



Telecommunication Newsletter Switzerland

Painful Unbundling Experience: Is Ex Ante Regulation or Network Separation the Solution?

Local Loop Unbundling was introduced in April last year through a revision of the Swiss Telecommunication Act after lengthy debates in the parliamentary commissions and strong opposition from Swisscom, the Swiss monopolist.

Based upon Swisscom's interference and successful lobbying, the compromise found in the Swiss Parliament restricted bit stream access to a period of 4 years and unbundling was restricted to the copper twin pair. In addition, despite efforts from various sides, no sufficient support could be gathered for ex ante regulation which is the standard in the European Union.

The painful experience with the local loop unbundling has revitalized the debate on the separation of networks and ex ante regulation in Switzerland.

Under the applicable ex post regulation system in Switzerland, the parties must first attempt to negotiate a commercial interconnection or unbundling agreement. Only if and when the parties cannot come to an agreement, and after a negotiation period of 3 months, may the parties challenge the regulator who will determine the charges and other contractual terms. It must be noted that the regulator does not determine the services in advance, where an operator is deemed to have a dominant position in the market. This will be determined only in connection with an actual proceeding.

Given the complexity, the length and the costs involved in interconnection and unbundling proceedings, the system of ex post regulation does not invite new entrants to engage in lengthy and costly proceedings. The fact, however, that in the recent proceedings Swisscom has suffered many setbacks and given the contractual clause imposed upon the incumbent operator that it will have to offer lower prices also to the parties who did not engage in interconnection proceedings, Swisscom's appetite to drag on such proceedings has lessened.

The uncertainty involved in interconnection proceedings and its lack of predictability seem now to run also contrary to Swisscom's interests. In this fast moving and ever changing environment, predictability has become more and more important. Whereas the new market entrants seek protection for their investments, Swisscom commences to realize that predictability may act in its favor and, last but not least, may substantially lower its legal expenses.

However, given the Swiss legislative process, the chances that ex ante regulation or a network separation may be implemented anytime soon are remote at best. The latest revision of the Swiss Telecommunication Act with the introduction of the unbundling obligation lasted for over 4 years.

A network separation to be imposed by law will certainly face strong criticism not only from Swisscom, but most likely also from the mobile operators and cable operators who may fear that such regulation could apply to them, too. Further, the lack of experience with the long-term impact of network separation on competition on the infrastructure is not helpful to convince the Parliament to move into this direction, at least for as long as Swisscom opposes such network separation. In light of this, ex ante regulation would be the preferred route and may, in a first step, find a sufficient majority in the parliament.

Although the debate has been launched, it is unlikely that such changes will be introduced anytime soon to the Swiss Telecommunication Act.

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