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27th Aug. 2012

**Federal Supreme Court
of Switzerland**

2C_271/2012

**Judgment of 14th August 2012
Second Public Law Division**

Composition of the
court

Federal judge Zünd, President,
Federal judge Seiler,
Federal judge Aubry Girardin,
Federal judge Donzallaz, Stadelmann,
Clerk Klopfenstein.

Parties to the procedure

**SWITCH (formerly SWITCH —
Teleinformatics Services for Education and Research),**
Werdstrasse 2, Postfach, 8021 Zürich,
Appellant,

versus

Federal Office of Communications OFCOM,
Department of Telecom Services,
Zukunftstrasse 44, Postfach, 2503 Biel.

Subject

Supervisory procedure relating to services,

Appeal against the judgment of the Federal Administrative Court,
First Division, dated 13th February 2012.

Facts of the case:

A.

In accordance with its entry in the commercial register, the purpose of the SWITCH foundation (formerly: SWITCH – Teleinformatics Services for Education and Research) is to create, promote, offer, participate in and maintain the necessary foundations for the effective use of modern methods of teleinformatics in education and research services in Switzerland. It has been managing and allocating “ch” domain names in Switzerland since 1987. SWITCH has been delegated this task by the Federal Office of Communications (hereinafter referred to as OFCOM) under contracts dated 24th January 2003 and 31st January 2007.

In May 2009, SWITCH established subsidiary company switchplus ag. In accordance with its entry in the commercial register, the purpose of switchplus ag is to sell and offer internet solutions, specifically the registration of domain names, operation of e-mail and software, hosting of websites as well as other services relating to the internet.

B.

On 16th March 2010, OFCOM initiated a supervisory procedure against SWITCH in connection with the formation of switchplus ag and on 11th April 2011 ordered the following:

1. From the moment this order enters into effect, SWITCH shall offer all wholesale partners all the services it is capable of providing and switchplus ag offers based on its domain name allocation and management activities on the same terms and conditions. This shall exclude services which are typically provided between associated companies only and services which do not relate directly or indirectly to the delegated allocation and management of domain names.
2. SWITCH shall draw up a list of the services it intends to offer to all wholesale partners including switchplus ag under the same terms and conditions. Binding prices and other conditions shall also be set for individual services. SWITCH shall submit this list to OFCOM as well as all wholesale partners within 30 days of this order entering into effect. A service catalogue shall be published simultaneously with any changes tracked.
3. SWITCH shall ensure that switchplus ag does not profit from any promotionally effective services not provided to other wholesale partners by SWITCH within 30 days of this order being disclosed. This also relates specifically to presence on the internet.

4. SWITCH shall notify OFCOM, without being specifically requested to do so, of all contracts or amendments to contracts between itself and switchplus ag within 30 days of their conclusion. This shall exclude contracts which do not relate directly or indirectly to the delegated allocation and management of domain names.
5. SWITCH shall disclose to OFCOM all costs associated with services provided to switchplus ag appropriately and in a separate bill of charges. This shall apply for the first time to financial year 2010.
6. The suspensive effect of any possible appeal against paragraphs 3 and 5 shall be revoked.
7. Administrative fees of CHF 13,650.00 shall be charged to SWITCH – Teleinformatics Services for Education and Research. These shall be payable from the moment this order enters into effect and must be paid within 30 days.
8. This order shall be disclosed to SWITCH – Teleinformatics Services for Education and Research in writing by registered mail.
9. Hostpoint AG et al., represented by (...), shall be notified of the outcome of this procedure.

C.

SWITCH submitted an appeal to the Federal Administrative Court on 27th May 2011, with the (main) request of removing paragraphs 1-4 and paragraph 7 (regarding the obligation to pay costs) from the order of 11th April 2011. It should also be noted that by notifying Hostpoint AG et al. of the outcome of the supervisory procedure before the disputed order came into effect, the court of lower instance has breached Federal Law. It also called for the suspensive effect to be reinstated. The Federal Administrative Court accepted this request with an interim order dated 10th June 2011.

In its judgment dated 13th February 2012, the Federal Administrative Court approved the appeal in part and found that the court of lower instance unlawfully informed advertisers prior to its decision relating to the outcome of the procedure coming into effect. Furthermore, it rejected the appeal and ordered the appellant to take all of the measures established in paragraph 3 of the lower court order within 30 days of the judgment entering into effect.

D.

SWITCH is submitting an appeal to the Federal Supreme Court requesting the disputed judgment be annulled insofar as it rejects the appeal against paragraph 3 of the order and requested the measures established therein to be taken within 30 days of the judgment entering into effect. Paragraph 3 of the order dated 11th April 2011 should be removed.

OFCOM requests the appeal be rejected. The Federal Administrative Court waives its demand for a hearing. SWITCH adheres to the requests submitted in its supplementary statement.

Considerations:

1.

1.1 An appeal in matters of public law to the Federal Supreme Court is permitted (art. 82 (a), art. 86 para. 1 (a) and art. 90 BGG [Swiss Federal Supreme Court Act]) against the final award of the Federal Administrative Court in a matter of public law. There shall be no ground for exclusion (art. 83 BGG).

1.2 The only matter still to be contested before the Federal Supreme Court is paragraph 3 of OFCOM's order upheld by the Federal Administrative Court, i.e. the ban on switchplus ag profiting from promotionally effective services which are not provided to other wholesale partners. The obligations set out in paragraphs 1, 2 and 4 of the order shall no longer be contested.

2.

2.1 In line with art. 28 para. 1 of the Swiss Telecommunications Act of 30th April 1997 (FMG; SR 784.10), OFCOM manages addressing resources in accordance with international standards. It takes appropriate measures to ensure a sufficient supply of numbering elements and communication parameters. It may allow the holders of basic resources to assign subordinate addressing resources. In line with paragraph 2, OFCOM may, in special cases, delegate its responsibility for the management and assignment of certain addressing resources to third parties. The Federal Council fixes the detailed rules for implementation, in particular the arrangements for supervision by OFCOM. These rules are set out in the Ordinance on Addressing Resources in the Telecommunications Sector dated 6th October 1997 (AEFV; SR 784.104). Art. 13 ff. AEFV governs the delegation of management of addressing resources to third parties. In accordance with art. 14a para.1 AEFV, OFCOM designates a register operator and concludes an administrative contract therewith.

This forms the basis of the administrative contract currently in force dated 31st January 2007 (see “A” above, hereinafter referred to as delegation contract), under which OFCOM delegated the management and allocation of “.ch” domain names to SWITCH after it had already carried out the work prior to applicable statutory regulations entering into force (UELI BURI, *Domain-Namen* [“Domain Names”], in: Roland von Büren/Lucas David [Hrsg.], *Schweizerisches Immaterialgüter- und Wettbewerbsrecht* [“Swiss Intellectual Property and Competition Law”], Bd. 3/2, 2005, p. 337 ff., 344 f., 350 f.; GALLUS JOLLER, *Schweiz (.ch)* [“Switzerland 9.ch”], in: Torsten Bettinger [Hrsg.], *Handbuch des Domainrechts* [“Handbook of Domain Law”], 2008, p. 927 ff., 935 f.).

2.2 On this basis of this delegation contract, SWITCH provides a register operator with all of the tasks set out in AEFV (art. 20 delegation contract). More specifically, it allocates domain names to individual users in a transparent and non-discriminatory manner under private law (art. 13e para. 1 and art. 14c para. 1 AEFV; art. 9 delegation contract; see BGE 131 II 162 E. 2.2). SWITCH is entitled to develop additional business activities, upon which it must disclose all associated costs appropriately and in a separate bill of charges (art. 37 delegation contract). It must then provide a wholesale offer to all persons wishing to manage and allocate domain names to third parties and who fulfil the necessary conditions (art. 14c *quater* para. 1 AEFV; art. 17 delegation contract). These wholesale partners then offer users domain name registration services alongside other mail and hosting services. The subsidiary owned by SWITCH, switchplus ag, also has the status of a wholesale partner and operates in competition with the other wholesale partners. The activities of the appellant as a register operator are subject to the supervision of OFCOM (art. 58 ff. FMG; art. 13i ff. AEFV).

2.3 As the court of lower instance has appropriately considered, the appellant performs a public function as a register operator for the “.ch” domain and is, in this respect, bound to fundamental rights (art. 35 para. 2 BV [Federal Constitution]); more specifically, it must treat all of its wholesale partners who are in competition with each other, equally (art. 27 and art. 94 para. 1 and 4 BV; equal treatment of direct competitors), including its subsidiary company. The appellant expressly acknowledges this, which is why it is no longer contesting the obligations stipulated in paragraphs 1, 2 and 4 of OFCOM’s order.

2.4 What is in dispute is the obligation imposed on the appellant to ensure that its subsidiary company switchplus ag does not profit from any promotionally effective services provided by SWITCH which are not available to other wholesale partners.

According to conclusions made by the court of lower instance, this mainly concerns the fact that the appellant has placed a prominent advertising banner on its website www.switch.ch which takes users directly to the website www.switchplus.ch while no reference is made to other wholesale suppliers. The court of lower instance has considered that, by using a word mark which is identical to the name of its parent company and by placing a link to the homepage of the subsidiary on www.switch.ch, switchplus ag is profiting from the appellant's reputation and/or brand awareness. As a result, the subsidiary company is receiving preferential treatment compared with other wholesale partners in the management and allocation of domain names. With this unequal treatment of direct competitors, the appellant is distorting competition and regulations in its delegated public area and therefore breaching art. 27 and 94 para. 1 and 4 in connection with art. 35 para. 2 BV, which is why the supervisory measure has rightly been ordered.

2.5 The appellant accuses the court of lower instance of not sufficiently distinguishing between the wholesale sector and the retail sector. While performing a public function for consumers and being required to adhere to the principle of equal treatment, it has no public function in the retail sector in relation to the wholesale partners and instead is in competition. The conditions for applying equal treatment of competitors are not present. It may also in this context perform additional services outside of its public function, which has been expressly assured in the administrative contract held with OFCOM and which has been considered a *conditio sine qua non* for the completion of the contract. The appellant is also free to perform these activities via a subsidiary company and to support it by way of advertisements as it may also advertise itself in the retail sector. The disputable obligation represents an unlawful encroachment on economic freedom.

2.6 OFCOM states that the appellant's contested advertising efforts would create a competitive advantage for its subsidiary company compared with other retailers on the market. Switchplus ag is being advertised with the appellant's brand awareness.

2.7 The legal regulation represented may consider the management and allocation of “.ch” domain names a public function, however intends to accomplish this in a competitive environment with several suppliers, namely the appellant on the one hand and wholesale suppliers as the appellant’s wholesale partners on the other (art. 14c *quater* AEFV). All suppliers, both the appellant and its wholesale partners, can also offer additional services, in particular those related to the internet. These additional services are carried out privately and are not subject to the supervision of OFCOM. Thus the appellant has a dual role towards its wholesale partners as prescribed by law: on the one hand it performs a public function as a register operator and must in this respect treat everyone equally. On the other hand, in relation to consumers it is a competitor of its wholesale partners and is in competition with them, both with respect to the public function of allocating and managing domain names as well as the additional services provided privately (e.g. web and mail hosting). The latter are not subject to the supervision of OFCOM.

2.8 If the appellant allows its subsidiary company to use the word “switch” in its name and refers to its subsidiary on its website, it is plausible that a competitive advantage is being created as a result of the appellant’s brand awareness. However, this does not mean that this advantage is unlawful:

2.8.1 Insofar as the appellant is performing a public function towards wholesale partners, it cannot refer to economic freedom. It is instead bound to fundamental rights and cannot give its subsidiary company preferential treatment over the other wholesale partners. With respect to its activities carried out in a competitive environment, however, the appellant is not bound to fundamental rights and is instead subject to the same regulations as its competitors; like any other person operating privately, it can refer to economic freedom (art. 27 BV) and advertise its activities (judgment 2C_559/2011 of 20th January 2012 E. 4.2, with further references, sic! 6/2012 p. 399), just as its wholesale partners may also advertise. Likewise, it is free to set up a subsidiary company which performs these competitive activities. This subsidiary will be granted a status equivalent to the other wholesale partners.

Like them, it can also advertise its activities. In a competitive environment, the appellant's competitors have no basic right to equal treatment (BGE 129 III 35 E. 5.2; ELIANE SCHLATTER, *Grundrechtsgeltung beim wirtschaftlichen Staatshandeln* ["The Application of Basic Rights in Economic Government Action"], 2009, p. 156 f., 174 f.). Any distortions of competition which could result from the appellant performing a public function must be tackled by separating business areas and matters of competition (art. 2 para. 1 and art. 3 para. 1 KG; BGE 137 II 199 E. 3.1, judgment 2C_485/2010 E. 6.3 and 9, intended for publication; art. 2 ff. UWG [Swiss Act against Unfair Competition]).

2.8.2 Advertising is aimed at consumers and therefore does not concern the relationship of the appellant to its wholesale partners requiring equal treatment but instead the retail sector which is subject to rules on competition. Therefore there is no legal reason to justify prohibiting the appellant from advertising the retail activities of its subsidiary company. The advantage of advertising for the subsidiary is no greater than it would be for the applicant itself if it advertised its own retail activities; also in this instance the brand awareness gained by the appellant from its public activities would be promotionally effective and it would be even more difficult for consumers to distinguish between the public function of the appellant and its private advertising activities. However, these difficulties are conditioned by the legal structure and the associated dual role of the appellant and so are therefore inevitably present. With the reasoning of the courts, the appellant itself would consequently also be prohibited from advertising its own retail activities. This means the appellant would be in a less favourable position in competition matters than the other wholesale partners that advertise without restrictions in the retail sector and that are allowed to establish subsidiary companies and advertise for them. However, if the appellant has established a subsidiary company for this purpose – instead of performing the relevant retail activities itself – it would be better for successfully separating both areas of activity to make them recognisable to consumers. Insofar as retail activities do not include the allocation of domain names but instead the provision of other services, the behaviour of both the appellant and its subsidiary will not be subject to the supervision of OFCOM.

Any possible abuse of a dominant market position would be settled with competition law, and in doing so both the competitors and consumer protection organisations have opportunities for legal action and/or participation (art. 9 f. UWG; art. 43 KG [Swiss Cartel Act]).

3.

The appeal therefore proves to be justified. No costs shall be charged (art. 66 para. 4 BGG). With no legal representation, the appellant shall not be entitled to claim compensation.

The Federal Supreme Court therefore acknowledges:

1.

The appeal is approved. The judgment of the Federal Administrative Court dated 13th February 2012 will be annulled insofar as it upholds paragraph 3 of OFCOM's order dated 11th April 2011.

2.

No court fees shall be charged and no compensation shall be granted.

3.

This judgment shall be communicated to the parties to the procedure and the Federal Administrative Court, First Division, in writing.

Lausanne, 14th August 2012

On behalf of the Second Public Law Division of the Swiss Federal Supreme Court

President:
(signature)

Zünd

Clerk:
(signature)

Klopfenstein

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Court of Switzerland**

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Tel. 021 318 91 49

Judgment of / File no.

14.08.12 / 2C_271/2012

represented by

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versus

OFCOM

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Account **01-59202-1**
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8021 Zürich

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Receiving office

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