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USING MARKET STUDIES TO TACKLE EMERGING COMPETITION ISSUES – Contribution from Costa Rica

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Using market studies to tackle emerging competition issues

- Contribution from Costa Rica[*] -

1. Background

1. Market studies are a tool for promoting competition. They are used to carry out in-depth assessments of market conditions when there is reason to believe that a market, or even a sector[1], is not working well for consumers, though no evidence to assume that the cause is a violation of competition law may be found.

2. In the case of Costa Rican legislation, the authority to carry out market studies is regulated under Article 23, Title II: "Promotion and Advocacy of Competition" of the Law on Strengthening Costa Rica's Competition Authorities (hereinafter Law 9736).

3. Said article empowers the Superintendency of Telecommunications (SUTEL), as the sectoral competition authority in telecommunications, to **carry out studies to better understand the operation of markets in which it exercises its jurisdiction in order to detect distortions or barriers to competition and free concurrence and to promote their removal.**

4. The SUTEL Market Study Guide[2] states that, upon defining the market study to be performed, the Competition Authority may summon interested economic agents to help design the recommendations and evaluate the expected costs and benefits of their implementation.

5. Recommendations issued by SUTEL through market studies do not have binding effects. However, any public entities deviating from these recommendations must inform SUTEL about the reasons for not implementing them within a maximum of 30 calendar days. The report must be signed by the highest authority with powers to implement recommendations of the public entity issuing it.

[*] This document was prepared by the Superintendency of Telecommunications (SUTEL).

[1] The choice whether to assess a specific market only or an entire sector depends on the type of concern which led to the decision to conduct the market study. It is more complex to assess a sector, as the object of analysis is much broader. However, in some cases a number of interrelated markets may apparently not be performing well, so the analysis must consider these interrelations and cover the entire sector.

[2] SUTEL's Market Study Guide was issued in 2017 with the purpose of helping stakeholders, i.e. companies, trade associations, consumers, consumer organizations and public entities understand market studies and their purposes, how they are undertaken and what their outcomes may be.

Available at the following link: https://www.sutel.go.cr/sites/default/files/guia_de_estdios_de_mercado_ei_vf.pdf.

2. SUTEL priorities in market studies

6. SUTEL may consider any information gathered in the course of its work promoting competition or enforcing the law, through complaints from companies, consumers, trade associations and other stakeholder groups, or through formal requests from designated bodies, to select and prioritize market studies. In particular, the following elements could be indications that a market is not working properly:

- Seemingly high prices compared to other geographic markets.
- Shortage of supply.
- No entry or very limited entry of new players in the market.
- An apparent low quality of goods or services.
- A high level of consumer dissatisfaction.
- Considerable public concern regarding market operation.
- Low consumer mobility rates.

7. Additionally, SUTEL has defined the following prioritization criteria to select potential market study topics:

1. The impact of the study on consumers.
2. Evidence of unusually low market development.
3. The impact of the study on rural and low-income areas with low access to telecommunications services.

3. Market Study on Access to Shared Infrastructure in Residential Condominiums

8. As stated above, market studies assess how markets work for consumers. They examine a market as a whole and analyze the regulatory framework, its structure and the behavior of market participants, including consumers, companies, and public bodies. Through this analysis, studies determine if a market is not working properly, as well as the causes and possible solutions to the problem.

9. The purpose of this tool is to promote competition by helping markets work better, since better performance brings greater competition, thus benefiting consumers with better prices, quality, variety and innovation, and increasing productivity and economic growth.

10. This is of great relevance when the first signs of competition problems arise in a market.

11. The context of the first market study undertaken by SUTEL involves telecommunications operators with limited possibilities of accessing and marketing services in some residential condominium projects. Since 2015, SUTEL began receiving various end-user complaints and reports on these types of problems, which prompted the need for a general assessment on access to telecommunications networks in this type of residential buildings. There were indications that a practice which could be harmful to competition was being applied in such buildings: real estate developers signed exclusive contracts with certain operators, thus preventing other providers from accessing the internal telecommunications networks.

12. SUTEL considered it necessary to verify whether such barriers were indeed present in the market in a generalized manner, limiting the entry of certain operators to a market segment.

13. Therefore, the objective of this study was to determine the incidence of barriers to entry and preventively issue a series of recommendations to favor competition among telecommunications service providers in these types of buildings.

14. The main objective of the "Market Study on Access to Shared Infrastructure in Residential Condominiums"[3] was to determine whether or not there were barriers to entry for telecommunications service providers and operators in the internal telecommunications networks of horizontal and vertical condominiums, apartment buildings and closed residential complexes in the central planning region.

15. Evidence of problems in this market segment stemmed from complaints filed with SUTEL by end users concerning potentially unjustified restriction to the entry of telecommunications operators to certain types of residential buildings. This could have been hindering the free choice of consumers.

16. One of the main entry barriers present through denial of access was the potential existence of exclusive agreements between developers or builders of such housing projects and a certain operator: in exchange for installing the condominium's internal networks, the developer or constructor would subsequently restrict access of other providers to the housing project, thus limiting competition and guaranteeing a captive market of users.

3.1. Description of the Methodology Used

17. The methodology used by SUTEL for this study was based on the compilation of quantitative and qualitative information in order to ascertain the validity of the concerns that gave rise to the study, understand the causes of the problem, and identify potential solutions. The following sources of information were used in the study:

3.1.1. End-user survey:

18. In 2018, specific questions on the availability of telecommunications services were included in a national survey to end users living in horizontal and vertical condominiums, apartment buildings and closed residential complexes in the cantons of interest for the market study in question[4]. This survey was conducted for fixed telephony, fixed internet and subscription television services.

19. The survey included specific questions about the possibility of choosing a telecommunications operator to provide service and users' perception of the effect of not being able to choose a telecommunications operator to provide the service. There were also questions related to the geographic location or place of residence to pinpoint the most affected areas.

[3] Available at the following link: https://www.sutel.go.cr/sites/default/files/estudio_mercado_acceso_de_telecomnunicaciones_a_condominios_y_otros_0.pdf.

[4] The information was gathered between May 16 and July 30, 2018, through telephone interviews with people over 18 years of age. The distribution of the sample of the total number of interviews is proportional to the universe of users of the evaluated service; the population of interest for the study was extracted from it.

20. The following findings were drawn from the results:

- Subscription television service: 18% of survey respondents stated that they do not have the possibility of choosing a subscription television service provider where they live. Of them, 56% reported that having an exclusive provider was negative, stating the following reasons: they feel obligated to acquire a package they do not want; when comparing with other options available in the market, they consider they are acquiring a service with inferior quality; they make higher payments.
- Fixed internet service: 13% of survey respondents reported they do not have the possibility of choosing the fixed internet access service provider where they live. Of them, 46% stated that not being able to choose a supplier affected them negatively.
- Fixed telephony service: 11% of survey respondents reported they do not have the possibility of choosing the fixed telephony service provider where they live. Of them, 33% stated that not being able to choose a supplier affected them negatively.

3.1.2. Condominium poll

21. First, we contacted the Federated Association of Engineers and Architects (CFIA), the organization responsible for the approval of construction plans for all building constructions in the country. The CFIA has a wide-ranging database, which provided a list of 1928 projects that requested a construction permit between 2006 and 2016.

22. Based on this information, SUTEL officials made visits to the cantons included in the study, collecting information on the households that could be included in the poll. We produced a database of horizontal and vertical condominiums, apartment buildings and closed residential complexes in the cantons of interest for the study, including the name and address of the project and contact information.

23. Between November 2017 and May 2018, SUTEL officials carried out extensive field work, inspecting 46 properties of interest for the study, distributed in the central planning region.

24. Besides meetings with people who were aware of the property’s operation, their work included conducting the survey *“Market Study on Access to Shared Infrastructure in Residential Condominiums”* and creating photographic records.

25. In the properties visited, most of the time the condominium administration owns the telecommunications infrastructure: 59%. In 30% of the properties, the infrastructure owner is a telecommunications operator; and in 11% of the properties, even though the infrastructure “owner” is the condominium, the operator owns it by virtue of assignment or donation.

3.1.3. Consultation with telecommunications service operators

26. Qualitative and quantitative information was collected among the telecommunications operators that provide services in the properties of interest. Initially, meetings were held with some companies, and later a request for information was sent.

27. The information provided by the operators was assessed in an aggregate manner. This survey had a response rate of 94%. Surveyed operators perceived that the properties relevant to the study exhibited situations that hindered or prevented their entry for constructive or aesthetic reasons, or by means of exclusive arrangements or assignments. In fact, 58% of the operators surveyed stated that they had been prevented from entering a property.

28. Regarding exclusivity contracts, 50% of the operators reported that they are aware of their existence, citing a series of specific condominiums where they have had problems to enter. It is worth noting that the operators who stated this consider that the issue of exclusivity in condominiums is the result of agreements with one specific company.

29. Regarding the perception of the operators on the impact of exclusive agreements in the properties of interest, 92% consider they may affect the level of competition.

30. Regarding the assignment or donation of internal infrastructure to support telecommunications networks in a property to a specific operator, 75% of the operators consulted think this affects the level of competition in the market, as the operator then considers that there is a contract for exclusive use, limiting use or applying tactics to avoid competition.

31. On the other hand, 83% of the operators consider that construction problems make it difficult to enter properties, and 75% of respondents have been prevented from entering on the grounds of aesthetic reasons.

32. When asked for a solution to the hindrance or impediment of entering certain buildings, operators tend to agree in the answer, although it is based on their own experience and perceptions: regulations or guidelines should be established for future constructions in order to guarantee the existence of multi-operator infrastructure in condominiums.

33. Another aspect pointed out by operators is the relevance of eliminating any existing exclusivity agreements or assignments. SUTEL is asked to issue an official statement on the importance of having telecommunications services openly provided by various operators.

3.2. Main Study Findings

34. Once the information was analyzed, the following access barriers were detected:

3.2.1. Nature of construction

35. Infrastructure to support telecommunications networks was designed or built with a reduced capacity; proper installation of network infrastructure is reduced, directly impacting possibilities of having a growing number of networks present. This is due to multiple factors, ranging from historical to financial and contractual, and eventually a lack of foresight or knowledge.

3.2.2. Aesthetic nature

36. Overhead wiring networks and wireless networks are primarily planned in terms of their role, not their capacity to harmonize with the landscape; they stand out in the surrounding environment more than underground channeled networks. The use of overhead wiring entails the presence of a greater number of cables, clamping pieces on poles, and passive and active equipment. All these elements are exposed in plain sight, which may affect the aesthetics of common areas in the property to some extent. Given this situation, it is not unusual for condominium administrators or homeowners' associations to limit the number of operators that can provide telecommunications services by deploying their networks in internal electricity poles, justifying their decision based on purely aesthetic criteria.

3.2.3. Bad deployment practices

37. Besides limitations in terms of infrastructure construction, some involve an incorrect deployment of telecommunications networks. This can affect both overhead and channeled networks and is not directly related to the supporting infrastructure, which may have been designed and built to allow the passage of several networks.

3.2.4. Saturation of infrastructure

38. Despite the absence of a ban on entry by administrators or homeowners' associations, there may be limitations for the deployment of new networks due to saturation of the available infrastructure. This happens when the only way for a new network to enter is by expanding the support infrastructure. This may not be feasible in all cases for new operators or condominiums themselves.

3.2.5. Exclusivity agreements

39. Exclusivity agreements were being materialized and enforced in many forms, from outright bans to charging new entrants. However, they always had the same purpose: to guarantee that a single operator/ service provider would be the only one fully authorized to provide services within the condominium under reasonable conditions, at least for a specified period of time.

40. It was also found that it is relatively frequent for this type of implicit or explicit arrangement to arise at the time of construction of a property: developers delegated the construction of the network and its support infrastructure to an operator/ service provider in exchange for a guarantee of sole exploitation of the condominium's internal demand.

41. This scenario negatively distorts the development of the sector, as it creates small "islands" where the benefits of competition among different service offerings cannot be enjoyed. End users are the most affected party; they are not able to exercise their right of choice and thus have less quality of life within these properties.

42. Barriers based on aesthetic criteria and resulting from poor deployment practices, exclusivity agreements and construction problems can be addressed through three strategic areas of action:

- Education
- Use of new regulatory standards[5].
- Enforcement of the competition regime.

43. The study evidenced that developers of construction projects, administrators and owners of condominiums lacked knowledge regarding competition and its benefits for consumers.

[5] Recently, different institutions issued a series of regulations to help solve part of the identified barriers in the future, in particular: Regulations on the Shared Use of Infrastructure for the Support of Public Telecommunications Networks, issued by the Regulatory Authority of Public Services (ARESEP), through Scope No. 270 of official Gazette No. 214 of November 13, 2017; Construction Regulations issued by the National Housing and Urban Planning Institute (INVU) through Scope No. 62 of official Gazette No. 54 of March 22, 2018; and Regulations for the Processing of Telecommunications Plans, issued by the Federated Association of Engineers and Architects (CFIA) through Scope No. 23 of official Gazette 19 of February 1, 2018.

44. Consumers themselves were also found to be unaware of their rights to freely choose and change service providers.

3.2.6. Market Study Recommendations

45. Based on the previous conclusions, and after an open public consultation process, the following recommendations were issued with the aim of reducing barriers to competition:

- Train condominium developers, builders and administrators on the subject of competition so they may avoid establishing or promoting the establishment of unjustified restrictions on the entry of telecommunications operators to this type of property.
- Inform users of telecommunications services that they have the right to freely choose and change operators, so that users may demand their rights, thus preventing the establishment of regulations or agreements at homeowners' meetings that restrict the entry of telecommunications operators to properties built under the condominium regime to the detriment of competition and the well-being of users.
- Determine the feasibility of preparing and publishing a Good Administrative Practices Guide aimed at managers of horizontal and vertical condominiums, apartment buildings and closed residential complexes[6].
- Initiate investigations to determine the potential violation of telecommunications legislation regarding the alleged existence of exclusivity agreements with certain telecommunications operators[7].

46. At this time, SUTEL is working on implementing and communicating these recommendations to stakeholders identified in the study.

[6] SUTEL is currently in the process of developing this Guide.

[7] SUTEL has several ongoing investigations, as well as an ongoing procedure.