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LATIN AMERICAN COMPETITION FORUM

Session II - Measuring Competition Advocacy's Impact in Latin America and the Caribbean

-- Contribution from Costa Rica --

23-24 September 2015, Montego Bay, Jamaica

The attached document from Costa Rica is circulated to the Latin American Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 23-24 September 2015 in Jamaica.

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Session II - Measuring Competition Advocacy's Impact in Latin America and the Caribbean

CASE STUDY OF A SECTORAL COMPETITION REGULATOR IN COSTA RICA

-- CONTRIBUTION FROM COSTA RICA --

1. Background

1. Competition authorities usually have powers that allow them to perform duties both in the fields of implementing competition law and in advocating competition. In Costa Rica, the national competition authority, Comisión para Promover la Competencia (COPOROCM), and the sectoral competition authority for the telecommunications sector, Superintendencia de Telecomunicaciones (SUTEL), are governed by competition laws that require them both to engage in advocacy, but those laws are not well developed in either case.

2. However, Articles 3(e) and 52(a) of the General Telecommunications Law¹ (LGT) clearly confer a mandate upon SUTEL to promote competition in the telecommunications market. Additionally, Article 52(b) of the LGT empowers SUTEL to analyse the degree of effective market competition. This implies that, despite the absence of any express reference to advocacy in the LGT, SUTEL is nonetheless able to exercise its competence in that regard using the powers conferred upon it under Article 52 of the LGT.

3. In so far as the exercise of these powers is concerned, it should be noted that SUTEL is a recently established competition authority; it was set up in 2009, and the first few years of its existence have focused chiefly on implementing competition law and the processes for authorising economic concentrations. The fact that concentrations must be dealt with immediately, especially where matters related to their authorisation are concerned, has prevented SUTEL from developing advocacy because of the commitment in time and resources it would entail.

¹ Chapter II of General Telecommunications Law No. 8642 establishes the System of Competition in the Telecommunications Sector.

4. However, since 2014, SUTEL has been enhancing its work as a sectoral competition authority. Accordingly, it is recruiting more staff to work exclusively on the system of competition in the telecommunications sector and is preparing a series of procedures to streamline its work to implement competition law and the processes for authorising concentrations.

5. In view of this, 2015 is a year of consolidation for SUTEL as a sectoral competition authority; it is a year in which the institution is beginning to take its first steps in tackling the issues involved in competition advocacy.

2. Initial approach to competition advocacy

6. The dual role played by SUTEL as regulator and competition authority in the telecommunications sector gives it a number of advantages in performing its competition duties: first, it has detailed knowledge of the telecommunications market; secondly, in its regulatory work, it employs various types of instruments that can also be used in its competition authority work; and thirdly, it is able to apply a share of the recommendations issued in a particular sector study itself.

7. The second of those advantages in particular is a key factor in addressing the question of competition advocacy because inevitably the toolkit for the economic analysis used in both types of market studies is similar, whether the studies are part of its regulatory or competition advocacy work.

8. That being the case, as part of its duties in 2015 SUTEL issued a methodological instrument, the “Methodology to analyse the degree of competition in telecommunications markets”, which as its name implies sets out a methodology to assist in determining the level of competition in a given market while also helping to identify the principal barriers to accessing that market and providing SUTEL with the opportunity to correct at least partially any shortcomings that impede further development of market competition.

9. The methodology was initially formulated to respond to regulatory aspects of SUTEL’s duties², but SUTEL very quickly realised that it could also be used in competition advocacy, and this led ultimately to its development for the purposes both of the study referred to in Article 50 of Law No. 8642 and of Article 52(b) of that law.

10. The instrument was issued under SUTEL Council Resolution RCS-082-2015 and is currently undergoing the process that will make it final. It is anticipated that the authorities will be able to implement it in early 2016.

11. The methodology is an initial effort by SUTEL and accordingly is based on a number of economic instruments and simple indicators that are individually calculated and are chiefly statistical in nature. In view of this, sophisticated econometric models and game theory are not incorporated in the instruments that will be applied.

² In conformity with Article 50 of Law No. 8642, the prices and tariffs for telecommunications are to be regulated by SUTEL until such time as a reasoned decision is issued that the conditions in the market are sufficient to ensure effective competition. By virtue of that legal obligation, in 2014 SUTEL began developing a methodology to enable it to assess the prevailing degree of competition within a given market. However, following a number of investigations, it became clear that the methodology it was trying to develop was suitable both for the purposes laid down in Article 50 of Law No. 8642 and for the purposes of Article 52(b) of that law which, as noted previously, confers upon SUTEL the opportunity to exercise competition advocacy powers.

12. There were two reasons for that choice; the first relates to availability of information: econometric models, especially dynamic models that include simultaneous equilibria, are highly demanding in terms of information, and SUTEL's initial attempt in 2012 demonstrated that gaining access to the data required to construct that type of model is no simple matter. Secondly, given that the methodology paper is the first of its kind, our preference was for a simpler toolkit that would be easy to explain and easily understood by the various market agents, while hopefully making it easier for SUTEL to communicate the outcomes, especially with regard to the implementation of recommendations and actions that are outside its direct competence.

13. It should also be noted that, although the proposed methodology includes neither sophisticated econometric models nor game theory, it is regarded as incorporating all aspects that are essential to the type of analysis required, in particular because it allows SUTEL to determine the existence or otherwise of price competition, barriers to entry and bottlenecks, and the effectiveness of *ex ante* legislation in ensuring the development of competition, among other issues.

14. Despite this, SUTEL has not ruled out the option of implementing more complex models in the medium term; however, the decision to do so will hinge on having the information required to construct them.

15. Note also that, although currently the toolkit does not include a stage for evaluating the impact of the study's outcomes and recommendations, the fact that SUTEL is planning to conduct studies of this type for a given sector at hitherto unspecified intervals ensures that it will be possible in subsequent studies to evaluate the real impact of the previous one, especially where the effective application of recommendations is concerned, whether those recommendations were able to be implemented by SUTEL or were to be implemented by other agents (other governmental bodies or market agents).

16. Accordingly, subsequent analyses of each market will allow an evaluation to be made of the impact of previous advocacy work, especially where the elimination of barriers to entry is concerned, such that if a study finds that there is a higher degree of competition as a result of the implementation by SUTEL of previous competition advocacy recommendations, that fact would be evidence of the advocacy's success which, in turn, would lend greater weight to the recommendations.

3. Collection of information

17. One key factor in conducting a market study involves the opportunity that the competition authority has to access the information base that will enable it to conduct the necessary economic analyses.

18. Here again, SUTEL's dual role as regulator and competition authority in the telecommunications sector gives it an advantage since it holds an extensive information base on the various markets in the telecommunications sector. This reduces the amount of information that must be obtained from agents in the market place in order to prepare any given study, thereby increasing the study's chances of success.

19. Similarly, SUTEL has the necessary powers both to require agents in the market to provide information pursuant to Article 75(a) of Law No. 7593 on the Public Services Regulatory Authority and to punish any agents who fail to supply information, pursuant to Articles 67 and 68 of the LGT.

20. This being so, if additional information is required over and above that already held by SUTEL to prepare a given market study, the powers to require that information to be provided are already in place.

4. OECD “Competition and Market Studies in Latin America” project

21. One factor which Costa Rica regards as essential to bear in mind when it implements competition advocacy in future, especially through SUTEL, relates to the OECD *Competition and Market Studies in Latin America* project launched in 2014. The group of countries studied as part of the project included Costa Rica, and as a result both SUTEL and COPROCOM will benefit in the short term.

22. The conclusions of the first stage of the study provided SUTEL with a clear vision not only of what a market study is but also of the areas it should cover and the need to make a number of legislative changes to strengthen powers of advocacy.

23. Additionally, the second stage of the project proposes that Costa Rica draws up a “Market Studies Guide” and supports legal reform to include express powers to conduct market studies.

24. This being so, we view the project as further encouragement to SUTEL to commence competition advocacy in 2016. One factor regarded as essential to that end is to establish contact with the Colombian Competition Authority³ which, with OECD support, will prepare a well-structured, effective market study. In our view, the Colombian experience could be of great assistance to Costa Rica, especially with regard to the collection of information, the management of the study, links with stakeholders in the process and notification of the study’s outcomes.

5. Future actions

25. In view of the above, SUTEL hopes to commence effective competition advocacy in 2016. Given SUTEL’s knowledge of the telecommunications sector, it has been decided that one of the markets that are candidates to kick-start the market studies is the fixed Internet service: the view is that its development has not been as dynamic as it should have been, and it is important, therefore, to determine why that is so.

6. Conclusion

26. Despite the lack of initial momentum behind advocacy during SUTEL’s initial years of operation, it is clear that advocacy is vital for a competition authority because it enables the authority to assess the level of competition in a given market as part of a general survey. This in turn enables it to identify the principal barriers and bottlenecks that are hampering the development of competition in that market. It also provides an opportunity to recommend general actions that various agents should take to eliminate or minimise any barriers identified, thereby helping to develop competition in the market in question.

27. By virtue of this, SUTEL has already begun to take the first steps required to start its competition advocacy work: currently, it has (i) an extensive information base on the various markets that comprise the telecommunications sector; (ii) a methodology that sets out the method for analysing the degree of competition in a given market; and (iii) the trained staff required to conduct market studies.

28. The expectation is that the first results of SUTEL’s competition advocacy work will be available in the short term.

³ Superintendencia de Industria y Comercio de Colombia.