

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by Costa Rica****27 November 2018**

This document reproduces a written contribution from Costa Rica submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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Costa Rica

1. Background

1. Before 2008 Costa Rica did not have legislation for the prior control of mergers. With the approval of the General Law of Telecommunications, Law N° 8642¹, the Superintendence of Telecommunications, as sectorial authority with competencies in telecommunications, was granted the powers to perform the prior control of mergers.
2. Thus, **SUTEL is the first competition authority in Costa Rica empowered to carry out the prior control of concentrations**. Later, in 2012, a reform to the Law for the Promotion of Competition and Effective Consumer Protection, Law N°7472,² gave the domestic competition authority, known as the National Commission for the Promotion of Competition (Comisión Nacional para Promover la Competencia - COPROCOM), the necessary competencies to implement the prior control of mergers.

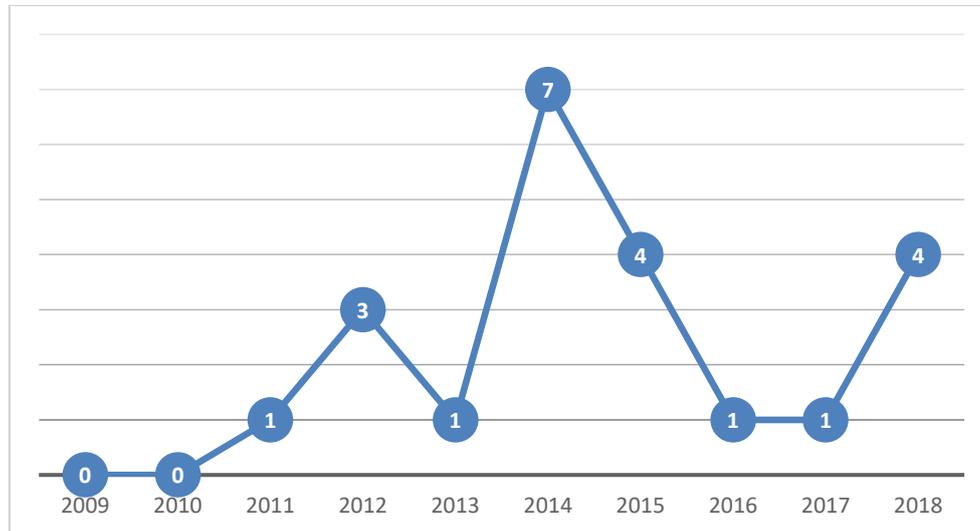
2. Current Situation

3. SUTEL started functioning in January 2009. In its early years, many applications were submitted requesting licenses. But as the market gradually developed and matured, many enterprises disappeared, others merged, and still others have solidified in the market.
4. As the charts below describe, the number of notifications of concentration submitted to SUTEL has fluctuated over the years.
5. From 2009 to the present, a total of twenty-two applications for authorization of concentrations have been presented and analyzed, of which:
 - Eighteen were approved;
 - Three were approved with conditions; and
 - One was rejected.

¹ General Law of Telecommunications, N° 8642, of 30 June 2008, published in the official journal La Gaceta N° 125.

² Reform to Law 7472, Law for the Promotion of Competition and Effective Consumer Protection, of 20 December 1994, and its amendments, N° 9072.

Chart 1. Costa Rica: Number of mergers analyzed in the telecommunications sector 2009 to 2018*



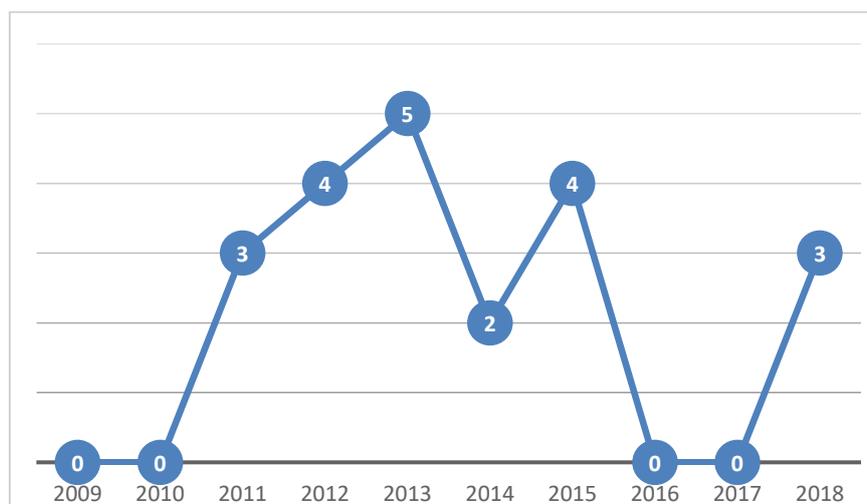
Note: *Figures to August 2018.

Source: Compilation based on SUTEL records.

6. Additionally, SUTEL has processed 23 cases of prior notification of concentration that did not conclude in a normal manner, including:

- Transactions that did not require notification;
- Queries on the duty to notify;
- Concentrations that SUTEL was not responsible for analyzing; and
- Notifications that were withdrawn.

Chart 2. Costa Rica: Number of transactions analyzed that did not conclude normally 2009 to 2018*



Note: * Figures to August 2018.

Source: Compilation based on SUTEL records.

3. Un-notified Mergers and “Gun Jumping”

7. Costa Rican telecommunications legislation provides that mergers be controlled ex ante. Article 56 of Law 8642 indicates that “**prior to a merger**, network operators and telecommunications service providers shall ask SUTEL to assess the impacts that such a merger could have on the market.”³

8. In this sense, “gun jumping” occurs when the merger control procedure is breached.⁴

9. Transactions that may be considered a merger must mandatorily be notified to SUTEL prior to completion. **The breach of duty to notify a merger is typified as a very serious infraction** under Article 67, paragraph a), sub-paragraph 14) of Law 8642, and may be penalized with fines that ranges between 0.5% and 1% of the gross revenue earned by said operator or provider in the previous fiscal period. Additionally, Article 58 of Law 8642 provides that, in the case of unauthorized mergers, SUTEL may impose corrective actions such as “the partial or total deconcentration of whatever was subject to undue concentration.”

10. The Regulations of the Telecommunications Competition Regime (Reglamento del Régimen de Competencia en Telecomunicaciones - RRCT) set out the steps to follow in the event a concentration or merger has not been reported to SUTEL, indicating that “In the event a merger has not been notified to SUTEL, the latter shall, ex officio, demand the parties to notify so they comply with the corresponding notification.”

11. SUTEL requires parties to submit the corresponding notification within 20 days. Otherwise it may ex officio open a merger control file and may impose the sanctions and fines provided in the General Law of Telecommunications.

12. It is also worth highlighting that in the event of un-notified mergers that have already produced effects and have been pre-sold by SUTEL, **the effects of the transaction in the market are not subject to an order of temporary suspension** since Costa Rican legislation does not provide for such a figure.

13. To date, SUTEL **has required notification in five cases of transactions that were subject to the process of prior control of notifications**, as described below.

14. The first case of a requirement of notification occurred in 2013, between a pay television service operator and an IP fixed-line telephony service operator. When the operators received the notification requirement from SUTEL and realized that they should have reported the transaction, they decided to strike the agreed partnership. The parties requested to close the merger analysis file since they were going to immediately eliminate the effects of the merger; the case was closed (File CN-1591-2013).

15. The second case of requirement of notification occurred in 2014, between two subscription television and residential Internet access service providers, one of which acquired 100% of the shares of the other enterprise without requesting the prior authorization of SUTEL. The enterprises proceeded to notify the transaction as required

³ This is in contrast with Law No. 7472, according to which agents from other sectors may notify mergers within five business days following the signature of the agreement.

⁴ As to substantive gun jumping or limits to the exchange of information prior to a merger, SUTEL has no criteria to determine the quantity and quality of the information that operators involved in a transaction may share prior to approval of the merger by SUTEL.

by SUTEL, which concluded, after analysis, that it had no negative impacts on the market and, therefore, authorized the transaction without conditions (File CN-1743-2014).

16. A third case arose in 2014, this time between a provider of fixed and mobile Internet access provider and a wholesale services provider with access to capabilities in international marketing. The enterprises informed SUTEL of their interest to transfer assets from one operator to the other. Given the nature of the transaction, SUTEL determined it should be notified of prior control of mergers, and, therefore, required notification. After further analysis, it concluded that the transaction had no negative impact on the market, and authorized the transaction without conditions (File CN-1824-2014).

17. Then a fourth case of requirement of notification occurred in 2015, between a subscription television and residential Internet access service provider and a fixed telephony service provider. The operators were informed by SUTEL of the requirement of notification and proceeded to notify such transaction, but the notification was incomplete. They were warned to comply with the requirements in the Regulations. The party responded that it could not meet all requirements, and therefore requested to close the file (File CN-00476-2015).

18. The most recent case of un-notified mergers occurred in 2017, where SUTEL informed an operator of the merger notification requirement after the enterprise informed of its interest to transfer its shares, but had understood there was no need to notify this transaction; it requested a revocation, appealing against the requirement of notification. The revocation was examined and dismissed, and the enterprise decided to withdraw the appeal and, instead, notified the request for authorization of the merger. Thereafter, SUTEL analyzed the merger, determining it had no negative impact on the market, and gave its approval (File CN-01497-2017). This transaction involved a pay television and Internet access provider and a wholesale data transmission provider.

Table 1. Costa Rica: Number of transactions to be notified for prior merger control procedure by SUTEL. 2009 to 2018*

| | | | |
|------|---------------|---|-------------------------------|
| 2013 | CN-1591-2013 | Pay television and IP fixed telephony | Closed |
| 2014 | CN-1743-2014 | Pay television and residential Internet access | Authorized without conditions |
| 2014 | CN-1824-2014 | Internet access and access to international capabilities | Authorized without conditions |
| 2015 | CN-00476-2015 | Pay television, residential Internet access and fixed-line IP telephony | Closed |
| 2017 | CN-01497-2017 | Wholesale data transmission | Authorized without conditions |

Note: * Figures to August 2018.

Source: Compilation based on SUTEL records.

19. Another noteworthy case occurred in 2012, precisely a gun jumping event, involving notification of a merger between a subscription television and residential Internet access operator and a fixed-line IP provider. SUTEL identified that the transaction had been notified after the fact: the effective transfer of shares had occurred several months before the operation was notified to SUTEL. Although the operation had already taken place, SUTEL examined the effects of the transaction on the market and determined there was no negative impact, and authorized the transaction without conditions (File OT-0991-2012).

20. In all the above mentioned cases, SUTEL becomes aware of these transactions in the telecommunications market due to its regulatory functions, under which operators must inform, among others, changes in capital stock, partnerships formed, and the provision of services, among others. With this, SUTEL learns about transactions in the market but which were not notified.

21. None of these cases, though, resulted in sanctions for agreeing to a merger without prior notification of SUTEL, basically for the following reasons:

- Two of these cases involved operations that had not yet been finalized; they were informed to SUTEL prior to completion, and, therefore, notification occurred as provided by Law, not representing gun jumping.
- In two other cases, the enterprises withdrew the transaction.
- In the two remaining cases, where gun jumping was determined when one operator took control over the other without prior authorization of SUTEL, it was decided that these transactions occurred in the early years of enactment of Law 8642 and there was not enough knowledge on the scope of the legislation, particularly its interpretation and enforcement.

22. It is important to consider that in none of these cases was the transaction found to have a negative impact that would merit its rejection or condition or call for the dissolution of the merger, and, therefore, the parties were not found to breach the duty of notification, or to unfoundedly disregard the merger authorization procedure.

4. Preventing the Occurrence of Un-notified Mergers

23. An analysis of these cases yields two reasons for the existence of un-notified mergers in the field of telecommunications. Firstly, the initial unfamiliarity with the norm that mandated subjecting certain transactions to the process of prior control of notifications, especially considering that telecommunications was the first sector in Costa Rica to have a specific rule. And secondly, the divergent views about which transactions were subject to prior merger control.

24. Therefore, in order to avoid the occurrence of un-notified mergers, SUTEL must be preventive and proactive promoting competition, mainly focusing on the dissemination of the legislation related to the Sectorial Regime of Competition in Telecommunications.

25. As part of its advocacy efforts, SUTEL has a Guide to the Analysis of Mergers in the Telecommunications Sector (“Guía de análisis de concentraciones del sector telecomunicaciones”), which may be found on the SUTEL website, <https://www.sutel.go.cr/guias-competencia>. Additionally, in 2017 SUTEL⁵ made available competition-related training courses for the telecommunications sector, seeking to broaden knowledge with regards to the application of the Sectorial Regime of Competition in Telecommunications.

⁵ Information available at: <https://sutel.go.cr/noticias/comunicados-de-prensa/capacitacion-gratis-temas-de-competencia-de-telecomunicaciones>

26. Additionally, as indicated above, it is easier for SUTEL to identify un-notified telecommunications through its regulatory actions, through which it becomes aware of transactions that have not been notified to SUTEL for prior analysis.

27. In this sense, the openness of the authority to address competition is a significant step to reduce the number of un-notified transactions and gun jumping cases. SUTEL is in active communication with operators during pre-notification⁶ phases. In other words, when an operator is considering a transaction, the authority is always open and willing to meet with agents to clarify different matters, such as who should notify, what procedure must be followed, and what requirements apply.

28. Finally, the establishment of a sound relationship of cooperation with the national authorities and those of other jurisdictions⁷ is extremely helpful to detect un-notified mergers since some competition authorities and other State authorities may have information on transactions taking place in the market.

⁶ The obligation of pre-notification is not defined in Costa Rican legislation.

⁷ Regarding the exchange of information with other jurisdictions, it is worth mentioning that Costa Rica has mechanisms of positive courtesy, particularly the notification of mergers or acquisitions where one or more party involved in the transaction is established or organized under the laws of the other party, as established in several trade agreements, like the Free Trade Agreement with Canada, and the Free Trade Agreement with Korea.