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Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

-- Contributions from Costa Rica --

4-5 April 2017, Managua, Nicaragua

The attached document from Costa Rica (SUTEL) is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



15th Latin American and Caribbean Competition Forum
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Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

MERGER CONTROL AND THE TELECOMMUNICATIONS MARKET IN COSTA RICA

-- CONTRIBUTION FROM COSTA RICA (SUTEL) --

1. Overview

1. Although most mergers have no negative effects on market operations, the Costa Rican sectorial competition regime in the area of telecommunications focuses specifically on mergers between and among operators and/or providers, and the aim of an analysis of this nature should be to determine whether an operation produces adverse or harmful effects on competition.

2. The Superintendency of Telecommunications (SUTEL) has resolved 33 operations and, although each in itself represents a challenge due to its uniqueness, this contribution summarizes the crucial legal and economic aspects to consider when estimating the effects of a merger and, if they affect the market, evaluate the possibility of offsetting them with conditions or, otherwise, reject the operation.

2. Description of the Merger Control Regime in Telecommunications

3. Pursuant to the General Law of Telecommunications, Law 8642,¹ enacted in 2008, the operation of networks and the provision of telecommunications services is subject to a sectorial competition regime, where the Superintendency of Telecommunications (SUTEL) is the body in charge of regulating, enforcing, monitoring and controlling its legal system.²

4. Although the sectorial competition regime was established less than a decade ago, it was able to take advantage of the country's experiences both domestically as well as internationally, whereby regulations are built on basic principles, coherent with the enforcement of rules issued by the national

¹ Article 52.

² Law of the Public Services Regulatory Authority, Law 7593. Article 59.

authority, the Commission for the Promotion of Competition (*Comisión para Promover la Competencia - COPROCOM*).³

5. Article 56 of Law 8642 provides the legal foundation for the analysis of economic mergers, defining these as “*the consolidation, acquisition of control stock, alliance or any other action in virtue of which companies, associations, shares, equity, trusts or general assets of network operators and telecommunications service providers that have previously been independent from each other unite.*” Likewise, Article 24 of the Regulations of the Competition Regime in Telecommunications (Regulations) provides that all mergers of network operators or telecommunications service providers are subject to prior approval of SUTEL.

6. Concerning the procedure followed to analyze mergers, once the required information is complete, depending on the complexity of the case, SUTEL has thirty or forty-five business days⁴ to resolve, considering three options: approval without conditions, approval with conditions, or rejection of the operation.⁵

7. In the event that SUTEL decides to subordinate the operation, it must apply the conditions set out in Article 57 of Law 8642.⁶

8. An operation is rejected when⁷ (i) it results from the acquisition of substantial power, (ii) it enhances the likelihood of exercising substantial power in the relevant market, (iii) it facilitates express or tacit coordination between operators or providers, or (iv) it results in adverse effects on end users.

9. It is worth noting that the regulations allow SUTEL to examine whether the merger is necessary to avoid the exit, in detriment of users, of an operator or provider to attain economies of scale or to develop efficiencies,⁸ for which it must consider the elements contained in Article 19 of the Regulations.

10. Likewise, Article 25 of the same Regulations consider the favorable presumption if, unless evidence to the contrary, a merger does not aim to reduce, damage or prevent competition or free participation when it involves the corporate restructuring of a same economic group, the participation of a first-time acquirer in the market, and when the holder of the company shares or stock has control over the company or increases its shares relative to company equity.

11. Based on the principle that some conducts harm the economy more than others, legislation considers that a merger without the prior authorization of SUTEL causes very serious harm to the economy,⁹ so much so that a network operator or telecommunications service provider that is found guilty of such infraction will be penalized with a fine that ranges from zero point five percent (0.5%) to one point five percent (1%) of the gross revenue of such operator or provider in the previous financial year.¹⁰ And in

³ In December 2010, Executive Decree 36234 led to the amendment of the Regulations to Law 7472, whereby the voluntary notification of mergers was added to Article 34 and subsequent. Later, in 2012, Law 9072 amended Law 7472, establishing in Article 16 the mandatory notification of mergers

⁴ In cases of special complexity, fifteen additional days are provided, for a total of forty-five business days.

⁵ Law 8642, Article 56.

⁶ The conditions will be discussed in greater detail in another section.

⁷ Law 8642, Article 56.

⁸ Law 8642, Article 56.

⁹ Law 8642, Article 67.

¹⁰ Law 8642, Article 68.

such case, SUTEL may deem the infraction to be of particular severity, and may impose a fine between one percent (1%) and ten percent (10%) of the annual sales of the offender during the previous financial year, or between one percent (1%) and ten percent (10%) of the offender's assets.¹¹

3. Evolution of Economic Mergers in the Telecommunications Sector

12. Although the legislation does not make specific reference to concrete evidence, either legal or economic, in order to determine anticompetitive effects, it clearly lays out the elements to determine anticompetitive mergers.

13. Therefore, a “*standard*” methodology of analysis¹² was implemented in 2015, and publicized in the Guide for the Analysis of Mergers in the Telecommunications Sector (“*Guía de Análisis de Fusiones del Sector de Telecomunicaciones*”).¹³

14. This methodology allows making a predictive analysis, and defines and compares two future scenarios: the most likely outcome if the operation is approved, or if it is rejected. Additionally, an explanation was published in 2016 regarding the formal requirements to request a merger authorization.¹⁴

15. “*The starting point*” of an economic merger analysis is to determine whether the operation really requires notification and prior approval by SUTEL. The analysis includes determining if the participation includes two or more network operators or telecommunications service providers in Costa Rica, independent from each other, and whether the operation implies transferring control of at least one of the participating entities, or the creation of a new economic agent under the joint control of the companies participating in said transaction.¹⁵

16. Once SUTEL determines the presence of a merger, the following elements are examined:¹⁶

- Nature of the merger¹⁷ and possible anti-competitive effects;
- Relevant markets involved in the operation;
- Relevant market structure;¹⁸
- Unilateral and coordinated practices that could result from the operation;

¹¹ Law 8642, Article 68.

¹² Since each case is unique, the guide for analysis will vary depending on the merger operation.

¹³ Available at: https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf

¹⁴ Available at: https://sutel.go.cr/sites/default/files/normaticascompetencia/explicacion_de_requisitos_solicitud_de_concepcion.pdf

¹⁵ Superintendencia de Telecomunicaciones. *Guía de Análisis de Fusiones del Sector de Telecomunicaciones*. 2015, page 3. Available at: https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf.

¹⁶ Superintendencia de Telecomunicaciones. *Guía de Análisis de Fusiones del Sector de Telecomunicaciones*. 2015. Available at: https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf

¹⁷ Horizontal, vertical, conglomerate or combination merger.

¹⁸ It is necessary to identify the participants, assign them market share and estimate the degree of merger of each relevant market identified.

- Restrictions that could discipline the exercise of identified practices;
- Efficiency gains attributable to the operation; and
- If the merger prevents the exit, in detriment of users, of an operator or provider.

17. It is worth highlighting that international experience dictates that the analysis of elements must be comprehensive: no element by itself is a determinant. This guarantees assessing the net effect of a transaction. Besides, it is worth recalling that the telecommunications sector has its specificities, such as the convergence of technological transmission platforms for different types of signals, network externalities, essential facilities, interconnection rules and network access fees, medium- and long-term provisioning contracts, substitutability criteria, and others.

18. If the comprehensive analysis determines that, although the operation could have restrictive or distortive effects, competition could continue to be possible by resorting to conditions, then SUTEL may propound the contents of Article 57 of Law 8642:

- Transfer, sale or assignment of one or more of its assets, rights or shares through the takeover bid figure, as may legally be determined;
- Separation or splitting an operator or provider;
- Limitation or restriction to provide certain telecommunications services, or geographies in which they may be provided;
- Limitation or restriction to acquire new concessions or authorizations; and
- Introduction, limitation or modification of a clause in contracts signed by the operator or service provider regarding network operation, or the rendering of telecommunications services.

19. Concerning remedies, legislation does not limit the operator in its bid; that is, the operator may offer whatever that it deems appropriate and may “negotiate” with the authorities. Nevertheless, just like SUTEL, it must consider measures that are proportional, adequate and comprehensive, effective and timely¹⁹ for the competition issue detected.

20. Regarding experiences of SUTEL conditioning transactions, the first and only event occurred in 2012.²⁰ The operation involved an operator with a wide portfolio of telecommunications services that pretended to expand its offering by acquiring an internet and subscription television company. Essentially, the operation was approved because, although some issues were detected, they could be prevented by means of behavioral measures applicable to the acquirer, such as no tied goods, approval of promotions and/or service packages, and no participation in the acquisition or ownership of subscription TV service providers, among others.

21. SUTEL's first experience rejecting a merger was in 2015.²¹

¹⁹ Superintendencia de Telecomunicaciones. *Guía de Análisis de Fusiones del Sector de Telecomunicaciones*. 2015, page 67. Available at: https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf.

²⁰ Docket OT-00015-2012, RCS-326-2012.

²¹ Docket OP-05-15, RCS-149-2015.

22. The transaction involved telecommunications operators that were offering a range of services and, although certain possible anti-competitive effects were detected in some markets (not all) during the analysis, the shared nature itself of access of the HFC²² network did not allow separating relevant markets that had issues from those without issues. Due to the technical inability to separate networks and the lack of conditions to help solve the issues detected, SUTEL rejected the entire operation.

23. Although the interested party had not presented conditions initially, in reaction to the rejection and hoping to get the operation authorized, it offered a series of commitments, but these were not accepted claiming that they did not prevent or correct the market issues and technical limitations detected.

24. This particular decision set a precedent for SUTEL. The decision to reject was challenged in court, both on procedural as well as substantive grounds, but was deemed inadmissible.²³

25. This ruling also clarified several procedural aspects regarding a merger application process, as follows: (i) SUTEL has no legal obligation to forward to COPROCOM any appeals or obligations submitted to it by a party; (ii) SUTEL may, but is not legally forced to, give time to a party to discuss and propose remedies and obligations, and (iii) the timeframe indicated in Article 56 of the General Law of Telecommunications begins to count from the moment the opinion of COPROCOM is notified.

4. Conclusions

26. To control merger operations, the Costa Rican sectoral legislation has two characteristic elements: ex-ante controls, and the absence of notification thresholds. Therefore, prior controls apply to all operations between operators and telecommunications providers, and allow detecting and stopping operations that create, enable, facilitate or consolidate market power.

27. Over the years, the work of SUTEL, as the sectoral competition authority, has allowed it to see each merger operation as unique. Despite the comprehensive analysis of analytical elements, these are not applied in a uniform and automatic manner, and instead are adapted to the specific conditions of each case.

28. Likewise, SUTEL clearly understands that the objective of setting conditions to a merger is to offset the anti-competitive effects derived from it, and never as a regulatory tool.

29. Lastly, given the complexity of analyzing mergers, the effort to produce a Guide is worth highlighting, since it seeks comprehensible standards for all parties involved throughout the process.

²² It is physically impossible to separate the access of a given user from the network of one operator and then connect it to another; that is, it is not possible to disaggregate specific users individually.

²³ Ruling number 53-2016-VI of 16:05 hours of 1 April 2016 of the Administrative Court Section VI of the Second Judicial District of San José, Goicoechea available at http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_Documento.aspx?param1=Ficha_Sentencia¶m2=1&nValor1=1&nValor2=664289&tem1=¶m7=&strTipM=T&lResultado=1