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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Costa Rica --

28-29 November 2016

This document reproduces a written contribution from Costa Rica (SUTEL) submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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-- COSTA RICA* --

1. The Superintendence of Telecommunications (SUTEL) has processed 33 merger requests in the last five years. Only in one such case did SUTEL detect issues that could be resolved through commitments or conditions. However, SUTEL Council decided to decline the merger application.

2. This merger application (filed in 2014) involved the companies TELECABLE ECONÓMICO TV S.A. (hereinafter TELECABLE) and MILLICOM CABLE COSTA RICA S.A. (hereinafter MILLICOM)[1].

3. The transaction reported was for MILLICOM to purchase all capital stock of TELECABLE. Both companies provided subscription television services; residential internet access; residential fixed telephony; business data transfer services (business connectivity); and fixed network termination. Some of these markets were national in scope, but all the residential markets had a sub-national dimension because TELECABLE only offered services in the Metropolitan Area.

4. The analysis of SUTEL in Resolution RCS-149-2015 dated 19 August 2015 at 12:00 hours, determined that this merger involved markets with issues in their levels of competition. These issues would continue to exist despite the remedies offered.

5. The conditions or remedies offered by the parties were as follows:

- optimized utilization of scarce resources
- same contractual conditions for certain customers for a given period
- information and transparency with users
- stable prices
- retained trade mark
- digitalized and enhanced cable TV services
- lower price per megabyte delivered
- improved consumer choices.

* Contribution by the Superintendencia de Telecomunicaciones de Costa Rica (Telecommunications Superintendency of Costa Rica, SUTEL).

1 Subsidiary of Millicom International Cellular, S.A.

6. However, these remedies were turned down by SUTEL in view that the Council believed that the draft commitments, besides being technically feasible, needed to prevent or remedy market issues and technical limitations detected by SUTEL. However, it was considered that the remedies proposed did not meet such conditions in this case.

7. In its resolution rejecting the merger, SUTEL indicated that the remedies offered were insufficient to end the issues detected, for the following reasons:

i) Concerning optimization of limited resources, it was considered that although it reduces a possible barrier to entry (saturation of infrastructure) it is not a remedy to obtain substantial power or to increase the likelihood of coordination among operators in the event of a merger. Even if the remedy existed, it was felt that the merger increased the barriers to entry. The period offered (two years) was deemed very long and SUTEL considered that by that time the competition conditions could have changed, and the late implementation of this measure could have negative effects on competition. Mention must be made that optimization of limited resources is the obligation of operators, and the infrastructure that MILLICOM was pledging to optimize was not owned by MILLICOM or by TELECABLE, and therefore it was impossible for MILLICOM to guarantee the entry of new market players by means of this remedy.

ii) Other solutions proposed did not qualify as remedies, as they were related to the duties of protecting users, such as the lack of commitment to not modify contractual conditions, the commitment to provide sufficient and transparent information to users.

iii) Concerning behavioral remedies, such as maintaining market prices over a 24-month period, these was deemed to not have a long-term effect on competition, not have an enforcement method and, besides, were considered to have loopholes.

iv) The proposal to use the TELECABLE brand was considered useless to push or maintain market dynamics since the brand is not the originator of the rebellious behavior, but instead the company itself.

8. Additionally, what MILLICOM called remedies were really seen to be efficiencies, such as the case of digitalizing and improving cable television services, or lowering the price per megabyte delivered, or enhancing consumer choices.

9. Besides, the remedies proposed underwent a technical analysis, which concluded that technical limitations prevented simultaneously fulfilling several of the abovementioned commitments, particularly to eliminate the coaxial network used by TELECABLE, and maintain the services and prices offered by the company at the time.

10. However, it is important to highlight the main reason why SUTEL rejected the merger between these two companies: it would eliminate the disruptive agent from the market. TELECABLE was, and continues to be, the competitor that has forced major market agents, including MILLICOM, to compete in a more dynamic manner, and has increased market rivalry not only reducing prices but also eliminating previous practices of tacitly dividing territories.[2]

[2] Prior to the General Law of Telecommunications, the National Competition Authorities, that is COPROCOM, conducted a series of investigations about this territorial division between the companies MILLICOM and TELEVISORA DE COSTA RICA S.A.

11. Likewise, in the case of Costa Rica, the General Law of Telecommunications provides that SUTEL, as the sectorial competition body, must necessarily consult merger cases with COPROCOM, so that the latter can determine whether the merger in question is susceptible to: i) resulting in the acquisition of substantial power or an increase in the likelihood of exercising substantial power in the relevant market; ii) facilitating coordination, expressly or tacitly, among or between operators or providers; and/or iii) causing adverse effects on end users.

12. Through Opinion OP-05-2015, COPROCOM presented several proposals to remedy the competition issues detected, expressly indicating that if said proposal could not be executed or verified by SUTEL, the merger needed to be rejected. The main condition proposed by COPROCOM dealt with splitting TELECABLE, and allowing MILLICOM to only purchase certain nodes of the company´s network.

13. SUTEL analyzed the conditions proposed by COPROCOM and determined that, due to the technical characteristics of the networks, these conditions could not be implemented or would not be effective solving the problems, since the economies of scale in the telecommunications sector are critical, and the possibility of MILLICOM acquiring a majority of the network would further reduce the ability of TELECABLE to compete and continue acting as a disruptive market agent.

14. After the ruling by SUTEL, MILLICOM decided to go to court, claiming procedural and substantive flaws such as violation of the right to entrepreneurial freedom due to the lack of proportionality and reasonableness when the merger was rejected; absolute nullity due to flaws in the motivation of the administrative act, problems with the motivation of the definition of relevant market, the analysis of efficiencies and commitments, and contradictions in the motivation of the administrative act.

15. However, Ruling number 53-2016-VI of 16:05 hours of 01 April 2016 of the Dispute Tribunal, Section VI of the Second Judicial Circuit of San José, Goicoechea, declared that the claim was unlawful. The main arguments of the Dispute Tribunal dealt with the fact that SUTEL had adequately examined the conditions offered both regarding motivation and the procedure followed, since SUTEL complied with the legislation.

16. Additionally, the judges considered that the analyses to determine the relevant market and the substantial power were sufficiently reasoned and were not arbitrary or unlawful, and claimed that the parameters in past telecommunications legislation had been adequately examined.

17. In conclusion, SUTEL entered this process to analyze proposals that included structural and behavioral remedies and other measures not seen as remedies but instead as obligations or efficiencies from the economic and technical stance. It also counted on the opinion of a technical third party. In the end, it concluded that the merger had to be rejected as it was a risk to market competition. Although the decision was challenged in court, the respective Tribunal endorsed SUTEL´s decision to prohibit the merger. The final judgment continues to be firm to this date.