammen mit der Wettbewerbskommission eine oder mehrere Bekanntmachungen, welche regelmässig zu überprüfen und gegebenenfalls anzupassen sind.**“

**Art. 10a, Abs. 2**

- 25. C&W supports the regular re-examination of decisions of market dominance. However, in order to ensure certainty, such re-examinations must follow the same procedural principles as the original decision.
- 26. Therefore, C&W supports the following changes to Art. 10a, Abs. 2:  
 „Die Kommission ..... regelmässig **unter Beachtung desselben Verfahrens** an die Wettbewerbssituation ....“

**Art. 10a, Abs. 3**

- 27. As set out in Art. 10a, Abs. 3, C&W considers that it is very important that appeals against decisions defining the relevant market and determining the market dominant provider should not suspend the effect of the original decision. The proposed provisions in Art. 10a, Abs. 3 are fully justified in order to ensure the effectiveness of ex ante-regulation. Without these provisions, a market dominant provider could delay the entry into effect of an original decision for several years. The provisions in the present Art. 10, Abs. 3 are especially necessary in the telecommunications market where market conditions such as market dominance change rapidly with the effect that an original decision that is appealed may no longer be suitable if it only comes into effect at a (usually) much later time. The absence of suspensive effect is also the rule for the appeal of administrative decisions to the Swiss Federal Court by way of the Verwaltungsgerichtsbeschwerde as provided for in Art. 111 OG.
- 28. Also very important is that the procedures and times for determining market dominance are specified, including a reasonable timeframe.

29. Therefore, C&W supports the following changes to Art. 10a, Abs. 3:  
*„Die Kommission führt die Verfahren zur Bestimmung von relevanten Märkten sowie zur Bezeichnung von Anbieterinnen mit beherrschender Stellung jeweils innerhalb von maximal 4 Monaten durch. Die Beschwerde ....“*

#### **ACCESS (Art. 11 FMG)**

30. The following comments and proposed changes follow on from the above discussions and recommendations regarding the definition of access and interconnection.

#### **Art. 11, Abs. 1**

31. C&W submits that Art. 11, Abs. 1 should be clarified to indicate that the Bundesrat may specify the principles of access and interconnection in the manner considered by Art. 12 of the EU Access Directive. This change will ensure that reasonable requests for access and interconnection are met in order to ensure a sustainable competitive market at retail level in the interests of end users. Furthermore, this change will ensure that providers requesting access and providers of such access have certainty regarding possible requirements and procedure.

#### **Standard Offer**

32. As discussed in paragraph 20 above, it is important that the standard offer contain all essential terms and conditions. The standard offer must specify not only cost-oriented prices but also all technical and commercial conditions including quality requirements such as delivery times, availability, and maintenance and repair times, etc. Further, compliance with all essential terms and conditions must be ensured through the application of sufficient penalties for non-compliance. This is necessary to ensure that market dominant providers do not restrain effective competition.

#### **Sanctions**

33. It is also important that ComCom has the authority to impose sanctions if a market dominant provider breaches its standard offer. This includes the situation where ComCom can intervene at its own initiative where justified or, in the absence of agreement between providers, at the request of the parties involved. While the provider requesting access or interconnection could seek ComCom's intervention via the interconnection procedure per Art. 11, as discussed above, this approach is not suitable and may further damage the position of the provider requesting access or interconnection given that such procedure is lengthy and costly. It is therefore necessary that ComCom can intervene as required and order the market dominant provider to comply with the standard offer.

#### **Benchmarking**

34. While the proposed changes to Art. 11, Abs. 1<sup>bis</sup> require the provision of access and interconnection services at cost-oriented prices, the proposed formulation and testing of these prices is not clear (see also Art. 45, Abs. 2 FDVS and Ziffer 2.1.2.1.3 of the Explanatory Report). C&W submits that

Art. 1, Abs. 1<sup>bis</sup> should require the proof of the actual costs which must then be tested to ensure the correct costs are used and that they do not exceed the costs of an ideal efficient supplier. Furthermore, should the costs be found to be too high, ComCom should then set them after consultation and with reference to the costs of an ideal efficient operator.

**Definition „interested circles“**

35. C&W submits that the concept of interested circles must be clarified to include other providers in the relevant markets and to include relevant associations. It is clear that competitors are significantly impacted by the standard offer and are also able to provide essential information on the basis of their own experiences.
36. C&W supports the following changes to Art. 1, Abs. 1<sup>bis</sup>:  
*„Als marktbeherrschend ..... Die Kommission prüft das Standardangebot unter dem Aspekt markt- und branchenüblicher Grundsätze und Vergleichswerte (Benchmarking) sowie insbesondere auch im Hinblick auf angemessene terminliche und qualitative Bedingungen sowie angemessene Konventionalstrafen bei Verletzung der Bedingungen des Standardangebots durch die marktbeherrschende Anbieterin und genehmigt das Standardangebot nach Anhörung der interessierten Kreise, namentlich der im betreffenden Markt tätigen Unternehmen und deren Verbände, und nach Vornahme notwendiger Änderungen. Sie veröffentlicht ihre Entscheide. Die Verweigerung von Preisen und Konditionen gemäss dem von der Kommission genehmigten Standardangebot gegenüber Fernmeldedienststanbeiterinnen stellt eine Verletzung anwendbaren Rechts im Sinne von Art. 58 und 60 dar.“*

**Art. 11, Abs. 1<sup>ter</sup>**

37. C&W again stresses comments made above at paragraph 27. It is important that appeals against decisions regarding approval of standard offers of market dominant providers do not affect the original decision. The provisions proposed in Art. 11, Abs. 1<sup>ter</sup> are fully justified in order to ensure effective ex ante-regulation. Without these provisions, a market dominant provider is able to delay the entry into effect of original decisions for (possibly) several years. If an original decision is able to be suspended because of appeal, given the rapid change of telecommunications market conditions - especially regarding commercial conditions for access – it is likely that the original decision would be inappropriate when and if it comes into force once the suspension is lifted. The absence of suspensive effect is also the rule for the appeal of administrative decisions to the Swiss Federal Court by way of the Verwaltungsgerichtsbeschwerde as provided for in Art. 111 OG.
38. Again, it is critical that a timeframe be set for the resolution of procedures regarding decisions of relevant markets and market dominant providers.
39. C&W supports the following changes to Art. 11, Abs. 1<sup>ter</sup>:  
*„Die Kommission führt die Verfahren zur Genehmigung von Standardangeboten jeweils innerhalb von maximal 4 Monaten ab Eingang des Genehmigungsgesuchs durch. Beschwerden .....“*

**Art. 11, Abs. 3**

40. For the reasons discussed above, C&W supports the following changes to Art. 11, Abs. 3:

*„Einigen sich .... markt- und branchenübliche Grundsätze **und Vergleichswerte (Benchmarking)** und berücksichtigt ....beherrscht. Die Kommission führt die Verfahren zur Verfügung von Zugangs- und/oder Interkonnektionsbedingungen jeweils innerhalb von maximal 4 Monaten ab Eingang des Gesuchs durch.“*

**UNIVERSAL SERVICES (Art. 38)**

41. Universal services and funding for universal services are critical to ensure that each and every Swiss consumer is able to access affordable telecommunications services of good quality without discrimination. These benefits must be balanced against the benefits to Swiss consumers of a viable and competitive telecommunications market.
42. C&W welcomes the exclusion for providers from contributing funds for unrecovered costs from providing universal services where their turnover is less than a particular limit. However, C&W submits that the profitability of providers is also a very relevant consideration – especially with current market conditions. Providers who may have revenues that exceed the limit should not be obliged to contribute to the fund if and until they have also made a profit.
43. Furthermore, C&W submits that when determining the contributions by providers to a fund, considerations such as market share and relative revenues must be taken into account. For example, a contribution based on low revenues would cause great hardship to the contributing provider compared with a contribution at the same rate where the latter provider's revenues are very high. Therefore, the rate of contribution should be less for low revenue providers and higher for high revenue providers.
44. Lastly, C&W submits that, for all providers, only revenue in excess of the limit referred to in Art. 38, Abs. 3 should be considered for calculating each provider's contribution.

**UNWANTED INFORMATION (Art. 45a)**

**Operators as mere conduits of spam**

45. Spam, or unwanted advertising information, is a significant problem for C&W and our customers. It is the leading cause of complaints among internet users and C&W must spend significant time and resources to protect its networks and consumers from this unwanted nuisance. Because of its sheer volume, spam clogs the internet and can force dial-up users to pay increased long-distance charges while they wait for their email to download. Mobile and fixed telephony spam is also a problem for C&W and its customers.
46. Therefore, C&W has implemented an internal process for dealing with spam. C&W relies on its Acceptable Use Policy (AUP) ([www.cw.com](http://www.cw.com)) to prevent



spam. The AUP is incorporated into each customer contract for internet services and expressly prohibits spamming. A customer who spams will receive warning letters and may ultimately be disconnected. Furthermore, where a C&W customer receives spam, C&W will make a complaint to the provider of the sender of the spam requesting that the spam be stopped. This process is followed 24 hours per business day.

### **Compliance not feasible**

47. Notwithstanding C&W' process for handling spam sent by or to its customers, compliance with Art. 45a would expose providers to many legal and contractual risks. These risks apply to providers whose customers send spam and providers whose customers receive spam.
48. Measures against spam such as filtering are inadequate and infeasible. It is not possible for filtering and blocking techniques to distinguish spam from legitimate bulk emails such as newsletters and advice of network upgrades, etc, so that the likelihood of blocking legitimate emails is very high.
49. Furthermore, Art. 45a requires providers to determine whether a certain communication is spam or not. The provider, as a mere conduit for the transmission of communications, is not in a position to make this determination – for example, it is not possible for the provider to determine if the sender of the “spam” and the receiver are in an existing business relationship or if the receiver has consented to receive the communication. It is also not possible to accurately determine if a communication is advertising information or not.

### **Art. 45a**

50. Therefore, it is not feasible or practical to oblige providers to take measures against spamming as currently required by Art. 45a. Only the sender and the recipient are able to determine if the communication is legitimate, if there is valid consent and/or if there is an existing business relationship. Therefore, it is these parties that must be targeted for the prohibition and prevention of spam. On this basis, and given C&W' existing internal AUP processes, C&W supports the deletion of Art. 45a.
51. Practically, it is possible for providers to support consumers who allegedly receive spam by allowing providers to investigate the identity of the sender of the spam. In this case, C&W supports the amendment of Art. 45, Abs. 2, with the addition of the following text:

„..... verlangen, *insbesondere betreffend die Absender von unerwünschten Mitteilungen zu Werbezwecken.*“

### **Operators as senders or receivers of legitimate communications**

52. Lastly, C&W notes that it is important that legitimate business to business (B2B) marketing activities are carefully considered. Legitimate B2B marketing activities include commercial communications sent between specific individuals within companies, such as individual with procurement responsibilities. B2B communications of this nature have long been employed by businesses and long been accepted as legitimate marketing practices –

whether the communications are via telephone, by mail, face-to-face or by email. Therefore, C&W supports an opt-in model for its own communications to legal persons – other businesses and their nominated representatives (as opposed to natural persons or individuals).