

## **Unbundling the last mile: current status and prospects**

This document presents an overview of recent developments in the unbundling of the last mile in Switzerland, with particular reference to the ongoing revision of the Telecommunications Act.

### **1. Introduction – explanation of terms**

#### **a) Unbundling the Local Loop**

Unbundling the last mile, or unbundling the Local Loop, which means the same thing, is understood to comprise the following three forms of unbundling:

- high-speed Bitstream Access
- joint access to the Local Loop (Shared Line Access)
- completely unbundled access to the Local Loop (Full Access).

#### **b) Leased lines**

The subordination of leased lines to the interconnection regime (duty to connect) is directly linked to the unbundling of the last mile. This is of particular relevance for the local connection of individual locations in corporate networks. Swisscom also has a dominant position with respect to local leased lines of this type. Experience has shown that it is often not possible for the alternative service providers to obtain leased lines from Swisscom, for the purpose of the local connection of locations, subject to reasonable terms and conditions.

#### **c) Further aspects**

Other aspects that often arise in connection with the unbundling of the last mile are:

- reselling the Local Loop (Access Reselling) and
- access to cable channels.

#### **d) General precondition: market-dominant position**

The general condition that must exist in order to invoke a duty to connect a third party (interconnection), and in particular to unbundle, is that the service provider concerned must enjoy a market-dominant position. All the interested parties whose positions are set out below are in agreement on this point.

### **2. Revision of the Telecommunications Act (FMG) – current status and prospects**

#### **a) Debate in plenary session of National Council (6 and 7.10.2004)**

The decisions reached by the National Council in autumn 2004 may be summarised as follows:

- Non-technology-specific regulation of unbundling, in other words applicable to all types of networks and technologies: copper, fibre optic, mobile telephony, CATV, WLAN etc.
- Completely unbundled access (Full Access) to be granted for the copper cable of the local network (last mile), leased lines and cable ducts.
- Bitstream access restricted to two years (for a maximum of six years after the revised FMG comes into force).
- Duty to unbundle specifically not to apply to mobile phone and fibre optic networks.

**b) Current status – deliberation by Council of States Committee (14.4.2005)**

The Committee on Transport and Telecommunications of the Council of States (CTT CS) deliberated on the revision of the FMG for the first time in April 2005:

- Like the National Council, the CTT-CS also wants to compel Swisscom to unbundle the Local Loop.
- Where bitstream access is concerned, the CTT-CS goes further than the National Council, however, and does not want to restrict access to two years. But after five years the Federal Council would check whether the alternative service providers are also investing in the infrastructure. If this is not the case, access at regulated prices would be withdrawn.
- The CTT-CS also wants to introduce a competence clause empowering the Federal Council to determine other forms of unbundled access or to discard existing ones, depending on technical developments.
- The CTT-CS has instructed the Federal Office for Communications (BAKOM) to examine whether or not Swisscom would be put at risk by these decision.

**c) Next steps**

- Further deliberations by the CTT-CS on 12.5.2005.
- Debate in plenary session of the Council of States probable in summer session 2005 (30.5. to 17.6.2005).

### **3. Arguments and discussion to date**

The unbundling of the last mile has been a controversial political topic for many years. The following stages of the debate can be singled out:

**a) Theiler parliamentary initiative (December 2000)**

- On 14.12.2000 the National Council failed to approve to the Theiler initiative, which demanded the unbundling of the last mile.

**b) Federal Court’s decision in Commcare case (October 2001)**

- In its decision dated 3.10.2001, the Federal Court found that at that time, at least, there was no legal basis for any unbundling of the Local Loop.

**c) Ordinance governing Telecommunications Services (or FDV) of the Federal Council (April 2003)**

- By way of reaction to the Commcare decision, the Federal Council supplemented the explicit regulation of the unbundling of the Local Loop and subordination of leased lines to the interconnection regime in the FDV. The relevant provisions have been in force since 1.4.2003.

**d) Draft revision of FMG by Federal Council/BAKOM dated 12.11.2003**

- In parallel with the FDV supplementation, unbundling was also considered within the context of the revision of the FMG.
- The following are envisaged: high-speed Bitstream Access, Shared Line Access, Full Access and leased lines.
- Shared Line Access and Full Access are restricted to copper cable.
- Bitstream Access is defined in a technologically neutral way, and could thus also apply to fibre optics, as could the regulation concerning leased lines.

**e) CTT-NC deliberates FMG revision for first time (spring 2004)**

- 9.2.2004: Application for law not to be discussed submitted to plenary session of the National Council, in particular on grounds of the unbundling proposal of the Federal Council/BAKOM.
- 18.3.2004: Decision by National Council to proceed with discussion of law and instruction to CTT-NC Committee to undertake detailed deliberation of draft revision of FMG.
- Summer 2004: CTT-NC deliberates FMG.

**f) FMG revision debated by National Council (autumn 2005)**

- 6. and 7.10.2004: National Council supports access regulation in form of complete unbundling (Full Access) for copper cable in the local network, leased lines and cable ducts, but restricts high-speed bitstream access to two years for a maximum period of six years after the revised FMG has come into force.

**g) CTT-CS deliberates FMG revision for first time (spring 2005)**

- 14.4.2005: The Committee goes further than the National Council and wants to grant Bitstream Access, too, without any fixed-term restrictions.

**4. Position of telecommunications providers and associations  
(Status September 2004)**

**a) Swisscom**

- Had fundamentally rejected unbundling and subordination of leased lines to interconnection regime up to this point.
- After National Council decision to proceed with discussion of FMG revision (see Section 3e above), Swisscom CEO Jens Alder suddenly proposed a compromise in a

letter to members of parliament dated 24.8.2004: unbundling of the Local Loop on copper cable in the shape of complete unbundling (Full Access).

- In his letter, Jens Alder continued to reject all other forms of unbundling, particularly Bitstream Access, Access Reselling and especially the inclusion of mobile telephony.

**b) Sunrise**

- Rejected unbundling in areas other than copper cable, particularly for mobile telephony, fibre optics, WLAN etc., referring to the legal situation in the EU.
- Sunrise argues that unbundling is justified for copper cable because it has been built up using the copper-based local network of the erstwhile PTT as a state monopoly. The new networks such as fibre optics, WLAN and mobile telephony, on the other hand, have only been established subject to liberalised market conditions. If unbundling were also granted to networks like these, it would result in insufficient investment in new networks. The creators of such networks would also have to make these available to their competitors, meaning that the latter could benefit from the advantages offered by them without having to take the risks connected with investment in the networks.
- Unlike Swisscom, Sunrise would also like to see high-speed Bitstream Access, the opportunity of Access Reselling, and the subordination of leased lines to the interconnection regime.

**c) Cablecom**

- No objection to the CTT-NC stance.
- Not being market-dominant, Cablecom would be under no obligation to unbundle.
- In the case of CATV, moreover, unbundling is said to be technically more complex than in the telephone network: only entire estates could be unbundled and not individual homes.

**d) economiesuisse**

- Is of the view that unbundling should be restricted to copper cable, as opposed to the CTT-NC view.
- Taking its previously expressed views into account, it can therefore be assumed that economiesuisse agrees with Sunrise's position, favouring not only Full Access but also the other forms of unbundling and the subordination of leased lines to the interconnection regime.

**e) Swisscable**

- No objection to the CTT-NC stance and thus the associated possibility of unbundling CATV as well.

---

Dr. Widmer & Partners, attorneys-at-law, Berne / 25.4.2005

