

# SWITZERLAND

## Has regulation failed?

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Network separation has become a hot topic in Switzerland. The discussion on network separation has been launched in Switzerland by Christoph Brand, CEO of Sunrise, following the developments in the European Union, where the Commission seems to promote network separation.

In order to better understand the background of the discussions on network separation in Switzerland, it is necessary to first understand the Swiss regulatory regime, which differs in many important aspects from the regulatory environment in the European Union. The most important distinction is that the Swiss regulatory environment does not provide for an ex ante regulation. Although ex ante regulation was being discussed in connection with the recent revision of the Swiss Telecommunication Act, ex ante did not find sufficient support in the Swiss Parliament and, therefore, the ex post regime was maintained.

Based upon this peculiarity, the Swiss Telecommunication Act foresees that the parties must first attempt to negotiate the terms and conditions of an access agreement. Only if and when no agreement can be found, can the parties petition the regulator to determine the respective terms and conditions (Article 11a, paragraph 1 TCA). Since there are likewise no predefined services, where the former monopolist provider is deemed to have a dominant position, the former monopolist can challenge the obligation to provide the services at cost-oriented prices by arguing that it has no dominant position for the services requested. It is then up to the regulator to obtain an opinion from the Competition Commission (Article 11a, paragraph 1 TCA) and to determine whether or not the former monopolist has a dominant position for the services requested and is required to offer the services at cost-oriented prices (Article 11a, paragraph 1 TCA).

Swisscom, the former Swiss monopolist, has just recently challenged to have a dominant position in the bitstream access. The Communication Commission, based upon the opinion from the Competition Commission, however, found Swisscom to have a dominant position and ordered Swisscom to offer bitstream access at cost-oriented prices.

For anyone who has been trying to negotiate an arms-length agreement with a dominant carrier, this Swiss solution must appear awkward, if not to say naive.

Swisscom, the former monopolist provider of telecommunication services, has no incentive whatsoever to enter into arms length negotiations and in the past has consistently refused to discuss prices and substantial deviations from their standard offered terms. Moreover, Swisscom has engaged an army of lawyers who expertly used the procedural remedies to delay interconnection proceedings by challenging almost any decision of the regulator in court. At the beginning of the liberalisation of the telecommunication market, alternative providers have been reluctant in bringing time consuming and costly proceedings against Swisscom. Recently, the number of access proceedings against Swisscom has increased sharply. After Swisscom suffered a series of defeats in court, and was required by the regulator to offer lower prices also to those parties who did not participate in the interconnection proceedings filed with the regulator, it appears that the flood of proceedings brought by the alternative providers commences to work to the detriment of Swisscom.

It does, therefore, not come as a surprise that given this regulatory environment, network separation is seen as an effective way out of this time consuming, costly and inefficient regulatory regime. It is believed that network separation may create a level playing field amongst the participants in the market and add transparency to the costs and other terms of the services provided by the incumbent.

So far, it is clear that the current legal framework in Switzerland does not offer a sufficient legal basis for the regulator to mandate network separation. Given the fact that the latest revision of the Swiss Telecommunication Act only entered into force on 1 April 2007, there is equally no hope that network separation will be introduced any time soon. It must be remembered that Swisscom has in the past already successfully challenged its obligation to unbundle the last mile for lack of a clear legal basis, which then led to the more than three-year legislative process for the revision of the Swiss Telecommunication Act in order to introduce the unbundling obligation.

In light of the legislative process in Switzerland, Swisscom's weakening resistance for ex ante regulation appears to be rather a political move in an attempt to maintain the sympathy of the representatives in Parliament than a true concession. Should network

separation become an issue, ex ante regulation would seem to be the lesser of the two evils. When discussing network separation, it must also be decided whether the separation is to apply to the next generation networks as well and whether this is to include the networks of the cable providers. It is one of the peculiarities of Switzerland that almost 80 per cent of the households can be reached by cable operators. Swisscom will certainly use this to argue that there is already an effective competition and, therefore, there is no need for a new regulation. The current law (see Article 3 lit d bis and Article, 11, paragraph 1 lit a TCA) explicitly restricts unbundling to the copper pair, although it was initially planned to define access technology neutral, this attempt failed, since no sufficient majority could be found in parliament. The technology neutral unbundling faced strong opposition not only from Swisscom, but also from the cable and mobile operators who feared that a technology neutral definition may be used against them to open up their own last mile. It was also feared that opening up the access beyond the copper pair may create a disincentive to future investments in the next generation network. However, given the fact that the existing copper lines are being gradually replaced by fibre to the home, the wisdom of a network separation restricted to the copper pair is – at least in the mid to long-term – a questionable one.

The Swiss Telecommunication Act has so far been based on the belief that not only service but also infrastructure competition must be fostered. Consequently, the law restricts bitstream access at cost-oriented prices to a period of four years. The key questions to be answered, however, are whether or not Switzerland offers a large enough market to duplicate costly infrastructure and whether such allocation of financial resources would lead to increased competition for the benefit of the consumers or whether it wouldn't be wiser to invest in service competition rather than duplicating costly infrastructure.

One might be tempted to argue that the Swiss market is indeed large enough to finance infrastructure competition, because there exists already an almost Swiss-wide separate network from the cable operators. However, similar to Swisscom's, the cable operator's networks were also deployed under a monopolistic

regulatory framework. Prior to the liberalisation of the telecommunications market, the communities – having the supreme power over the use of the public ground decided who should be granted a license to build and operate a cable network on community ground. Within the communities, there was no competition from different cable operators.

The lack of reliable empirical data makes it difficult to assess the impact of network separation on investments in infrastructure and service competition in the mid to long-term. However, we do not believe that network separation should be killed because of the lack of such empirical data. Network separation appears to be an efficient and obviously workable solution (as has been proven by BT's Openreach) to remedy certain deficiencies of the existing regulatory framework and to improve transparency for all access services. Whereas in the larger cities alternative providers as well as public utilities have already built and continue to build their own alternative broadband infrastructure for key customers, no significant infrastructure competition has developed and will develop in the more rural regions. Network separation will, however, most certainly increase competition on the service level in the more rural regions, where it does not make economical sense to duplicate the broadband infrastructure.

### Conclusion

The current discussion on network separation in Switzerland is a strong indication that regulation has failed to provide efficient results in the interest of the consumers and alternative providers. Network separation in Switzerland requires an amendment of the Swiss Telecommunication Act and it cannot be expected that such change be introduced any time soon. Network separation can only be one element in a regulatory environment which will have to assure non-discriminatory and cost-oriented access on all levels. State intervention may not be perfect, but neither is competition in an environment, where there is such an imbalance of the negotiating and financial power between the party seeking access and the former monopolist.