

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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## Costa Rica

### 1. Telecommunications Regulatory Framework and Competition

1. The enactment of the General Telecommunications Law, Law 8642, in 2008 established a milestone in Costa Rican history by opening to competition a sector that had been a legal monopoly for decades.
2. Opening the sector unleashed several challenges, including the challenge to guarantee equal conditions when different operators compete. When Law No. 8642 was approved, the features of the telecommunications services were analyzed and showed signs of being differentiated from other goods and services. There was a rapid technological evolution so there was a rule that telecommunications networks would be operated, and their services would be provided subject to the sector-based competition system applied by the Telecommunications Regulatory Authority (SUTEL) as a specialized entity.<sup>1 2</sup>
3. This is the context in which this entity began to act as the sector specialized competition authority under the auspices of Law 8642, the Regulation of the Competition Regime in Telecommunications (Regulation) and Law 7472.
4. Thus, the sector-based merger system establishes mandatory notification, ex-ante and without minimum thresholds. Therefore, prior to performing a merger<sup>3</sup> that involves operators of telecommunication service providers and networks that have been independent from each other, an application for authorization must be submitted to SUTEL.
5. The SUTEL actions in this matter are based on Article 56 of Law 8462 as well as by Article 24 of the Regulation. In addition, in line with the best international practices to provide transparency, analytical solidity and structure to the process, SUTEL implemented a standard methodology in 2015<sup>4</sup> in the form of the “*Guidelines to Merger Analysis for the Telecommunications Sector.*”<sup>5</sup>
6. Thus, in line with the legal system, the Guidelines, and the features of each merger operation, SUTEL maintains a consequential analysis structure that includes appraisal of the following elements.<sup>6</sup>

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<sup>1</sup> Article 52.

The Public Utility Regulatory Authority Law, Law 7693, Article 59.

<sup>3</sup>Either acquisition of control over shares, alliances, or any other action used to merge companies, associations, shares, capital stock, trusts, or assets in general.

<sup>4</sup>This is an analytical guide that provides guidelines to follow and must not be mechanically or uniformly applied.

<sup>5</sup>This guide is available at: [https://sutel.go.cr/sites/default/files/2015\\_sutel\\_telecomunicaciones\\_guia.pdf](https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf).

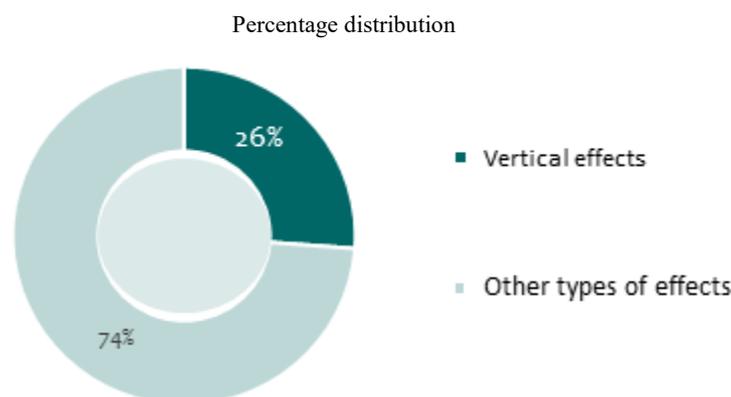
<sup>6</sup>The Telecommunications Regulatory Authority: *Merger Analysis Guide for the Telecommunications Sector*, 2015. This guide is available at: [https://sutel.go.cr/sites/default/files/2015\\_sutel\\_telecomunicaciones\\_guia.pdf](https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf).

- Nature of the merger and possible anti-competition effects<sup>7</sup>.
  - Relevant markets involved in the operation.
  - Structure of the relevant markets.<sup>8</sup>
  - Unilateral practices that are coordinated that may come about as a consequence of the operation.
  - Restrictions that may govern the exercise of the identified practices.
  - Efficiency gains that are attributed to the operation.
7. Whether the merger will keep an operator from exiting in prejudice of the users.

## 2. Treatment provided for vertical mergers.

8. In the last decade, the Costa Rican telecommunications sector has lived through a consolidation process that as of 2018 implied that SUTEL had analyzed 42 merger operations, and in particular, 11 transactions with vertical effects.<sup>9</sup>

**Figure 1. Costa Rica: Classification of telecommunication sector mergers, based on their effects. Period 2008-2018.**



Source: Proprietary preparation based on SUTEL data.

9. It is important to note that the telecommunication sector is characterized by the existence of numerous interrelationships, a convergence of technological platforms, network externalities, essential facilities, and supply contracts. Hence, 50% of the merger

<sup>7</sup>Merger horizontally, vertically, as a conglomeration, or as a combination.

<sup>8</sup>The participants should be identified, and they should be assigned market shares plus the degree of merger of each identified relevant market should be estimated.

<sup>9</sup>All the analyses performed by SUTEL are included.

operations that were analyzed entail a combination of horizontal, vertical, and/or conglomerate effects<sup>10</sup>.

10. Horizontal operations have a direct effect on end consumers and any analysis of those operations revolves around the coordinated and unilateral effects that may be generated by the transaction when direct competition is removed. A different situation occurs in vertical or conglomerate transactions that may affect the competitive dynamics between competitors and market foreclosure. Any sort of effect may appear indirectly related to the consumers of the products produced by the involved firms.<sup>11</sup>

11. The study on resolutions issued by SUTEL to date evidences that the sector-based authority that is part of the underlying principle that the impact of the transaction on the market is directly related to the type of economic merger, and therefore, the first issue that is defined when performing the analysis is that, if the involved companies are direct competitors, they operate at different levels of the value chain or they operate in different markets due to being closely related<sup>12</sup> and given that a single merger may have combined effects, the impact and its effects must be individualized.

12. At the level of a *vertical* analysis in particular, the sector-based authority needs to define at least two relevant and geographic markets for the product: an **upstream** market that manufacturers or markets a service that is input for the product or service that is manufactured and commercialized in the market **downstream**<sup>13</sup>. An example of this type of transaction is the transaction analyzed between Telecable S.A. and Técnicos en Telecomunicaciones S.A.L.,<sup>14</sup> where the purchase of the trunk network at the vertical level implied the study of the data transfer effects (upstream market), as well as access to the Internet (downstream market). Another example is the transaction between the Millicom Cable Costa Rica, S. A. and Cable Zarcero<sup>15</sup> companies. This operation, presented three types of effects: horizontal effects in providing subscription television services; horizontal effects in providing Internet access services, as well as conglomerate effects for the geographic market area in providing access to Internet services, as well as vertical effects in providing the access service and transportation for international exit capacity.

13. Consistent with what is provided by the national competition authority,<sup>16</sup> SUTEL considers that the risk of a vertical operation lies in the possibility of a company expanding to a chain stage and that it may implement a strategy involving “*leveraging*” based on

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<sup>10</sup>Only the merger operations are considered in which SUTEL determined that there was a horizontal, vertical, or conglomerate impact. No withdrawals, non-modifiable operations or cases that were closed due to lack of provision of information were considered.

<sup>11</sup>The Telecommunications Regulatory Authority. *Merger Analysis Guide for the Telecommunications Sector*. 2015, pp. 5-6. This guide is available at: [https://sutel.go.cr/sites/default/files/2015\\_sutel\\_telecomunicaciones\\_guia.pdf](https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf).

<sup>12</sup>The three types of mergers do not exclude each other and may occur simultaneously.

<sup>13</sup> The Telecommunications Regulatory Authority. *Merger Analysis Guide for the Telecommunications Sector*. 2015, p. 34. This guide is available at: [https://sutel.go.cr/sites/default/files/2015\\_sutel\\_telecomunicaciones\\_guia.pdf](https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf).

<sup>14</sup> RCS-230-2018

<sup>15</sup> RCS-235-2018

<sup>16</sup> Commission to Promote Competition *Guide for the Analysis of Economic Mergers*. 2014.

*exclusion, either related to input or to the clientele.*<sup>17</sup> In particular, in the assessments that involved *exclusion of access to input*,<sup>18</sup> the authority pays special attention to those cases where the merged company has a share in the supply market greater than 30%.<sup>19</sup> The existence of this threshold allowed the authority to consider, in the recent merger between the companies LBT Acquisitions S.A. (*part of the Liberty Latin America Limited group*) and Televisora de Costa Rica S.A.,<sup>20</sup> that affected the market for international broadband capacity access and transportation service that the companies that were involved and the companies that were related in the transaction did not reach that threshold. This, linked with the prevailing conditions, reduced the possibility of being able to block input.

14. Although the legal foundation established by SUTEL does not exclude specific standards related to harm theories, given that the success of the exclusion is based on the principle of profitability, SUTEL did determine the net effect in its analysis by using the parameters established in the Guide.<sup>21</sup> <sup>22</sup> Likewise, SUTEL evaluates the possible negative effect of the transaction on the final customers, by evaluating:<sup>23</sup>

- The nature of the competition both upstream and downstream.
- The mechanisms used to set and form the prices, and the pricing structure.
- The pre-existence of double marginalization,<sup>24</sup> which ends up being removed by the operation and results in a drop in the final product prices.<sup>25</sup>

15. Finally, the authority evaluates the coordinated effects that could generate a vertical merger due to the possibility generated by the transaction of providing access to commercially sensitive information about non-integrated competitors; increase the merger of the supply in a relevant market if competitors are excluded; facilitate the alienation of the coordination's incentives and internal sustainability; increase the market entry barriers;

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<sup>17</sup> Telecommunications Regulatory Authority. *Merger Analysis Guide for the Telecommunications Sector*. 2015, p. 43. This guide is available at: [https://sutel.go.cr/sites/default/files/2015\\_sutel\\_telecomunicaciones\\_guia.pdf](https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf).

<sup>18</sup> Known as customer foreclosure.

<sup>19</sup> Cf. U.K. Office of Fair Trade; U.K. Competition Commission, 2009, paragraph 4.141.

<sup>20</sup> RCS-231-2018

<sup>21</sup> Telecommunications Regulatory Authority. *Merger Analysis Guide for the Telecommunications Sector*. 2015, p. 44. This guide is available at: [https://sutel.go.cr/sites/default/files/2015\\_sutel\\_telecomunicaciones\\_guia.pdf](https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf).

<sup>22</sup> Known as customer foreclosure.

This issue has not been evaluated in any merger.

<sup>23</sup> Telecommunications Regulatory Authority. *Merger Analysis Guide for the Telecommunications Sector*. 2015, p. 45. This guide is available at: [https://sutel.go.cr/sites/default/files/2015\\_sutel\\_telecomunicaciones\\_guia.pdf](https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf).

<sup>24</sup> This happens when two independent companies, with market power, obtain positive margins upriver and downriver. If they merge, a single margin is set, which may result in a greater quantity offered of the product and a lower price.

<sup>25</sup> This issue has not been evaluated in any merger.

and finally, reduce the countervailing power of the buyers if the operation consists of purchasing a large client.<sup>26</sup>

16. It bears mentioning that the bill of law for strengthening the competition authorities in Costa Rica, which is being processed as legislative file number 21.303, by modernizing the merger analysis standard, will make it possible for authorities in the future to concentrate their merger analyses on the effects of the transaction on the market, to thus broaden the current analysis milestones.

17. However, as was mentioned previously, the sector-based authority, under the current analysis standard, has always sought to consider weighting of the negative and positive effects of a determined market merger operation as the cornerstone.

18. Thus, in the operation between Millicom Cable Costa Rica, S. A. and Cable Zarcero S. A.<sup>27</sup> for example, for the latter to purchase the commercial operations, client portfolio, network and assets from the former, an assessment was made about whether the operation would generate an incentive and the capacity to exclude current or potential competitors from the relevant markets that were affected both at the wholesale and retail level for the buyer as the provider of a wholesale access and international transportation capacity. Likewise, in the recent transaction between Ufinet Costa Rica S.A. and Super Wireless T.D.T. S. A.<sup>28</sup>, the central point of the analysis was how the purchase of an optical fiber network, which is essential infrastructure to support telecommunications networks, could generate the incentive and capacity to exclude current or potential competitors from the wholesale service markets for access and carrying the international exit capacity and the dedicated wholesale lines area.

19. In addition, a relevant point that was evaluated by SUTEL in analyzing vertical mergers are the gains in efficiency, such as:<sup>29</sup>

- The resource savings gained make it possible to always produce the same quantity of the good at a lower cost and a greater quantity of the good at the same cost.
- Gaining lower costs if two or more goods or services are produced jointly instead of separately.
- The meaningful reduction in administrative expenses.
- The transfer of production technology or market knowledge.
- The drop in production or marketing costs derived from expansion of an infrastructure network.

20. The issue of efficiencies is relevant for two reasons. *In the first place*, they are a weighty factor that could tip the balance toward approval or rejection. This is even though

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<sup>26</sup> Telecommunications Regulatory Authority. *Merger Analysis Guide for the Telecommunications Sector*. 2015, p. 46. This guide is available at: [https://sutel.go.cr/sites/default/files/2015\\_sutel\\_telecomunicaciones\\_guia.pdf](https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf)

<sup>27</sup> RCS-285-2018

<sup>28</sup> RCS-381-2018

<sup>29</sup>Article 19 of the Bylaws establishes a non-exhaustive list. The indicated efficiencies are applicable to any type of merger.

a notable aspect of this reasoning is that SUTEL does not consider any element to fit that description, yet minimum applicable criteria do exist:<sup>30</sup>

- They must have a high degree of likelihood of occurrence within a time frame that matches the time frame when damages may possibly appear; any sort of efficiency that may occur after the damage to the consumer has taken place will not be considered.
- They must be specific to the operation, i.e., they must have a direct consequence; the fact that companies may have obtained earnings through any other course of action other than a merger will not be considered gains in efficiency.
- They must be transferred to the direct consumers of the companies involved in the merger; gains in efficiencies transferred to other consumers or markets will only be considered as a complementary mode.

21. *In second place*, in comparison to the first vertical applications analyzed by the authority, companies currently tend to submit a descriptive list with greater frequency of what may be considered to be the improvements brought about by the transaction, however, the constant here has been that anything that may have been submitted lacks any sort of quantification and a deadline for development, plus they are not accredited. For example, in the case of the merger between Ufinet Telecom S.A.U. and RSL Telecom (Panama) S.A.,<sup>31</sup> when the application for analysis was submitted, four efficiencies were included. However, none of them met the basic requirements to be able to be considered by the authority so they were rejected by SUTEL. Due to its characteristics, this transaction allows for a quantification of the benefits existing in the market, such that currently there is proof of an increase in the offered speeds, the available capacity of international exits and investments performed by the acquiring company.<sup>32</sup> This has positioned this company as a leader in the wholesale transportation segment in the Costa Rican telecommunications market.

22. In addition, in the operation between the companies Millicom Cable Costa Rica, S. A. and Cable Zarcero S.A.<sup>33</sup>, SUTEL thought that, although the parties did not substantiate the efficiencies in conformity with the regulations, it did consider that the existing information made it possible to determine that the merger operation could have a series of positive effects to benefit the end-users of the telecommunications services. The authority believed that entry of the operator in the geographic area could contribute to users being able to have a more modern subscription television service option and residential access to fixed Internet with digital services at greater speeds. This is due to the buyer's commercial supply in juxtaposition to what had been provided up to that point by the seller. In addition, the transaction would imply a new landline and business telephone connectivity service supply. Therefore, the sector-based authority determined that:

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<sup>30</sup>The Telecommunications Regulatory Authority. *Merger Analysis Guide for the Telecommunications Sector*. 2015, p. 58. This guide is available at: [https://sutel.go.cr/sites/default/files/2015\\_sutel\\_telecomunicaciones\\_guia.pdf](https://sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf).

<sup>31</sup> RCS-196-2016

<sup>32</sup>Although it is not necessarily the fruit of the approved operation, an evaluation of the impact must enter into the picture to be able to make that claim.

<sup>33</sup> RCS-285-2018

*“(…) the merger operation subject to authorization does not entail negative effects; instead, it could have positive effects at the level of a greater supply available of services for end-users in the cantons of Los Chiles, Guatuso, Sarapiquí, and Garabito.”<sup>34 35</sup>*

### 3. Approved with remedies on vertical mergers

23. Finally, should the net effect of the operation be negative for the competition and if a solution exists for the problems that were found, a legal tool that is available consists of the conditions. The parties could propose the conditions that they deem to be appropriate on their part; the sector-based authority has its limited action framework as indicated in Article 57 of Law 8642, as follows:

- Assignment, transfer, or sale of one or more of its assets, rights, or shares by means of a public bidding procedure that is determined in the regulations.
- The separation or split of the operator or provider.
- The limitation or restriction on providing determined telecommunication services, or the limitation on the geographic setting wherein those services could be provided.
- The limitation or restriction on acquiring new concessions or authorizations in conformity with this Law.

24. The introduction, elimination, or modification of any of the clauses in the contracts subscribed to by the operator or provider that are related to operating networks or providing telecommunications services.

25. In a decade, conditioning has arisen in three merger operations with vertical effects as analyzed by the SUTEL. The first transaction conditioned by SUTEL was in 2012 and pertained to the purchase by the Costa Rican Electricity Institute (ICE) of Cable Visión CVCR S.A.

26. Later, in 2018, the figure of conditioning arose again in two cases where the buyer was the company called Millicom Cable Costa Rica S.A., and the sellers were the companies **Cable** Televisión Doble R, S.A. and Cable Zarcero S.A.<sup>36</sup> respectively<sup>37</sup>. In both transactions, the commitments arose after the national authority, COPROCOM, indicated, in its nonbinding opinion, issues that it was concerned about at the level of the non-competition clauses. In that regard, SUTEL send notifications to the companies about the concerns expressed by the authority and always sent notifications indicating its commitment to modify the pertinent non-competition clause. Both operations, with commitments, were underwritten by SUTEL.

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<sup>34</sup> Idem.

<sup>35</sup> This merger operation did not materialize.

<sup>36</sup> This operation did not materialize

<sup>37</sup> RCS-284-2018 and RCS-285-2018

#### 4. Future challenge of the convergence of telecommunications and radio broadcasting sectors

27. In relation to vertical mergers, one of the greatest challenges that will be faced by the telecommunications sector in the future comes from the convergence of this sector with the radio broadcasting sector. The recent merger between the companies AT&T and Time Warner at the external level is an example of the challenges that this type of transaction represents for competition authorities.

28. Clearly, a recent trend exists in the telecommunications and radio broadcasting sectors for the services that used to be provided using different types of platforms that are now provided in a general fashion using platforms that operate over the Internet. This situation has changed not only how this type of service is provided and consumed, but also the frontiers of the operators that operate at each level of the chain and their proprietary definitions of relevant markets that are used by the competition authorities. As the telecommunications and radio broadcasting sectors transform themselves and the technological barriers that used to separate them are watered down, the challenges grow that are faced by not only the regulators in the sector, but also by the competition authorities themselves.

29. Vertical mergers in Costa Rica between telecommunications and radio broadcasting operators generate an additional challenge. The analysis of the impact of competition on the market by this type of transaction is shared by the national authority called COPROCOM (Commission to Promote Competition) and by the sector-based authority, SUTEL.

30. Up to this point, a clear division has been established between the powers of each of the authorities:

- SUTEL's jurisdiction in relation to radio broadcasting services refers exclusively to the networks that are able to provide radio broadcasting services and free access to television. RCS-242-2016 clearly establishes the scope of the competency of SUTEL in this matter:

*“Recognize the jurisdiction of the Telecommunications Regulatory Authority in relation to defense of competition about the radio broadcasting and free access television activity to **acknowledge and resolve the mergers, only in relation to the exploitation of the support networks for those audiovisual communication services, which may be, but are not limited to, the service to transmit and disseminate the audio and video signals, according to Article 29 of Law 8642. This is in relation to the ex-ante control of mergers as set forth in Article 56 of Law 8642, as well as monolithic practices. The competencies of this Authority associated with the radio broadcasting and television services refer exclusively to regulation, supervision, and defense of the competition of the radio broadcasting audiovisual service support networks, which excludes the audiovisual communication services, and others, the contents, programming, advertising spaces, and space leasing.**”*

- The jurisdiction of COPROCOM in relation to the radio broadcasting services, refers to audiovisual communication services, as well as advertising and content services. COPROCOM, in its Vote Number 25-2016 issued at 7:20 p.m. on May 10, 2016, provided the following about mergers that affect free access radio broadcasting services:

*“This Commission frequently analyzes the operations that involve a relatively broad number of markets that may be affected by the operation. In general, to the degree that it is possible, they are all analyzed or, depending on the importance of the companies in all of them, those operations are delved into that may have anticompetitive effects given the greater market share or the fact that indications of substantial power may exist. (See Vote No. 32-2013, related to the Colgate-Punto Rojo merger).*

*What is unusual about the case mentioned by SUTEL is that the analysis, in the beginning supposition, must be shared by two institutions. In addition, this Commission must consider that, in relation to the accumulation of radio-electric spectra, the MICITT must take note of what is occurring and officially decide what is pertinent within its cast of duties. The capacities related to the transmission networks pertain to SUTEL and **COPROCOM in relation to other markets: advertising, content, radio spaces.** This is despite the fact that standards for the telecommunications sector do not include COPROCOM in any way should be highlighted.”*

31. This implies that transactions with possible vertical effects require major coordination work between both competent authorities to achieve a consistent analysis and an effective decision to the greater benefit of the market competition level.

32. The bill of law for the Strengthening of Competition Authorities in Costa Rica, which is currently in the legislature, proposes a series of instruments necessary for the coordination between the two competition authorities to be formalized, thus strengthening the degree of contact and collaboration that SUTEL and COPROCOM currently maintain.

33. The coordination of activities between SUTEL and COPROCOM, provided in articles 20, 22, 24 and 25 of the bill of law will make it possible to avoid discrepancies in the application of the competition law, and would make it possible to unify the content of the analysis of the resolutions on competition matters.

34. The existence of shared guidelines between both authorities, as proposed in the bill, would ensure that the attention of cases by both competition authorities is consistent.

35. In conclusion, the proposed regulatory framework not only formalizes the coordination mechanisms between both authorities, to guarantee joint and coordinated work by both authorities, but also allows a consistent application of competition law by part of both authorities.

## 5. Conclusions

36. Over the years, SUTEL, as the sector-based competition authority, has evaluated a growing number of transactions in a dynamic sector characterized by an ongoing technological change in the sequencing processes that are aware of the interrelationships between companies. They imply greater complexity in the projection of scenarios, both factual and otherwise.

37. For SUTEL, the starting point for the economic merger analysis and, in particular, vertical mergers, is the premise that, although generally as an exception, there are potentially anti-competitive effects behind each transaction.

38. Should the transaction have a negative effect, efficiencies are an elemental counterweight and this issue may precisely be something the operators should assess since SUTEL has been strict in its almost systematic rejection of efficiency allegations, when they do not comply the basic characteristics found in Article 18 of the Regulation on Competition in Telecommunications.

39. For SUTEL, it has been a decade of challenges as the sector-based competition authority with a series of transactions in wholesale markets that have an impact at the retail level, as well as the change in the companies' business model since the future provides a glimpse of continuing changes in the market. Appropriate coordination with the national competition authority in the country will make it possible to better deal with the future challenges related to merger analysis.

40. **The bill of law for the Strengthening of Competition Authorities in Costa Rica, is meant to formalize the coordination mechanisms between both authorities to guarantee joint, coordinated work by COPROCOM y SUTEL.**