

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION LAW AND STATE-OWNED ENTERPRISES****Contribution from Costa Rica****- Session V -****29-30 November 2018**

This contribution is submitted by Costa Rica (SUTEL) under Session V of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/csoes.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

JT03438637

Competition Law and State-Owned Enterprises

-- Costa Rica (SUTEL)* --

1. Background

1. The Costa Rican telecommunications sector opened up as result of the Free Trade Agreement between the Dominican Republic, Central America and the United States of America (CAFTA-DR). Prior to that time, telecommunications services were provided in the form of a State monopoly, with the exception of cable television, which was in the hands of private operators.¹

2. The process that led to the liberalization of telecommunications in Costa Rica contained a series of unique characteristics:

- Gradual and selective opening: CAFTA-DR, in particular, agreed to a gradual opening of three telecommunications services, namely private networks, Internet, and wireless mobile, thereby excluding basic traditional fixed telephony, which was offered through the circuit switching technology.²
- Opening without privatization: The telecommunications sector was opened without this step which implied a complete transfer of activities to private hands, and the Costa Rican State preserved its role as telecommunications service provider.
- Opening in accordance with regulations established by a specialized regulatory body: The regulatory framework gave SUTEL (Superintendence of Telecommunications) not only the powers to act as regulator, but also as sectorial competition authority in charge of telecommunications.

3. With this, the country opted for a telecommunications market open to competition, where a public operator, several publicly-owned enterprises and private operators co-exist and compete, based on what the Office of the General Comptroller of the Republic (CGR)³ has called a “*liberalizing regulation*,” as provided in the General Law of Telecommunications, Law 8642, and its supplementary rules. In its opinion:

“In general, reference is made to liberalization when facing an economic policy of market softening, which consists of withdrawing any prohibitions or obstacles introduced by the State in its legislation and which prevent producers and operators from selling and consumers from choosing.”

* Contribution of the Superintendence of Telecommunications of Costa Rica.

¹ Particularly Dodona S.A. (now Millicom Cable Costa Rica S.A.), Telecable Económico TVE S.A. (now Telecable S.A.), Televisora de Costa Rica S.A. (now Cabletica S.A.) and Servicios Directos de Satélite S.A.

² As provided in Article 28 of Law 8642.

³ CGR. (2011). *Informe sobre el proceso de apertura de las telecomunicaciones en Costa Rica*. Report No. DFOE-IFR-IF-11-2011.

Indeed, liberalization implies the suppression of monopolies and activities declared public services which, under the classical or nationalized definition, can only be provided by public authorities. Thus, liberalization fundamentally supposes returning to civil society, and to free economic enterprise, something which, in virtue of past State reservations, was exclusively under the purview of public authorities.”

4. The CGR determined that the liberalization model selected brought about a series of challenges, including the following with regards to State-owned enterprises:

“a) The complexity for the Regulator to combine the presence of private competitive dynamics and a dominant public operator arisen from a monopoly; in other words, there is now a competitive market in which the rationale of public enterprise must co-exist with the rationale of private enterprise, naturally causing significant distortions, both institutional and economic.

...

d) Role of the public operator. The difficulties for the public operator to adapt are also a serious threat in the liberalization process: despite its recent institutional strengthening and broader management flexibility, it still experiences functional rigidity and lack of experience enforcing current regulations, which could seriously affect its ability to compete against new players and could have a negative impact on public resources.”

5. Clearly the appearance of new private players in the market meant adjusting the regulations in force at the time to, first of all, incorporate the figure of a regulator, with the powers of a competition authority, independent from any and all operators, including State-owned operators; secondly, to establish mechanisms to ensure a “level playing field” for all operators, public or private, in order to ensure a successful transition towards a competition regime; and thirdly, to identify when the market had reached the appropriate level of competition to shift from an *ex-ante* to an *ex-post* regulatory regime based on the principles of the right to competition set forth in the Sectorial Regime of Competition in Telecommunications.⁴

2. State-owned Enterprises

6. The Costa Rican Electric Institute (Instituto Costarricense de Electricidad - ICE) is the major State-owned enterprise in the telecommunications sector. Created through Decree–Law 449, it started operating in the national market in 1949. Initially it focused on electricity, but in 1963 it was also entrusted with the establishment, enhancement, expansion and operation of domestic telephony, radiotelegraphy and radiotelephony communications.

7. Over the years, ICE has evolved to become a group of State-owned enterprises consisting of ICE and its companies: Radiográfica Costarricense S.A. (RACSA), Compañía Nacional de Fuerza y Luz S.A. (CNFL) and Cablevisión de Costa Rica CVCR S.A. (CVCR). Currently ICE offers fixed and mobile, residential and corporate, wholesale and retail services throughout the entire country.

⁴ Chapter II of Title III of Law 8642.

8. All ICE companies participate in the telecommunications market:
- Radiográfica Costarricense S.A. was created in 1964 by Law 3293, focused on providing telecommunications services. In 1975 it was acquired by ICE and is currently part of Grupo ICE. In the 1980s, it started offering services for the transmission of written information, via fax and a public data network, to provide communications both in the country and in all Central America. It later evolved to offer satellite communications and internet services, and currently offers market-specific solutions, mostly to the Government sector, but also to municipalities, cooperatives and other businesses.
 - Cable Visión de Costa Rica CVCR S.A. is a subsidiary of Grupo ICE, according to a merger authorized with conditions by SUTEL through Resolution RCS-291-2012. It currently plays in the telecommunications market directly in pay television and Internet for residential customers, small and medium enterprises, and the real estate and hotel sector.
 - The National Power and Light Company (Compañía Nacional de Fuerza y Luz) is a utility that distributes and markets electricity in the Greater Metropolitan Area (GAM) of Costa Rica. It was founded through Contract-Law N° 2 entitled “Electricity Contract” of 08 April 1941. It owns the basic infrastructure of posts needed to deploy the telecommunications networks in the GAM.
9. Additionally, two other enterprises co-exist in the telecommunications market although they are not directly owned by the State or central Government, but instead by municipalities, or local governments, namely:
- The Municipal Electric Service Administrative Board of Cartago (Junta Administrativa del Servicio Eléctrico Municipal de Cartago - JASEC) was created by Law No. 3300 of 16 July 1964 to manage the electric company of the Municipality of the Central County of Cartago. Pursuant to Law No. 8660 of 08 May 2008, Strengthening and Modernization of Public Entities in the Telecommunications Sector, JASEC has the power to provide services in such areas as telecommunications, info-communications and other related services, as provided in Law No. 8642. Although for decades JASEC had specialized in electrical services, in 2015 it inaugurated a fiber optics network, initially only connecting its own buildings and operating centers, but later broadly extending its market offering to other info-communications services such as IP telephony, pay TV, Internet, colocation, monitoring and security, cloud services, and others.
 - The Heredia Utility Enterprise (Empresa de Servicios Públicos de Heredia - ESPH) was founded in 1976 for the administration, maintenance and control of the aqueduct and sewer system of the County of Heredia. Through Law 7789 of 28 April 1998 it became a company, through a legal hybrid figure: a municipal company managing public resources, the assets of which are the aqueducts of member municipalities. Since 2010, the ESPH is authorized to provide other business services such as Internet access, IP telephony, private virtual networks and data transfer.

3. Implementation of the Competition Law in the Framework of State-owned Enterprises

10. In first place, regarding the role of SUTEL as sectorial competition authority in an environment where the Sectorial Competition Regime principles apply to all operators, including State-owned operators, it is important to highlight the following:

- SUTEL is independent from all telecommunications service providers and is not accountable to them; its decisions are impartial, regardless of the market players.⁵
- SUTEL enjoys full technical and functional independence, manages its own resources and budget, and does not depend on Government political directives, except as pertains to compliance with the “National Telecommunications Development Plan.”⁶

11. Down these lines, no political or government authority has, to this date, attempted to influence the manner in which SUTEL applies the Sectorial Competition Regime to any particular market agent, State-owned or otherwise.

12. This is evident in the fact that SUTEL has acted normally, and in compliance with all internal procedures, when receiving and processing claims and *ex officio* investigations, regardless of the party under investigation.

13. Several types of cases have been processed to date involving State-owned enterprises, and these are summarized below.

⁵ Annex 13 CAFTA-DR, Specific Commitments of Costa Rica on Telecommunications Services

⁶ Article 59 of Law 7593.

Table 1. Costa Rica: Cases of abuse of dominant position in the telecommunications market filed against a State-owned enterprise. 2008-2018*

File	Plaintiff	Defendant	Action Reported	Outcome
D-004-008	CVCR	ESPH	Refusal to allow access to post infrastructure to deploy telecommunications networks	Vote 01-2011 of COPROCOM, overridden by the First Chamber of the Supreme Court of Justice through Vote 910-2017 at 9:10 hours of 03 August 2017 indicating that COPROCOM had no jurisdiction to settle the matter, only SUTEL
T0053-STT-MOT-OT-00212-2011	Telefónica de Costa Rica S.A.	ICE	Predatory pricing and margin squeezing in the mobile telecommunications market regarding mobile termination rates	RCS-088-2015, sanction imposed (overridden by ruling of Administrative Tribunal number 108-2017-VIII, currently under appeal)
C0059-STT-MOT-OT-00151-2012	CallMyWay NY S.A.	ICE	Predatory pricing and margin squeezing in the mobile telecommunications market regarding mobile termination rates	RCS-144-2018, file closed due to expiration
S0178-STT-MOT-PM-00060-2013	Servicios Femarroca S.A.	JASEC	Agreement to access post infrastructure to deploy telecommunications networks.	RCS-277-2013, dismissed and redirected to the Access and Interconnection Regime, following the opinion of COPROCOM (OP-07-2013)
J0053-STT-MOT-PM-01898-2013	Amnet Cable Costa Rica S.A.	JASEC	Agreement to access post infrastructure to deploy telecommunications networks.	RCS-155-2014, dismissed and redirected to the Access and Interconnection Regime, following the opinion of COPROCOM (OP-011-2014)
C0262-STT-MOT-PM-02170-2015	Claro CR Telecomunicaciones S.A.	ICE	Discriminatory conditions and exclusivity in the fixed telephony market	Agreement 010-058-2016, recommended initiating a procedure, suspended by Resolution of the Constitutional Chamber of 10:49 hours of February 15, 2016
C00262-STT-MOT-PM-01347-2016	Claro CR Telecomunicaciones S.A.	ICE and CNFL	Discriminatory conditions, agreement to access post infrastructure to deploy telecommunications networks.	RCS-208-2018, dismissed due to insufficient evidence of the practices reported
I0053-STT-MOT-PM-00618-2017	Cámara de Comerciantes Detallistas (Retail Association)	ICE	Exclusivity in distribution of prepaid recharge	RCS-055-2018, dismissed due to lack of evidence on the anti-competitive nature of the exclusivity agreement in the mobile telecommunications market

*Figures to August 2018.

Source: Compilation based on internal SUTEL records.

14. The above cases represent 30% of a total of 27 cases settled to date by SUTEL and mostly related to control of special facilities and infrastructure needed to deploy telecommunications networks, many of which arose in the early years of market opening.

15. It is worth noting that SUTEL has not yet dealt with cases or complaints against State-owned enterprises involved in absolute monopolistic or horizontal practices or cartels.

16. Regarding mergers involving State-owned enterprises, SUTEL has addressed the following cases.

Table 2. Costa Rica: Telecommunications-related mergers involving at least one State-owned enterprise. 2008-2018*

File	Party 1	Party 2	Transaction Object	Outcome
I0053-STT-MOT-OT-00015-2012	ICE	CVCR	ICE acquires 100% of the shares of CVCR, which provided pay television and residential Internet access	RCS-291-2012, approved with conditions
I0053-STT-MOT-CN-01824-2014	RACSA	ICE	ICE acquires capabilities in submarine cables owned by RACSA	RCS-255-2014, approved without conditions
R0038-STT-INT-OT-00054-2012	RACSA	ESPH	Joint provision of passive telecommunications infrastructure	Withdrawn
GCO-NRE-ACU-OT-00038-2012	RACSA	JASEC	Joint provision of passive telecommunications infrastructure	Withdrawn
R0038-STT-MOT-OT-00070-2012	RACSA	ASELCOM S.A.	Joint provision of passive telecommunications infrastructure	RCS-293-2012, approved with conditions
R0038-STT-MOT-OT-00092-2012	RACSA	Computación Modular Avanzada S.A.	Joint provision of information services	Agreement 26-054-2012, does not require authorization
R0038-STT-MOT-OT-00092-2012	RACSA	BT LATAM S.A.	Joint provision of information services	Agreement 24-070-2012, does not require authorization
R0038-STT-MOT-CN-00107-2014	RACSA	Virtualis S.A.	RACSA acquires the customer base of Virtualis S.A., which offered virtual mobile operator services	RCS-017-2014, authorized without conditions

*Figures to August 2018.

Source: Compilation based on internal SUTEL records. *Figures to August 2018.

4. On the Current Market Situation

17. Without detriment of the above, it is worth recalling that several concerns continue to exist regarding State-owned enterprises and telecommunications.

18. In this sense, the United States Department of State,⁷ in reference to State-owned companies in the telecommunications and insurance sector, has expressed that:

“In the Information and Communications sector, the telecommunications regulation board SUTEL and the Telecommunications Ministry have worked since 2009 to build the framework of a competitive telecommunications sector, with progressive development of a regulated competitive telecommunications market for internet and Voice-Over Internet Protocol (VOIP), corporate networks and cell phones. Two cellular phone competitors to the state monopoly “National Electrical (and telecommunications) Institute” (ICE) successfully launched their operations in November of 2011, fulfilling a key CAFTA-DR provision that the cell phone market be opened to multiple competitors. The private operators have since reached 39 percent market penetration as of December 2013 but there are persistent complaints of regulatory and bureaucratic obstacles to truly open

⁷ U.S. Department of State. (2015). *Investment Climate Statement - Costa Rica*. BUREAU OF ECONOMIC AND BUSINESS AFFAIRS.

competition with the incumbent operator. In the insurance sector, after six years of opening the market to private competition, private insurers hold over 20 percent of Costa Rica's insurance market and are actively competing against state-owned insurance provider National Insurance Institute (INS). Both the insurance regulator SUGESE and telecom regulator SUTEL have won praise for successfully managing market transitions although in both markets new market entrants point to unfair advantages enjoyed by the incumbent operator."

19. Additionally, SUTEL has recognized the following facts about State or municipal actions that discriminate among operators or providers:

4.1. On public sector contracts awarded to State-owned enterprises⁸

"Concerning public mergers, some operators indicated in the questionnaire the existence of discrimination in public bid procedures, specifically:

"Direct purchases with State-owned enterprises continue to occur, despite the existence of other providers."

"State-owned enterprises prefer to contract State-owned enterprises, enabling abbreviated public procurement processes."

"Some public institutions prefer contracting directly."

"Public enterprises purchase directly from the incumbent."

"Direct procurement with State, institutional agreements between ICE and Government institutions."

"Projects are for ICE or RACSA, direct contracting."

...

A competitive design of contracting procedures directly influences the agreement of better contract conditions, both in price and in quality. Therefore, in the presence of competition, participating enterprises must convince and achieve consumer preference, in this case the State.

In this sense, it is necessary to ensure competition and free market participation when dealing with government procurement procedures so that participants have the appropriate incentives, and offer the best contract conditions.

The Organisation for Economic Co-operation and Development (OECD) recommends striving to ensure that public tendering, at all government levels, is designed to foster more effective competition and to reduce the risk of collusion in public procurement, while also guaranteeing the best quality-price ratio.

...

Therefore, exceptions in public tenders should not be seen as a rule but instead as an exception. It is important to ensure that exclusive advantages be granted to certain participants in government procurement processes; in particular subparagraph c), Article 2 of Law 7494 could result discriminatory and not promote competition among possible offerors."

⁸ Resolution of the SUTEL Council number RCS-266-2018 of 10:05 hours of 26 July 2018, "Overview of retail service market for corporate connectivity."

4.2. On the Permits Required to Deploy Telecommunications Networks⁹

“Concerning the impact of the issues listed above, it is worth highlighting the drawbacks with municipalities and the National Technical Environmental Secretariat regarding the deployment of telecommunications infrastructure, which has delayed the plans of certain operators to expand and extend coverage.

These difficulties have been reported by operators over time and have, in fact, been recognized by institutions like the World Bank:

“Claro and Movistar have experienced delays in the installation of their systems due to the slow Municipal approval of permits to build towers ... Given the difficulties to obtain building permits, private mobile service providers had to apply for an extension to complete Phase One of its network deployment plans.

...

This serves to prove that past market events put some mobile operators at a competitive disadvantage and, in fact, continue to persist, with institutions offering differentiated treatment to certain types of telecommunications operators. Aside from affecting established operators, this could also impact new entrants due to hurdles and delays in the deployment of telecommunications infrastructure.

Therefore, the regulator must strive to take all steps possible to avoid such discriminatory actions and barriers to the deployment of infrastructure. After all, this affects the end users of telecommunications services, who receive limited coverage and poor quality services.”

5. Conclusions

20. The explanations provided above lead to conclude the following:
- Costa Rica opted for a telecommunications market open to competition, in which one public operator, several private operators, and privately-owned enterprises co-exist and compete;
 - The market liberalization model chosen brought about a series of challenges, particularly for State-owned enterprises, requiring adjustments to the regulatory scheme in force at the time.
 - The telecommunications sector has one State-owned operator, ICE, which, in turn, owns three enterprises, namely RACSA, CVCR and CNFL; two other enterprises, although not directly owned by the State or government, are property of Municipalities (local governments), and these are JASEC and ESPH.
 - SUTEL is the independent competition authority for all telecommunications service providers, and has acted normally, and in compliance with all internal procedures, when receiving and processing claims and *ex officio* investigations, regardless of the party under investigation.

⁹ Resolution of SUTEL Council Number RCS-248-2017 of 17:45 hours of 18 September 2018, “*Overview of retail service market for mobile telecommunications*”.

- Of the cases examined by SUTEL to date involving abuse of dominant position, 30% have been filed against State-owned enterprises, and are mostly related to control of the essential facilities and infrastructure needed to deploy telecommunications networks.
- SUTEL has not dealt with cases or complaints against State-owned enterprises involved in absolute monopolistic or horizontal practices or cartels.
- SUTEL has processed eight applications for prior notification of a concentration involving at least one State-owned enterprise.
- Concerns continue with regards to State-owned enterprises in the telecommunications area. SUTEL has recognized the existence of actions by State or Municipal authorities that discriminate against operators or providers, particularly in government procurement contracts awarded directly to State-owned enterprises, and permits for the deployment of telecommunications networks.