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ROUNDTABLE ON "PRICE DISCRIMINATION"

-- Note by Costa Rica--

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*More documents related to this discussion can be found at
www.oecd.org/daf/competition/price-discrimination.htm*

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COSTA RICA

1. Overview

1. This contribution summarizes the legal and economic aspects behind the sectorial scheme for competition in telecommunications in Costa Rica, established in the General Law of Telecommunications (Ley General de Telecomunicaciones) (Law 8642), and the Regulations to the Scheme of Competition in Telecommunications (Reglamento del Régimen de Competencia en Telecomunicaciones) (Regulations), used to investigate and prosecute anti-competitive practices, particularly those related to price discrimination.

2. Likewise, this paper approaches the methodology to analyze price discrimination which is set out in the Guide for the Analysis of Anti-Competitive Practices (Guías de análisis de conductas anticompetitivas), and, lastly, presents a summary of relevant cases settled by SUTEL.

2. Legal framework and price discrimination in telecommunications

3. The General Law of Telecommunications, Law 8642¹, provides that the operation of networks and the provision of telecommunications services are subject to a sectorial scheme of competition.

4. As the entity responsible for regulating, enforcing, monitoring and controlling the legal system in the field of telecommunications SUTEL has the exclusive competency to examine, remedy, and penalize, as appropriate, any monopolistic practices by operators or providers that aim to limit, reduce or eliminate competition in the telecommunications market.

5. In conformity with the Costa Rican sectorial legislation regarding competition in telecommunications, Law 8642, two types of monopolistic practices are punishable: absolute practices and relative practices. The law also provides that illicit mergers are a prohibited practice.

6. Law 8642 specifically typifies anti-competitive behaviors, and refers to their most common forms. Regarding relative practices, the regulation directly prohibits “(...) *acts, contracts, covenants, agreements or combinations entered into by network operators or telecommunications service providers, individually or on in conjunction with other economic agents, with the objective of unduly displacing, present or future, other operators or market providers, substantially preventing their access, or by establishing barriers to entry or exclusive advantages in favor of one or more person in the following cases:*

- The establishment of different prices or conditions to third parties under similar conditions. (...)” Law 8642, Article 54.

7. Thus, price discrimination is considered a vertical practice that affects network operators and/or telecommunications service providers that participate in different links along the market chain.

¹ Article 52.

8. The national legal system typifies the behavior of discrimination, contrary to certain other legislations that opt to prohibit abuse of a dominant position, and, through resolutions, sets the framework to identify the forms in which such abuse is manifest.

9. It is also worth highlighting that the regulations² clearly establish the elements to examine prior to determining whether practices such as price discrimination are a violation: “(...) a) *That the operator or provider has substantial power in the relevant market, or that a group thereof has acquired such substantial power jointly;*b) *That the practice has anti-competitive effects*”.

10. Additionally, the review must consider “(...) *the elements submitted by the parties to prove the pro-competition effects or the greater market efficiency resulting from their actions, or any other element established in the regulations and which will produce some significant and non-temporary benefit to the end users*”.³

11. On the other hand, sectorial competition regulations are based on the notion that certain behaviors affect the economy more than others. In principle, anti-competitive practices seriously damage the economy. Therefore, fines are imposed in function of the damage, calculated based on annual gross revenue. It is also considered, however, that some behaviors are more harmful and others, calling for the need to consider particular severity, in which case a fine is calculated based on assets or annual sales.

12. In this sense, the penalty/fine policy of SUTEL considers that some infractions harm the economy more than others, and fines serve two purposes: punish those involved in such practice, and discourage others from behaving in contravention of the sectorial competition regulations.

13. In the event that a network operator or a telecommunications service provider is found guilty of price discrimination practices, a very serious infraction⁴, the applicable fine ranges from zero point five percent (0.5%) to one percent (1%) of the gross revenue earned by the operator or provider in the previous financial year.⁵ And, if applicable, SUTEL may consider the infraction as of particular severity, in which case the corresponding fine ranges between one percent (1%) and ten percent (10%) of the annual sales of the offender in the previous financial year, or between one percent (1%) and ten percent (10%) of the value of the offender’s assets.⁶

3. Methodology for the analysis of price discrimination in telecommunications

14. For price discrimination to be considered a relative monopolistic practice under the national legislation, it is necessary to thoroughly examine the implications of such conduct in the market, that is, to assess its net impact, and its anti-competitive and pro-competitive effects.

15. Precisely in line with the regulations, and in order to provide an assessment methodology, SUTEL published the Guide for the Analysis of Anti-Competitive Practices (Guide)⁷, which has been in force since 2015.

² Regulations, Article 18.

³ Law 8642, Article 54.

⁴ Law 8642, Article 67.

⁵ Law 8642, Article 68.

⁶ Law 8642, Article 68.

⁷ Available at: https://SUTEL.go.cr/sites/default/files/2015_SUTEL_quia_analisis.pdf

16. The Guide highlights the fact that a given relative practice may or may not be prohibited under Law 8642. It all depends on who is involved, and if the practice causes or could cause the undue displacement of other operators or providers, a substantial impediment to access or a barrier to entry, an exclusive advantage in favor of one or more individuals, and net impact on the market.

17. Although the legislation does not specifically refer to a rule of analysis, the interpretation of Article 18 of the Regulations leads to conclude that the investigation of relative practices is based on the “*rule of reason.*” To investigate price discrimination, the Guide instructs to:⁸

3.1 Determine if the behavior under investigation is practiced by a network operator or a telecommunications service provider.

18. Law 8642 establishes a sectorial competition system applicable exclusively to network operators or telecommunications service providers.⁹ This condition must be met in order for SUTEL to investigate a possible case of price discrimination. Otherwise, the Law on the Promotion and Effective Defense of Consumers, Law 7472, applies.

3.2 Demonstrate the occurrence of the practice typified in paragraph a) of Article 54 of Law 8642.

19. The definition provided in paragraph a) of Article 54 indicates that discrimination is the unjustified imposition of unfair prices or conditions for a product or service by operators and providers under similar conditions, where the difference is not related to production costs but instead to arbitrary segmentations, such as age, geographic distribution, or type of user.¹⁰ It is therefore necessary to examine whether the service is the same or if the price difference is due to a difference in costs, and if such price difference is justified by such cost difference.

20. It is worth noting that the mere existence of a difference does not mean price discrimination. It is necessary to demonstrate the rationale behind such difference, which is particularly relevant in the case of telecommunications services, which involve concepts of economies of scope and scale.

21. The Guide for the Analysis of Anti-Competitive Practices provides for two types of discriminatory behaviors:

1. **Non-price discrimination:** Discrimination does not always refer to the price of a product or service. On occasions, a company will apply unequal treatment to equivalent transactions. Therefore, Article 54 a) of the Law refers to “different prices or conditions.” This provision is in line with the legislation of other countries.

⁸ Superintendencia de Telecomunicaciones. *Guide for the Analysis of Anti-Competitive Practices*. 2015, pg. 24.

⁹ The definition is contained in Article 6 of Law 8642: “For purposes of this Law, the following definitions apply: (...) 12) Operator: physical or legal person, public or private, that exploits telecommunications networks under due concession or authorization, which may provide or not the available telecommunications services to the general public (...) 16) Provider: physical or legal person, public or private, that provides the available telecommunications services to the public over a telecommunications network available to the public under the corresponding concession or authorization (...) 23) Telecommunications services: services that consist, fully or partially, of carrying signals through telecommunications networks. These include telecommunications services provided by networks used for radio or television broadcasting.”

¹⁰ Superintendencia de Telecomunicaciones. *Guide for the Analysis of Anti-Competitive Practices*. 2015, pg. 44. Available at: https://SUTEL.go.cr/sites/default/files/2015_SUTEL_guia_analisis.pdf

2. Price discrimination: As indicated, price discrimination is the practice of selling one same product to different customers at different prices, although production costs were the same for each. The elements to examine in a case of price discrimination are:

- If the service was the same or if *any price differential* is justified in terms of difference in costs, and
- If the *level of differentiation* is justified based on the difference in costs.

22. Therefore, it will not suffice to simply determine the existence of a difference in costs. It is also necessary to determine whether the level of differentiation is justified.

23. Not all price discrimination is harmful here. In many cases, access is made available to consumers who otherwise would have been prevented from having it.

24. Economic theory and international jurisprudence show that price discrimination cases must be examined one by one. That is, each case must be examined in its specific context to determine the existence or not of anti-competitive effects, and their magnitude.

3.3 *On-net/off-net price differentiation*

25. Finally, the Guide defines a particular type of discrimination exclusive to the telecommunications sector: The difference between on-net and off-net rates on mobile networks is an especially relevant mode of discrimination in telecommunications markets. Therefore, it merits a separate analysis.

26. In markets where on-net rates are set lower than off-net rates, users of major networks pay in average a lower cost per call than subscribers of smaller networks. This situation is verifiable since a high percentage of the calls are made within that same network. Therefore, larger networks are more attractive to consumers, resulting in a competitive disadvantage for smaller networks.

27. These on-net and off-net price differentiations on mobile networks are driven by: 1) termination charges between and among mobile networks that exceed marginal costs, and 2) strategic incentives offered by companies to reduce communication to competing networks, thus reducing their appeal.

28. The most recent studies show that major networks have an on-net and off-net differential greater than that of smaller or incipient networks. These price differentials could have anti-competitive effects since the commercial policies that accentuate this differentiation benefit larger operators and harm newcomers through lower market fees, and could, in fact, prevent or limit the entry of future competitors.

3.4 *Define the relevant market for the product or service subject to the alleged practice.*

29. The elements that outline the market, both the product and the geographical dimension, are clearly established in the legislation on competition¹¹:

“(…) a) The possibilities to substitute the respective good or service for another, of national or foreign origin, considering technological possibilities, the availability of substitutes for consumers, and the time required to make such substitution.

¹¹ Article 20 of the Regulation refers to Article 14 of Law 74272: “(…) *In the investigation of a relative monopolistic practice, SUTEL shall determine the relevant market based on the criteria described in Article 14 of Law N° 7472.*”

b) The distribution costs of the good itself, its relevant inputs, complements and substitutes, from other places in the national territory or abroad; these must consider freight, insurance, tariff and non-tariff restrictions, as well as limitations imposed by economic agents or their organizations, and the time needed to supply the market from other sites.

c) Costs and possibilities of consumers resorting to other markets.

d) Regulatory restrictions, national or international, that limit consumer access to alternative sources of supply or of suppliers to alternative customers”.¹²

3.5 ***Determine the substantial power of the alleged violator in the relevant market.***

30. In the same manner, the elements to define substantial power are indicated in the legislation on competition¹³:

“(…) a) Their participation in that market and their ability to fix prices unilaterally or to substantially limit supply in the relevant market while other economic agents cannot and will not counteract such power.

b) The existence of barriers to entry and elements which, predictably, could alter these barriers as well as the offering of other competitors.

c) The existence and the power of their competitors.

d) The possibilities of access of the economic agents and their competitors to sources of inputs.

e) Their recent behavior.

f) Other analogous criteria as may be established in the Regulations to this Law.”¹⁴

31. Although a price discrimination analysis involves diverse components, the substantial power of national regulations is a key factor, since only companies with power in the relevant market could affect it, and its action could be considered punishable.

3.6 ***Determine which practice aims to, or could, unduly displace other market agents, substantially displaces access thereto, or establishes exclusive advantages in favor or one or several persons.***

32. Although the national legislation does not prescribe how to measure the potential or actual effects of price discrimination on the market to make them punishable, in accordance with Article 54 of Law 8642, the Guide indicates the need to demonstrate that such discrimination is likely to prevent the entry of other operators into the market, or to drive them out. In this sense, SUTEL must show the object or the anti-competitive effect of the practice by examining the following elements¹⁵:

¹² Law 7472, Article 14.

¹³ Article 21 of the Regulations refers to Article 15 of Law 74272: “(…) In the investigation of a relative monopolistic practice, SUTEL shall determine whether the operator or provider under investigation has substantial power in the relevant market based on the criteria described in Article 15 of Law N° 7472. (...)”

¹⁴ Law 7472, Article 15.

¹⁵ Superintendencia de Telecomunicaciones. *Guides for the analysis of anti-competitive behavior*. 2015, pg. 76 - 77. Available at: https://SUTEL.go.cr/sites/default/files/2015_SUTEL_guia_analisis.pdf

1. *Substantial power*: In general, the greater the substantial power, the greater the likelihood that the behavior behind this position will lead to closing the market to competition.
 2. *Reference market conditions*: Legal, technical or economic barriers to entry increase the likelihood of a given conduct becoming exclusionary. The presence of economies of scale, economies of scope or externalities amplify the effects of an exclusionary conduct.
 3. *The ability of competitors of the company with substantial power to respond to a given behavior*: It is necessary to consider if competitors can apply strategies in a realistic, rational and economically viable manner to offset the anti-competitive effects of a given behavior of a dominant company. It is important to differentiate dominant company practices that are part of free competition from those that are anti-competitive in nature and to which competitors can only react partially.
 4. *Number and characteristics of affected consumers*: This practice could affect all consumers or users, or it could only affect a group of them. To determine whether such impact justifies a sanction, it is necessary to consider the proportion of consumers affected compared with the total market size, the characteristics of the affected consumers (that is, if they represent a particularly important share of the consumption pattern, if they are mostly consumers with a given income level, or if they are more prone to change from one provider to another), or the proportion of consumers affected in one give given geographic area.
 5. *Scope of the allegedly abusive conduct*: The greater the share of potential sales affected by the conduct, the greater the likelihood that the conduct with have an exclusionary effect in the market.
 6. *Actual effects of the exclusionary conduct*: In the event the conduct under review has increased the market share of the dominant company in detriment of its competitors, or has prevented new players from surviving in the market, this will also be considered evidence of the exclusionary effect of such practice.
 7. *Direct evidence of a closure strategy*: Documents and other material evidence showing the exclusionary effects and intention of such behavior will be included in the analysis of an exclusionary practice.
33. Therefore, it is necessary to note that evidence on the overall impact of a conduct is not needed, only its exclusionary nature, in order to determine price discrimination.
- 3.7 *Analyze the elements brought by the parties to demonstrate the pro-competitive effects or greater market efficiencies resulting from such actions, and any other element provided in the regulations, that will produce a significant, non-transitory effect on end users.***
34. Regulations¹⁶ provide that SUTEL must analyze and refer to the elements submitted by the parties to demonstrate the pro-competitive effects of a practice such as price discrimination:
- “(...) a) Generating savings in resources that will allow to permanently produce the same amount of a good at a lower cost or a greater amount of a good at the same cost.

¹⁶ Regulations, Article 19.

- b) Generating lower costs if two or more goods or services are produce jointly instead of separately.
- c) Significantly reducing administrative expenses.
- d) Transferring production technology or market expertise.
- e) Reducing production or marketing costs as result of an infrastructure network expansion.”

35. These elements help to more thoroughly examine anti-competitive and pro-competitive effects in the market, and help further analyze the net effect of price discrimination to conclude whether the conduct is subject to sanction or not.

4. Case studies on price discrimination in telecommunications

36. Although SUTEL, responsible for the telecommunications sector, has investigated three (3) cases involving price discrimination practices, the companies involved have been sanctioned in that connection.

37. SUTEL price discrimination analyses date back to 2011, when a telecommunications operator filed a first claim in this sense due to a pay-per-view TV promotion offered by another provider¹⁷. The evidence that supported the anti-competitive practice led to opening an administrative proceeding. After evaluating several aspects, no solid evidence was found to determine that the promotion aimed to unduly displace a market competitor. The administrative case was closed and filed.

38. On the other hand, the first case of price discrimination examined under the Guide methodology concerned a complaint against a pay-per-view TV operator due to its pricing policy¹⁸. Under the corresponding methodology, all evidence supporting the possible anti-competitive practice was examined, but the case was closed during the preliminary investigation phase because there were no grounds to open an administrative proceeding, as provided in Article 54, paragraphs a) and i) of Law 8642 regarding Articles 8 and 16 of the Regulations to the Scheme of Competition in Telecommunications.

39. Finally, SUTEL is currently examining an administrative case related to on-net and off-net price discrimination on the network of the incumbent market operator.

5. Conclusions

40. Although competition between and among network operators and telecommunications providers is a dynamic process in which the most efficient parties excel, price discrimination could be an illegal practice if it harms competition, under the terms of Law 8642.

41. The sectorial law of competition in the telecommunications industry is clear in typifying price discrimination, the elements to be analyzed and the sanctions to be imposed. These are considered a minimum to support adequate competition practices and their effective enforcement.

42. Demonstrating market power is fundamental when addressing cases of possible price discrimination. However, the net effect of the practice is crucial: just because a significant market player acted in this manner does not represent, in itself, a violation to Law 8642.

¹⁷ Docket SUTEL OT-066-2011.

¹⁸ Docket SUTEL PM-1520-2014.

43. Precisely the Guide highlights the need to elaborate on the effects in favor of or against competition, eliminating the prohibition *per se*, and applying the rule of reason to analyze price discrimination.

44. Lastly, it is worth mentioning that the Guide falls within the advocacy efforts carried out by SUTEL in order to clarify the scope and analysis of anti-competitive practices, in an effort to develop norms that can be understood by all parties involved.