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The Promotion of Competitive Neutrality by Competition Authorities

Contribution from Costa Rica

1. Background

1. The Law for the Promotion of Competition and Effective Consumer Protection, Law 7472, established the Commission to Promote Competition [COPROCOM, if translated] as an administrative body responsible for the defense and promotion of free and open competition in all markets in Costa Rica (except for the telecommunications sector).

2. On the other side, the promulgation of the General Telecommunications Act, Nº 8642, established the opening of the telecommunications sector, which until that time, was serviced by a monopoly. The opening up of this sector required ensuring equal competition conditions among the various agents providing their services in that sector. In view of the above, and considering the particular characteristics of telecommunications services, members of congress opted for the creation of a sectoral competition regime that is applied exclusively by the Superintendency of Telecommunications [SUTEL, if translated][1]. This sectoral competition regime applies equally to all network operators and/or providers of telecommunications services, whether public or private, and does not include exonerations or exceptions for its application that may limit the scope of SUTEL's intervention.

3. In accordance with the above, Costa Rica has two administrative bodies that are responsible for the application of competition laws in the country, the COPROCOM, as the national authority, and the SUTEL, as sector authority specialized in telecommunications.

2. About the Principle of Competitive Neutrality in Costa Rican Legislation.

4. Having stated this, for the purposes of this contribution, competitive neutrality is recognized as a fundamental principle of competition law and policy that "occurs when no entity operating in an economic market is subject to undue competitive advantages or disadvantages"[2], i.e., competitive neutrality can be understood as a legal and regulatory environment in which all companies, public or private, face the same set of rules and government ownership or participation does not confer unjustified advantages to any entity. The foregoing stems from the idea that "firms should compete on the merits and should not benefit from undue advantages, for example, because of their ownership or nationality"[3].

5. In general basis, Costa Rican legislation does not establish any legal norm that explicitly defines and regulates competitive neutrality. However, the aim of the general

[1] Articles 52 of Act No. 8642; 59 of the Regulatory Authority of Public Services Act, No. 7593; and 2 of the Strengthening of the Competition Authorities of Costa Rica Act, No. 9736.

[2] The Organisation for Economic Co-operation and Development; (OECD) National Practices, 2012. Available at: https://www.oecd.org/daf/ca/50250966.pdf .

[3] Retrieved on September 23, 2021, from the following address: https://www.oecd.org/competition/competitive-neutrality.htm

competition laws is to safeguard and promote the process of free and open competition through the prevention and prohibition of monopolies, monopolistic practices, other restrictions that hinder the efficient functioning of the market, and the elimination of unnecessary regulations for economic activities[4]. Therefore, COPROCOM has understood that this principle is essential for effective competition in the markets and to prevent such distortions from affecting their efficiency and consumers or users and has recognized this in various statements it has published, as seen below.

6. In the case of the telecommunications sector, with the enactment in 2008 of Act Nº 8642[5], Costa Rica opted for an open market to competition, one in which several operators and providers of public and privately-owned businesses coexist and compete[6]. In order to ensure equal conditions for competition, the legislator determined that one of the guiding principles of Act Nº 8642 and, therefore, of the operation of SUTEL must be that of competitive neutrality (also known in our legislation as the principle of non-discrimination), defined as the: "treatment that is no less favorable than that accorded to any other operator, supplier or user, whether public or private, of a similar or equal telecommunications service"[7] [8].

3. The Application of the Principle of Competitive Neutrality and Actions Taken by Authorities

7. The recent enactment of the Strengthening of the Competition Authorities of Costa Rica Act, Nº 9736, established as one of the primary functions of the COPROCOM and of the SUTEL the carrying out of activities to promote and advocate in favor of competition, which aim is to foster and drive improvements in the process of competition and free and open competition in the market, eliminate and avoid distortions or barriers to entry, and increase the knowledge and awareness of the general public on the benefits of competition. To that end, this Act also establishes a number of non-coercive tools, including the issuance of opinions and recommendations[9].

8. Thus, to ensure competitive neutrality, competition authorities can assess the impact of laws and regulations (prior to or after their application), issue criteria on free and open competition, and make recommendations that benefit the market. In addition, in the

[4] Article 1 of Act Nº 7472.

[5] Law issued as part of the commitments assumed by Costa Rica under the Free Trade Agreement between Central America, the United States and the Dominican Republic (approved by Act No. 8622); which includes the agreement that neither party to the Treaty should grant *"to a public telecommunications service provider or an information service provider, treatment more favorable than that accorded to a similar supplier of the other Party on the basis that the supplier receiving more favorable treatment is owned, in whole or in part, by the party's national government" (*Chapter 13, Annex 13, point 13.7.3).

[6] According to statistics of the Telecommunications Sector, in 2020 a total of 158 economic agents were authorized. Available at: https://www.sutel.go.cr/sites/default/files/sutel_informe_estadistico_2020_digital.pdf

[7] Article 3 (g), Act Nº 8642.

[8] This precept is reinforced by the principle of effective competition, which states that "*adequate mechanisms be established so that market operators and suppliers compete under equal conditions with the purpose of ensuring the greatest benefit to the inhabitants and the free exercise of constitutional law and freedom of choice"* (article 3 (f) of Act 8642).

[9] Article 20 of Act Nº 9736.

case of COPROCOM, Act Nº 9736 vests upon it the power to challenge actions, resolutions, administrative conduct, and rules that are contrary to article 46 of the Political Constitution and the principles of Act Nº 7472 before the competent jurisdiction.

9. Article 21 of Act Nº 9736 also vests upon both authorities the power to issue opinions and recommendations in relation to laws, regulations, agreements, bulletins, and other administrative acts (in force or in the process of adoption), as well as in relation to bid or tender specifications pertaining to public procurement, the elements of which may obstruct the principle of free and open competition. While these opinions are not binding, Act Nº 9736 does require that any public entity that sets itself apart from these to report the motivations that resulted in such decision within thirty (30) calendar days. In addition, such communication is to be signed by the highest-ranking officer of the institution that issues it.[10].

10. In exercising such authority, both the COPROCOM and the SUTEL have recently made important efforts to address and, especially, to try to solve some of the causes of distortions in competition caused by State intervention in the market. In that regard, it is of interest to highlight the following opinions that have sought to ensure compliance with the principle under consideration by both COPROCOM and SUTEL.

3.1. Actions taken by the COPROCOM.

3.1.1. Actions in relation to legal regulations that favor the engagement of public enterprises.

11. Since 2016, the COPROCOM began to receive complaints concerning government actions aimed at favoring the engagement of state-owned enterprises in public procurement, which clearly places private companies at a disadvantage and affects the process of free and open competition. This also affects the efficiency of spending, as there is no certainty that the elected supplier was indeed the best one in terms of quality/price ratio.

12. The complaints related to the interpretation and application of paragraph c) of article 2 of the Public Procurement Act, which provides an exception from having to comply with the bidding procedures established under the Act when any contractual activity is conducted between public entities. The complaint concerned the direct procurement of a public enterprise that was not an expert in the service to be engaged and that ultimately subcontracted another company to fulfill certain elements of the engaged services. In both cases, no public tender was launched to allow for a wide range of agents to offer their services, and that would ultimately make it easier for the Government to choose the option with the best combination of price, experience, and quality[11]. In this regard, the COPROCOM has stated:

> *"5. The COPROCOM is concerned about recent examples of the use of derogation from a public tender that does not appear to be justified, especially in cases of agreements entered by and between public entities. (...).*
>
> *6. Such concern is further aggravated by the limitation of the principle of competitive neutrality, which requires that the commercial activities of the government do not benefit from competitive advantages over its competitors from the private sector. Thus, this body considers that competitive neutrality is necessary in order for guarantee effective competition in the markets and to prevent distortions that may arise in the market if a public*

[10] Article 121 of Act Nº 9736.

[11] Article 6 of the minutes of ordinary meeting Nº 38-2018. Available at: https://www.coprocom.go.cr/publicaciones/actas/2017/ACTA%2038-2017.pdf

enterprise has advantages that its competitors in the private sector do not have, from affecting the market's efficiency and its consumers or users.

7. This is why the following recommendations have been made:

a. The use of other types of procurement other than public tenders should be avoided save for highly qualified cases and only in the absence of sufficient bidders, whether at a national or international level.

b. Since the objective criteria to apply the assumptions for exempted types of procurement are not regulated, it is recommended that a bill to reform the regulations be considered and prepared, so as to improve the clarity and legal safety of the minimum requirements that need to be fulfilled in the docket for each assumption to apply.

c. (...).

8. It is also worth to note the position adopted by the Office of the Attorney General of the Republic in relation to inter-administrative contracts, which are based on the assumption of collaboration and complementarity between various public entities, so called for a better satisfaction of the general interest.

"...to better guide this type of public procurement initiatives, we took the liberty of creating the following guidelines:

1) Both contracting parties must contract within the framework of their respective authorities, which is why it is not admissible for a public entity that is subject to the principle of legality to become bound to execute actions that are beyond its scope.

2) The balance referred to under the law is such that a single party does not bear all or most of the resources required to fulfill the object of the agreement. (...)

3) Finally, if each entity undertakes to provide benefits that entail the disbursement of resources, these must be duly accounted for in a budget and available in order to meet the obligations it undertakes under the agreement.

(...)1. - A public entity that has previously made an agreement with another public entity cannot ignore the competition procedures when it intends to hire a private entity, a foundation in this case, to execute what is stated in the agreement. In this scenario, the general rule of the public tender must be followed.[12]" (See Competition Bulletin, No. 172, January-February 2018).[13]

13. Another complaint was related to Directive 023-H, issued on April 20, 2015, by the Ministry of Finance, which instructed the entities that make up the Central Government, and suggested to decentralized bodies, that they engage public universities, institutions, or enterprises for the provision of services, including those relating to information, advertising, and propaganda, medical and laboratory services, and training activities. As a result, the COPROCOM started an investigation and shortly after the guideline was repealed[14]. However, the competition authority issued Opinion No. 07-2018[15] expressing its disagreement with the scope of the directive issued by the Government and the effects it had on the domestic market for the procurement of goods and services by the Public Administration.

[12] Legal Opinion of the Office of the Attorney General of the Republic, No. 151-2001 dated October 17, 2001

[13]https://www.coprocom.go.cr/publicaciones/boletines/emagazine_boletines/Boletin_de_Competencia_N_172.html#page/2

[14] Repealed by Executive Order Nº 070-H of March 31, 2017.

[15] https://www.coprocom.go.cr/resoluciones/2021/OP-07-21_UCCAEP_111021.PDF

14. In addition to the wide dissemination of views, a chapter on this subject was incorporated into the 2019 revision of the Public Procurement and Competition Guide.[16] However, as long as a law allows public entities to procure from other public entities, not much can be done by the competition authority to prevent its abuse. Hence, the COPROCOM will focus its efforts on the legal reform that is already being processed.

3.1.2. Opinions in relation to the reform of the Public Procurement Act.

15. The Legislative Assembly requested the COPROCOM's opinion in relation to Bill No. 21.546, General Public Procurement Act. As a result, the COPROCOM issued Opinion OP-23-2019[17], in which it concluded the following in relation to such matter:

> *"ON EXCEPTIONS TO ORDINARY PROCUREMENT PROCEDURES AND FAVORING PUBLIC ENTERPRISES OVER PRIVATE ENTERPRISES:*
>
> *In relation to exceptions to the procedures laid down in the law, we find positive that the proposed rule is more rigorous in terms of some of the assumptions that have been detected, in practice, provide advantages to public enterprises over private ones. In particular, we refer to paragraph c) of article 3 of the bill, which provides for the exception of procedures between public entities but restricts its use to the fact that the contractual object be within the legal authorities of the contractor, sets out that it cannot be employed in the event that the public entities to be hired are in competition, and establishes that under no circumstance may it be used as a mechanism to engage third parties without following the procedures set out under this law.*
>
> *Notwithstanding the above, other new exceptions set out in paragraphs e) and f) of article 3 of the Bill also stand out:*
>
> *"Article 3 - Exceptions Only the following activities are excepted from the ordinary procedures set forth in this Act: (...)*
>
> *e) Sponsorship, and the engagement of means of social communication for the dissemination of messages related to institutional management.*
>
> *f) Procurement for open training, which should be understood as one where the general public is invited."*
>
> *In particular, from the point of view of Competition Law, which is the matter that concerns us, it does not seem that it is validly justified that these two activities should be exempted or excluded from the ordinary procurement procedures, and that such an exception framework could be used for the benefit of certain economic agents to the detriment of free and open competition and even result in significant economic disbursements. For this reason, a recommendation is made to congress to reconsider these two exceptions."*

16. Months after this opinion was issued, a new alternative text of the General Public Procurement Act was submitted for consultation. In relation to this new text, which included certain changes to the law, the COPROCOM issued Opinion OP-10-2020[18], which noted:

> *"The project sets out the following as an exemption from regular procurement procedures: "(...) b) The contractual activities conducted among public entities, when the contractual object is within the legal authorities vested in the entity to be contracted. In order to use this exception, the suitability of the public entity to be hired must be duly accredited in the*

[16] https://www.coprocom.go.cr/publicaciones/Guia_Contrata_Admin_2019.html

[17] https://www.coprocom.go.cr/resoluciones/2019/OP-23-19%20PROYECTO_LEY%2021.546-CONTRATACION_ADM.pdf

[18] https://www.coprocom.go.cr/resoluciones/2020/OP-10-20%20TEXTO_SUSTITUTIVO_PROY_LEY_21546.pdf

electronic file, and the latter shall have to provide at least 70% of the services or goods of the contractual object. Engagements of third parties by the contracted public entity should be limited to specialized matters and should observe the procedures set out in this law. This exception may not be used as a mechanism for hiring third parties without following the procedures set out in this law. (…)"

The fact that the contractual object is included within the legal authorities vested in the contracting entity can be very broad, as reality has shown that some public bodies have extensive legal authorities, even though they lack experience in the certain activity. This has resulted in a public entity that specializes in providing public services such as water, electricity, and telecommunications, also providing electronic billing services, electronic monitoring of offenders, and intelligent parking meters.

While the development of new activities by public authorities is not reproachable, the questions that arise are: Why should they have an advantage over private companies; Why does their public nature guarantee to the State the best price, service, or quality, and How does it achieve this if the public procurement process involving different offers is the ideal way to validate this?

The COPROCOM found that the way that the previous text had been drafted when it set out that the exception could not be used if the public entity were in competition, was more appropriate. The exception provided for in paragraph b), article 3) of the bill under review constitutes a limitation of the principle of competitive neutrality, which requires that the commercial activities of the government do not enjoy competitive advantages over its competitors in the private sector. Thus, this body considers that competitive neutrality is necessary in order for guarantee effective competition in the markets and to prevent distortions that may arise in the market if a public enterprise has advantages that its competitors in the private sector do not have, from affecting the market's efficiency and its consumers or users.

Finally, the circumstances that the country is experiencing as a result of the pandemic caused by COVID-19 require that policies promoting the reactivation of the private sector be fostered, and the granting of unjustified advantages to public enterprises in public procurement processes is not considered an appropriate measure to achieve that end.

17. Finally, the wording that was reflected in the regulation that will come into force in November 2021 is that of the latter version. Although an improvement in respect to the current law, it can still be used to violate the principle of competitive neutrality. In any case, COPROCOM will monitor its implementation.

3.1.3. Opinion regarding advantages awarded the Sistema Nacional de Radio y Television [SINART, National Radio and Television System, if translated]

18. In March 2021, the COPROCOM issued Opinion Nº OP-04-2021[19] as a result of an inquiry made by private companies in the communication sector that are adversely affected by the advantages that current laws award to the public company Sistema Nacional de Radio y Televisión (SINART).[20]

19. In this regard, the COPROCOM noted:

"Clearly, the regulations governing SINART are in violation of the principles of competitive neutrality and establish advantages for the state-owned enterprise to the detriment of other companies participating in the advertising market and other

[19]https://www.coprocom.go.cr/resoluciones/2021/OP-04-2021_CRIT_EXCEP_PROCED_CONTRPUB.pdf

[20] SINART, S. A. is a communication system composed of: The National Television Network, National Radio, Contrapunto magazine and the National Radio and Television Advertising Agency.

similar markets. The current situation, with the discussion in the Legislative Assembly of the amendment of the Public Procurement Act would allow, if there is political will, the elimination of some of these distortions that affect competition in the market. In particular, the one that allows to contract the advertising agency of the SINART without following the public procurement procedure.

In the reform of the SINART regulations, as in other laws that have been issued, the very reasonable concern of the members of congress is that the public enterprise can compete on equal terms with private companies. However, this vision does not consider whether rules are being introduced that undermine the latter's chances of competing for the benefit of state-owned enterprises."

20. It should be noted that the General Public Procurement Act that was finally approved expressly excluded from the list of exceptions to the regular public procurement procedures the engagement of advertising agencies to conduct advertising campaigns[21], as recommended by COPROCOM at the time.

3.2. Actions taken by the SUTEL.

3.2.1. Report on the alternative text of the General Public Procurement Act (Legislative Bill Nº 21.546)[22]

21. The alternative text of the General Administrative Procurement Bill sparked SUTEL's interest, because, for what is pertinent, it allowed the exemption of contractual activity carried out by public law entities from ordinary public procurement procedures when the contractual object was within the legal authorities of the contracting entity, for which purpose it imposes a restriction on subcontracting, meaning that 70% of the goods or services being engaged are to be provided by the public entity (paragraph b), article 3).

22. Once the scope of the proposed law was analyzed, and in line with the OECD guidelines, in its *"Recommendation of the Council on Public Procurement"*, the SUTEL concluded *that "it was unable to determine which circumstances justify the classification of such contractual activity as subject to an exception*," as the SUTEL was unable to clearly pinpoint which benefits or public end would be satisfied upon application of this exception. The foregoing especially considering that *"both state-owned enterprises (SOE) and the State itself comply with the rules of public procurement, so that these apply to public and private entities alike, in order to comply with the principle of competitive neutrality, which is to say, when in a market no party is subject to advantages or disadvantages."* In spite of the fact that it was recognized that the proposed rule resulted in clear progress in relation to the exception at that time included in paragraph c) of article 2 of the Public Procurement Act, Nº 7494, the discussion of the text of bill 21.546 signified an opportunity to benefit from a law that would foster competition, respect the principle of competitive neutrality,

[21] "Article 3 - Exceptions Only the following activities are excepted from the ordinary procedures set forth in this Act:

a) (...)

d) Sponsorship, and the engagement of means of social communication for the dissemination of messages related to institutional management, which does not include the engagement of advertising agencies to conduct advertising campaigns.

[22] Opinion that was issued by the Technical Body of the SUTEL (now Directorate General for Competition) under document 05915-SUTEL-OTC-2020 of July 03, 2020 and received by the Council of the SUTEL by agreement 022-049-2020 (according to document 07174-SUTEL-SCS-2020).

and approach best international practice in the field of public procurement. Therefore, efforts had to be made to eliminate all unnecessary exceptions that were not duly justified and that had the potential to restrict competition.

3.2.2. Report on the bill "National Digital Literacy Program" (Legislative Bill Nº 22.206)[23]

23. The bill *"National Digital Literacy Program"* was submitted to the legislative assembly for review and approval in response to the impact that the Costa Rican education system was facing due to the crisis caused by the COVID-19 pandemic and the suspension of in-person classes since March 16, 2020.

24. With regard to the principle of competitive neutrality, SUTEL found a purported amendment to article 36 of the General Telecommunications Act to be of interest. With this amendment, this article would now read *"(…) for projects to procure equipment to improve access and for digital literacy projects, including the required equipment, the applicable procurement procedures shall be followed, favoring those bidders that are able to accredit their experience in the field."* In this regard, it was considered that the proposed wording not only appeared to be contrary to the principles of free competition and equality that should govern public procurement, but it also contrasted with the best practices recommended by bodies such as the OECD and the COPROCOM in terms of public procurement, given that *"it affects the level of competition in the market, by giving advantages in competitions to certain economic agents, to the detriment of the principle of competitive neutrality that is set out in this law."*

25. The document "Public Procurement and Competition Guide" of COPROCOM, which states, among other things, that the principle of competition supplements the precepts of equal opportunities, transparency, publicity, legal certainty, formalism of procedures, balance of interests, good faith, mutability of contracts, and control of procedures, that govern public procurement, as well as in *the "OECD Council Recommendation on Fighting Bid Rigging in Public Procurement"*, in so far as it recommends that, in public procurement processes, the avoidance of unnecessary restrictions that reduce the number of qualified bidders should be considered, as well as avoid any type of preferential treatment for a certain category or type of supplier, for which purpose the criteria to assess and award a contract should be chosen carefully, as all selection criteria affect the intensity and efficacy of competition during the acquisition process.

26. The bill also proposed an exceptional or special procurement procedure that would authorize the Ministry of Public Education or the implementer of the National Digital Literacy Program projects, to conduct emergency procedures and without procurement processes, until December 31, 2021 (through the inclusion of transitional provision IX to Act Nº. 8642). SUTEL, reiterating the OECD's statement on the use of exceptions in the field of public procurement and on the need for both state-owned enterprises and the State itself observe public procurement procedures and rules, so that these apply to private and public entities alike, in order to comply with the principle of competitive neutrality, concluded that *"in line with the OECD recommendations, the most appropriate action is for public procurement procedures to follow the normal procedures laid down in Act 7494, avoiding at all times not only the imposing of restrictions on the participation of different bidders in procurement processes, but also the use of mechanisms of an exceptional nature*

[23] Report issued by the Directorate General for Competition under document 10908-SUTEL-OTC-2020 of December 01, 2020, and received by the Council of the SUTEL under agreement 003-084-2020 (communicated to the Legislative Assembly under document 10924-SUTEL-SCS-2020).

that adversely affect the principle of competitive neutrality and could favor a particular market agent to the detriment of the other participants".

3.2.3. Report on the bill to encourage and promote the construction of telecommunications infrastructure in Costa Rica (Legislative docket 22520)[24]

27. The aim of this bill was to "encourage public entities, which participate in the procedures and requirements for the construction of infrastructure in the sector, work in a coordinated manner and with the greatest speed in order to foster the improvement and coverage of telecommunications in all corners of the country." It intends that the telecommunications infrastructure in Costa Rica be developed in a coordinated manner among all public entities related or connected to the sector, to ensure that existing laws and technical and legal provisions are applied equally throughout the country.

28. After analyzing the proposed article, it was concluded that:

> *"Notwithstanding the foregoing, it should be noted that the SUTEL has presented various situations associated with the existence of actions taken by state or municipal authorities that discriminate between operators or suppliers, in particular in relation to the permits necessary for the deployment of telecommunications networks, stating the following:*
>
> *"Regarding the impact of the problems listed above, the problems with the municipalities and the Secretaría Técnica Nacional Ambiental [National Technical Environmental Secretariat, if translated] for the deployment of telecommunications infrastructure stands out. This has led to delays in the plans to expand and improve the coverage of certain operators."*
>
> *These problems have been reported by operators over time and have even been recognized by institutions such as the World Bank:*
>
> *"Claro and Movistar had delays in installing their systems due to the slow approval of tower building permits by the municipalities… due to difficulties in obtaining construction permits, private mobile service providers had to request an extension to complete phase one of their network deployment plans."*
>
> *…*
>
> *This shows not only that in the past there have been situations in the market that have subjected some mobile market operators to a competitive disadvantage, but also that still today certain institutions continue executing actions that result in an unfair treatment for different types of telecommunications operators in the country.*
>
> *This, in addition to affecting already established operators, could also affect new operators that would like to enter the market, especially those acts that affect and delay the deployment of telecommunications infrastructure.*
>
> *As a result, the regulator must also make the necessary efforts to avoid such discriminatory events and barriers to deploy infrastructure that ultimately affect end-users of telecommunications services, who will be affected by a limited coverage and quality of the services they receive."*

29. Based on the foregoing, the SUTEL confirms that the objective of Bill 22.520 contributes to leveling the playing field for the different operators and suppliers of the market; therefore, it is consistent with the principle of competitive neutrality and non-discrimination provided for in article 3, paragraph g) of Act Nº 8642.

[24] Report issued by the Directorate General for Competition under document 08748-SUTEL-OTC-2021 of September 16, 2021, and approved by the Council of the SUTEL under agreement 02-067-2021(communicated to the Legislative Assembly under document 08886-SUTEL-SCS-2021).

3.2.4. Report on Administrative Bulletin Nº 14-ADM-2020 "Procedure to address investigations relating to allegations of cable theft and other components of telecommunications and electricity infrastructure owned by the Instituto Costarricense de Electricidad [ICE; Costa Rican Institute of Electricity, if translated]" and its addendum, Nº 29-ADM-2020; both issued by the Office Attorney General of the Republic for prosecutors of the Public Ministry[25.]

30. In July 2020, the Office of the General Attorney of the Republic issued Administrative Bulleting Nº 14-ADM-2020. This provision contained a series of practical guidelines for the approach, processing, and investigation by prosecutors of the Public Ministry of criminal cases related to the theft and receipt of stolen cable or any other element of telecommunications and/or electricity infrastructure owned by ICE.

31. In principle, bulletin 14-ADM-2020 exclusively sought to solve a problem that apparently only affected ICE, noting: "indeed, it should be emphasized that, as of the entry into force of the General Telecommunications Act, it was provided that the operation of networks and the provision of telecommunications services would be subject to a sectoral competition regime (article 52) and that, in addition, fixed telephony could be offered to users through new technologies. It is true that, in the case of traditional basic service (…), it remains, so far, in the hands of the Costa Rican Institute of Electricity, as the only supplier authorized under a special legislative concession. Consequently, since the aforementioned service is provided exclusively by ICE, the ICE could not, in a valid way, refrain from providing it, even more so, if the community in question lacks any other technologies to access the fixed telephony service" (the original was not highlighted). In addition, the bulletin pointed out that the theft of cable and other elements of infrastructure hinders ICE's ability to render its telecommunication services adequately and effectively, and also results in additional costs (not only because of the material value of what is stolen, but also because of the associated expenses that are incurred, such as the acquisition of new materials, reconnection of the service, deployment of staff, and repair of damages).

32. However, SUTEL conducted a series of consultations with network operators and telecommunications service providers, whose responses helped understand that such problem [vandalism] and its possible effects, are not isolated events that only affect ICE, but an issue that affects all of the economic agents in the market. Consequently, the SUTEL inquired with the Office of the General Attorney of the Republic on the reasons why Bulletin 14-ADM-2020 established a procedure to exclusively address complaints submitted by ICE and did not consider other network operators and/or telecommunications service providers. In response to inquiry, the Office of the Attorney General stated "…the foregoing bulletin only refers to the Costa Rican Institute of Electricity (ICE), as it is the public enterprise that provides the infrastructure to the other operators and, therefore, the economic damage is to the detriment of ICE. However, the same treatment will be given to complaints filed by other operators…" The Office of the Attorney General further clarified that "… in order to avoid misinterpretations, it expanded Bulletin 14-ADM-2020, which states that the same diligence and speed must be employed to address complaints lodged by other telecommunications operators." (The original was not highlighted).

[25] Opinion that was prepared by the Directorate General for Competition under document 07217-SUTEL-OTC-2021 of August 05, 2021, and that was approved by the Council of the SUTEL under agreement 019-056-2021 (communicated to the Office of the Attorney General through notice 07564-SUTEL-SCS-2021).

33. This is how the Office of the General Attorney of the Republic proceeded to prepare an addendum to Bulletin 14-ADM-2020 under Nº 29-ADM-2020, which it called "Addendum to bulletin Nº 14-ADM-2020 Procedure to address investigations relating to allegations of cable theft and other components of telecommunications and electricity infrastructure owned by the Instituto Costarricense de Electricidad (ICE) and Other Telecommunications Operators", which expands the scope of the bulletin to any other telecommunications operator affected by this criminal practice.

34. In short, Bulletin Nº 29-ADM-2020 addresses the possible beneficial treatment given to ICE, expanding the scope of application of the procedure to address complaints relating to cable theft and other telecommunications and electricity infrastructure components to all other telecommunications operators on the market. This allows for the settlement of any preferences or advantages granted to any operator, thus driving a neutral regulation and competitive equity, given that the procedures to address complaints lodged before the Judicial Branch must be the same for all network operators and providers of telecommunications services, in line with the principle of competitive neutrality enshrined in article 3 of Act Nº 8642.

3.2.5. Report on the specifications of public tender Nº 2021CD-000030-0002700001 for the procurement of "OPTICAL FIBER INTERNET CONNECTIONS" launched by the Municipality of Alajuelita[26]

35. The Municipality of Alajuelita, through a *contratación directa por escasa cuantía* [direct procurement of lesser value, if translated] procedure, Nº 2021CD-000030-0002700001, required the engagement of optical-fiber internet connections for its municipal building for one year, renewable for a maximum of three additional years. The tender specifications included the following requirement: *"3. The supplier must be a provider based in Costa Rica with over 20 years of experience in the sale and installation of telecommunications connections using optical-fiber as a means of connection (notarized certification)."*

36. Thus, the SUTEL analyzed the scope of the above technical specification as follows:

> *"In order to evaluate the reasonableness and proportionality of the establishment of such a commercial requirement, one should start by considering that the telecommunications market in Costa Rica was opened to private operators in 2007, following the approval of the Free Trade Agreement between the Dominican Republic, Central America and the United States of America (DR-CAFTA). However, the materialization of the opening of the telecommunications market involved the adoption of a series of rules to regulate the sector, as well as the paperwork that private companies had to process to be able to start providing telecommunications services and, therefore, it was not until the year 2009 that the first licenses enabling the rendering of telecommunications services were issued by the SUTEL in Costa Rica. In that sense, the telecommunications market has been open for 12 years, which means that this is a requirement that could only be fulfilled by operators that provided their services before the market opening.*

[26] This report was issued by the Directorate General for Competition under document 05150-SUTEL-OTC-2021 of June 17, 2021, and approved by the Council of the SUTEL under agreement 031-046-2021 (communicated to the Municipality of Alajuelita under document 05926-SUTEL-SCS-2021).

It is also important to consider that in 2019 there were 23 telecommunications service operators providing fixed internet access service using optical fiber technology. Therefore, establishing as requirement an experience of more than 20 years implied granting an advantage to a particular market operator to the detriment of the rest, which could adversely affect the principle of competitive neutrality enshrined in article 3, paragraph g) of the General Telecommunications Act, Nº 8642, as the tender specifications fail to explain, with technical grounds, why such number of years of experience is required for the rendering of that service in particular. Hence, it is clearly established that there may be other operators that can meet the technical requirements to provide the service required by the Municipality.

As a result of the foregoing, it is considered that the provisions of clause 3 of the technical specifications may not be proportional in relation to the content of the services that are being procured, especially because a variety of companies exist that can provide the service in a satisfactory manner, even if they have fewer years of experience, and therefore such a requirement becomes an unnecessary restriction that reduces the number of bidders".

37. Based on the foregoing, the sectoral competition authority recommended to the Municipality of Alajuelita to amend clause 3 of the technical specifications included in the tender, adjusting the required experience in such a way that the number of bidders is increased, and the technical requirements of the contracting entity are safeguarded. The above considering the characteristics indicated by the OECD and the COPROCOM in terms of public procurement (identified in that document) in order to avoid infringing the principles of free and open competition. It is therefore recommended that the contracting authority avoid including in the tender specification it drafts unnecessary restrictions that reduce the number of qualified bidders, avoid introducing unjustified requirements, and specify minimum requirements that are proportional to the size and content of the tender.

3.2.6. Report on spectrum allocation for future deployment of 5G networks from a competition perspective[27].

38. The Ministerio de Ciencia, Tecnología y Telecomunicaciones [MICITT; Ministry of Science, Technology and Telecommunications, if translated], under note MICITT-DVT-OF-313-2020, expressed to the SUTEL its interest of launching a public tender process to allocate the spectrum, with the aim of "enabling access to and use of more and better mobile telecommunications services; to meet the growing demand for data traffic; and to ensure the benefits of the information society to the population; through a new radio spectrum procurement process for the deployment of IMT systems".

39. Thus, an analysis was made in relation to whether the current distribution of frequency bands included in the instructions issued by the Executive Branch by means of note MICITT-DVT-OF-313-2020 (which, although does not include spectrum bands in the frequencies of 2600 MHz and 3500 MHz, does include low, medium, and high spectrum bands) would confer a potential advantage to the existing concession holder of such bands, who given its historical position, could be in an advantageous position to deploy and

[27] This report was prepared by the Directorate-General for Competition under document 04225-SUTEL-OTC-2021 of May 19, 2021, and approved by the Council of the SUTEL through agreement 031-041-2021 (which was communicated to the MICITT under document 04548-SUTEL-SCS-2021).

provide 5G services; and to whether such advantages could negatively affect competition in the market, in the case that they do exist.

40. In that regard, the SUTEL considered:

"Regarding how historically consolidated situations can affect market competition, the OECD has indicated the following:

"There is a broad consensus that competition can drive significant benefits by improving consumer wellbeing by providing better products and services at a lower cost. These benefits are equally available in purely private markets, as well as in those where public and private companies compete. However, state-owned enterprises can often benefit from the advantages conferred on them by existing legislative and administrative frameworks, which can have an effect on the quality and cost of the goods and services they provide. These effects include, among others, lower capital costs, lower taxes, and lower risks of acquisition and bankruptcy. As a result, competition between state-owned and private enterprises can become distorted . Since these distortions cannot always be addressed through the application of competition law, a possible solution can be found in policies aimed at achieving competitive neutrality in markets where state-owned and private enterprises compete" (the highlighting is intentional).

As discussed above, the historical situation of ICE in relation to the full possession of the 2600 MHz and 3500 MHz spectrum bands, together with the non-recovery of the unused spectrum in these bands, as well as aspects related to the efficient use of the spectrum, has the potential to give ICE an advantage in deploying a key service, such as 5G, for future mobile market competition. In turn, this advantage could lead to a reconfiguration of market share, which, as discussed in a previous section, has tended to become more balanced among mobile telecommunications operators in recent years, and could drive a deterioration in the concentration indicators of the Costa Rican mobile market, which could ultimately affect competitiveness in the market.

Therefore, in circumstances where a situation contrary to the principle of competitive neutrality may arise and which cannot be addressed using traditional tools to defend competition, the alternative is to create adequate regulatory frameworks that foster competition and innovation and, in particular, to generate the necessary incentives to invest in networks. This is in line with resolution 12790-2010, issued by the Constitutional Chamber, in relation to radioelectric spectrum and the need to initiate procurement procedures to open the mobile telecommunications market:

"On this last point, it should be said that the progress in the last twenty years in information and communication technologies (ICTs) has revolutionized the social environment of the human being. It can be stated that these technologies have impacted the way in which human beings communicate, facilitating the connection between people and institutions worldwide and eliminating the barriers of space and time. At this time, access to these technologies becomes a basic instrument for facilitating the exercise of fundamental rights such as democratic participation (electronic democracy) and citizen control, education, freedom of expression and thought, access to information and public online services, the right to relate to public authorities by electronic means, administrative transparency, among others. The right access to these technologies, namely the right of access to the Internet or network of networks, has been affirmed as a fundamental right. In this regard, the Constitutional Council of the French Republic, in Judgment Nº 2009-580 DC of

June 10, 2009, held that Internet access is a basic right, directly linking it to Article 11 of the Declaration of the Rights of the Man and of the Citizen of 1789. The above, by declaring the following: (the original was not highlighted) In this context of the information or knowledge society, public authorities are required to promote and ensure universal access to these new technologies for the benefit of the public. On the basis of the foregoing, the Constitutional Court concludes that the verified delay in the opening of the telecommunications market has not only violated the right enshrined in Article 41 of the Constitution, but also it has affected the exercise and enjoyment of other fundamental rights such as the freedom of choice of consumers enshrined in article 46, in fine paragraph, of the constitution, the right of access to new information technologies, the right to equality and the eradication of the digital divide (info-exclusion) – article 33 of the constitution – the right that consumers or users have to access the internet through the interface of choice, and the freedom of business and trade. "Whereas, in accordance with article 11 of the Declaration of the Rights of the Man and of the Citizen of 1789, "the free communication of thoughts and of opinions is one of the most precious rights of man: any citizen thus may speak, write, print freely, except to respond to the abuse of this liberty, in the cases determined by the law"; the current state of means of communication; and in relation to the general widespread development of public online services and the importance of these services for participation in democratic life and the expression of ideas and opinions; this right implies the freedom to access these services; (...)" (the highlighting is intentional)".

41. Finally, it is important to point out that perhaps one of the challenges that SUTEL would face in the future to protect competitive neutrality is related to the monitoring and follow-up of the opinions and recommendations it issues. Although these have no binding effect, the sectoral authority must ensure that those public entities that deviate from its conclusions provide the respective justification for their actions (which to date and in relation to the opinions included in this contribution, has not occurred, assuming our interventions have been heard). To that end, the SUTEL is already working on the drafting of a Technical Regulation to Act Nº 9736 that addresses this subject through *licitación abreviada* [summary tender, if translated] Nº 2020LA-000011-0014900001.