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The Concept of Potential Competition – Note by Costa Rica

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More documents related to this discussion can be found at https://www.oecd.org/daf/competition/the-concept-of-potential-competition.htm

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Costa Rica

1. Regulatory background on barriers to entry and potential competition

1. Costa Rican regulations on the Competition Law, both general and specific for the telecommunications sector, establish that barriers to entry and the factors which could foreseeably alter these barriers and the supply of other competitors (Law N° 7472,[1] Article 15, subsection b) must be assessed, since it is considered highly relevant to analyze both potential and current competition in order to determine the existence of substantial market power in a much more accurate way.

2. The analysis mentioned in the previous paragraph must be carried out both for cases of relative monopolistic practices (Law N° 7472, Article 12 and Law N° 8642,[2] Article 54) and mergers (Law N° 9736,[3] Article 101, fourth paragraph and Law N° 8642, Article 56); regarding absolute monopolistic practices, the regulations establish that potential competitors can also be subjects of this type of practices (Law N° 7472, Article 11 and Law N° 8642, Article 53).

3. Entry barriers have been defined as: *"factors that prevent or hinder the entry of new economic agents to a market."* (Regulation to Law N° 7472,[4] Article 2). In accordance with this definition, the Regulation of the Competition Regime in Telecommunications[5] (RRCT) establishes that the following should be considered as barriers to entry, among others: *"a) The financial costs or of developing alternative channels, limited access to financing, technology, or efficient distribution channels. b) The amount, indivisibility, and recovery period of the investment required, as well as the absence or low profitability of alternative uses of infrastructure and equipment. c) The need to have concessions, authorizations, and permits or any kind of governmental authorization, as well as rights of use or exploitation protected by the legislation on intellectual or industrial property. d) The investment in advertising required for a brand or trade name to acquire market presence that allows competing with already established brands or names. e) Limitations to competition in international markets. f) Restrictions constituted by common practices of the operators and suppliers already established in the relevant market. g) Acts of state or municipal authorities that discriminate in the granting of incentives, subsidies, or support to certain operators or providers."* (Article 22)

4. In close coordination with what is established in the regulation to Law N° 7472 and the RRCT, both the Guidelines for the Analysis of Economic Mergers of COPROCOM[6] (COPROCOM Merger Guidelines) and the Guidelines for the Analysis of the

[1] Law for the Promotion of Competition and Effective Defense of Consumers, Law N° 7472 of December 20, 1994.

[2] General Telecommunications Law, Law N° 8642 of June 4, 2008.

[3] Law for Strengthening Public Competition Authorities, Law N° 9736 of September 5, 2019.

[4] Regulation to the Law for the Promotion of Competition and Effective Defense of Consumers N° 7472, Regulation N° 37899-MEIC, dated 29 September 2013.

[5] Regulation of the Competition Regime in Telecommunications. Published in the Official Gazette N° 201, of 17 October 2008 in Scope N° 40.

6 This document is being replaced by a series of guides that COPROCOM is preparing, as part of the enactment of Law N° 9736.

Telecommunications Sector Concentration[7] (SUTEL Merger Guidelines) have explained that entry barriers are the *"[…] Various elements of a legal, technological, or economic nature that adversely affect the probability, opportunity, and sufficiency of the entry capacity of new participants to the relevant market or the capacity to expand the scale of production or commercialization of the products of established participants."* (COPROCOM Merger Guidelines, Page 40[8] and SUTEL Merger Guidelines, Page 49).

5. Likewise, the Anticompetitive Behavior Analysis Guidelines of the Superintendency of Telecommunications[9] (SUTEL Behavior Guidelines) further clarifies the concept and indicates that "*Barriers to expansion and entry of new operators may take the form of legal obstacles to competitors or new entrants, legal advantages to the dominant company, technical barriers to entry such as the existence of economies of scale, of scope, or network economics, limitations on access to essential inputs when these resources are scarce or access is restricted through exclusive or long-term contracts, the existence of an exclusive distribution network, high customer loyalty, or high exchange costs."* (P. 37)

6. Now, as mentioned at the beginning, the figure of the potential competitor is currently contemplated both in the Costa Rican regulations and in the analysis guidelines; however, it should be noted that the figure of the potential competitor did not always exist literally in the Costa Rican legislation in relation to absolute monopolistic practices. The amendment carried out by Article 1 of Law 9072[10] to Law N° 7472, for the first time included in its articles the potential competitor as an agent who has the possibility of colluding (Law N° 7472, Article 11). From the study of the legislative file in which this amendment was processed, it should be noted that originally the proposal did not contemplate including potential competitors, so the Commission to Promote Competition (COPROCOM) was the one that suggested, among other things, its inclusion in the drafting of the article by issuing its opinion regarding the project (File 16434 of the Legislative Assembly,[11] folio 68).

7. Subsequently, when Law N° 8642 was issued, the term of potential competitors was included in the case of absolute monopolistic practices. This way, Article 53 is in accordance with the current wording of Article 11 of Law N° 7472, which includes potential competitors as possible agents that are subject to signing acts, contracts, agreements, arrangements, or combinations.

8. Regarding relative monopolistic practices, both Law N° 7472 (Article 12) and Law N° 8642 (Article 54), establish that these practices are subject to verification of the assumptions referred to in Article 15 of Law N° 7472, relating to the determination of

[7] Retrieved on 7 April 2021, from:

https://www.sutel.go.cr/sites/default/files/2015_sutel_telecomunicaciones_guia.pdf

[8] Retrieved 7 April 2021, from:

https://www.coprocom.go.cr/tramites_y_servicios/requisitos/guia_analisis_concevf.pdf

[9] Retrieved 7 April 2021, from:

https://www.sutel.go.cr/sites/default/files/2015_sutel_guia_analisis.pdf

[10] Amendment to the Law for the Promotion of Competition and Effective Defense of Consumers, Law N° 9072, dated 20 September 2012.

[11] File N° 16434 of the Legislative Assembly: "Amendment to Law N° 7472, Law for the Promotion of Competition and Effective Defense of Consumers, of 20 December 1994, and its Amendments" by means of which Law N° 9072 was processed. Retrieved 6 April 2021, from:

http://imagenes.asamblea.go.cr/EINTEGRATOR4/document.aspx?query=1009&doc=1018994

substantial market power and in which barriers to entry are analyzed as one of the most important elements.

9. In this sense, the Regulation to Law N° 7472 has defined as a potential competitor "any economic agent that has the possibility of entering the market or competing for it, within a reasonable time, depending on the sector and without incurring high sunk costs." (Art. 2) Furthermore, regarding the analysis of unilateral practices and in particular the determination of substantial market power, the SUTEL Behavior Guidelines considers that potential competition is "the possibility that agents present in a market expand their capacity in the event of possible price increases or the entry of new agents." (P. 36)

10. However, this possibility must be credible and feasible in a relatively short period of time. Besides, the expansion of existing production or the entry of new competitors must be of a sufficient magnitude for it to be considered that it has the capacity to discipline the behavior of agents present in the market; thus, to evaluate said possibility of expansion or entry of new agents, entry barriers must be assessed (Page 37). In addition, both the COPROCOM Merger Guidelines and the SUTEL Merger Guidelines have specified that potential competitors are those who have the will and/or the capacity to offer the goods and services in the relevant market, in a relatively short period of time. (COPROCOM Merger Guidelines, Page 14, and SUTEL Merger Guidelines, Page 12).

11. This line of analysis establishes that when there is a merger between a company and a potential competitor, it is considered a horizontal operation. This way, when identifying the relevant market participants and calculating their shares, market shares are assigned to potential competitors based on their production capacity (COPROCOM Merger Guidelines, p.14).

12. Since transactions between agents and possible competitors are classified as horizontal mergers, one of the unilateral effects that must be analyzed is to eventually prevent the development of potential entrants, "through control or influence over sources of inputs, distribution channels, intellectual property rights (patents, trademarks, and the like), infrastructures, and technological platforms." (COPROCOM Merger Guidelines, Page 29, and SUTEL Merger Guidelines, Page 35). Also, the existence or not of potential competitors is valued for the analysis of coordinated effects, since it is considered that "coordination is externally sustainable if there are no competitors (current or potential) who can undermine it from the outside." (COPROCOM Merger Guidelines, Page 30, and SUTEL Merger Guidelines, Page 37).

13. In relation to transactions considered as vertical mergers, the analysis that must be carried out is not exempt from the study of potential competitors, since, in the case of these businesses, possible exclusions that affect potential competitors must be observed before current competitors, given that the adverse effect may be an increase in entry barriers to one or both of the relevant markets affected, and only the entry of vertically integrated competitors is profitable (COPROCOM Merger Guidelines, Page 35, and SUTEL Merger Guidelines, Page 43)

14. In the telecommunications sector specifically, in terms of determining the relevant market and by virtue of "[…] rapid technological changes and the appearance of new services make it necessary to analyze other dimensions of competition between companies, not just price. Likewise, potential competitors, who may offer a similar service from different platforms, must be taken into consideration." (SUTEL Merger Guidelines, Page 19)

2. Application of the regulations in specific cases

15. Having made the previous regulatory clarifications, they continue with the application of these in cases resolved by both COPROCOM and SUTEL.

2.1. Entry barriers.

16. Regarding the analysis of barriers to entry, the work of COPROCOM has been oriented to a greater extent in the legal profession, with some success stories. As mentioned in the previous section, for the National Authority, the concept of barriers to entry is explicitly defined in the Regulation to Law N° 7472. However, it is important to note that Law N° 7472 also establishes the following in its Article 3, regarding the elimination of procedures and exceptions in regulatory matters (deregulation):

> *"The procedures and requirements for the control and regulation of economic activities must not prevent, hinder, or distort transactions in the domestic or international markets.* ***The public administration must review, analyze, and eliminate, when appropriate, those procedures and requirements to protect freedom of business and guarantee the defense of productivity if the necessary requirements are complied with to protect human, animal, or plant health, as well as safety, the environment, and compliance with quality standards.*** *All this must be in accordance with the provisions of special laws and international conventions, as well as the demands of the economy in general and an equitable distribution of wealth.*
>
> *Product quality standards should be applied to domestic and imported goods,* ***according to national and international quality standards*** *established after hearing the interested parties.*
>
> *The procedures and requirements that must be met for the access of goods produced abroad from the national market, as well as the trade regulations that must be maintained, are governed by the principle of speed in the administrative procedure.*
>
> ***(…)***
>
> ***Unnecessary procedures or requirements are those that are not essential nor indispensable to the administrative act. The procedure or requirement that, according to public interest, is irreplaceable and essential is necessary to carry out the act. (…) "***

17. Thus, in 1999, COPROCOM issued an opinion[12] in which it stated that the **National Regulation of the Hydrocarbon System** established a barrier to entry for potential competitors and encouraged the creation of local monopolies in the marketing of fuel. Specifically, this opinion is due to a query raised by an economic agent in relation to the procedures necessary to obtain a construction permit for a fuel station.

18. In Costa Rica, Law N° 7593[13] considers the supply of petroleum derivatives, asphalt, gas, and gasoline destined for the final consumer as a public service. It also

[12] Commission to Promote Competition (COPROCOM). Article Six of the Minutes of Ordinary Session N° 06-99, at seventeen hours of the twenty-third of February, nineteen hundred ninety-nine.

[13] Law of the Regulatory Authority of Public Services (ARESEP), Law 7593 of 5 October 1996.

establishes that the authorization to provide this service will be granted by the Ministry of Environment and Energy (MINAE).

19. However, Article 13 of Law N° 7593 (Prohibition of Monopolies) limits the granting of permits to the justification of the demand for services or that these can be offered in better conditions for the user. So, after an analysis by COPROCOM on the applicable regulations to be able to request said permission, it was concluded that:

> *"From the analysis of the case at hand, it can be inferred that the conditions established in the aforementioned article for granting new permits have become, in this case and are ignored in many more due to a bad technical application, legal and institutional barriers that make the entry of new economic agents impossible, which produces a reduction in investment at the national level and a direct damage to consumers by creating territorial fuel marketing monopolies.*
>
> *(...)*
>
> *Additionally, the regulation by which the DGTCC is governed establishes a series of requirements that hinder, if not prevent, the entry of market participants. On one hand, the request for a series of certifications (of vehicular traffic in the area, population density, whether urban or rural, among others) becomes a mere obstacle, since in addition to the fact that the institutions in charge do not do so in an updated way, they do not find justification for reasons of health, public safety, environment, or quality standards, as established in Article 3 of the Law for the Promotion of Competition and Effective Defense of Consumers, N° 7472.*
>
> *(...)*
>
> *Even though the service provided by gas stations is a public service, there is no reason for the permanence of barriers that hinder the entry of new competitors.*
>
> *(...)*
>
> *The Administration's work in applications for the construction of gas stations should focus on meeting requirements or procedures established for reasons of health, public safety, environment, and quality standards."*[14]

20. This opinion, together with a series of recommendations, was sent to the respective authorities, and despite not being binding, it enabled that shortly after receiving the recommendations from COPROCOM, MINAE modified the Regulation for the Regulation of the National System of Fuel Marketing, Executive Decree N° 24865-MINAE, eliminating some of the provisions questioned by the National Authority.

21. However, in this matter, it has not always been possible for the opinion of COPROCOM to be considered by the authorities, an example of this is the opinion of the Commission on the **Technical Regulation of Cement.** In this case, the opinion had its origin in a query that a member of Congress presented in 2009 regarding the effects of competition that the Regulation would have on the cement market.

22. After analyzing the case, COPROCOM issued an opinion in April 2010, noting that the chemical requirements for hydraulic cement were excessive, encouraged barriers to

[14] Commission to Promote Competition (COPROCOM). Article Six of the Minutes of Ordinary Session N° 06-99, at seventeen hours of the twenty-third of February, nineteen hundred ninety-nine.

entry for potential competitors, and closed the market to some participants.[15] Although not all COPROCOM recommendations were accepted, in a later government, some of the restrictions that prevented the entry of imported products were eliminated. As of the enactment of Law Nº 9736, pursuant to the provisions of Article 21, the hierarchical head of public entities that depart from the opinions of the Competition Authorities referring to the enactment, modification, or repeal of regulations, agreements, circulars, and other administrative acts and resolutions, in force or in the process of adoption, is obliged to inform the corresponding competition authority about their motivations, within a period of no more than thirty calendar days.

23. Along the same lines, COPROCOM has analyzed a series of approaches and requests for criteria from various economic agents, in relation to the establishment of some technical regulations, considering these as legal instruments that allow the introduction of regulations to economic activities, and that are defined as mandatory compliance documents, which establish the characteristics that a product must have or the processes and production methods related to them, which must be followed for its commercialization in the country.

24. COPROCOM has indicated that these instruments have consequences for international trade; since, if an imported product does not meet the established requirements, which national producers must also comply with, it will not be authorized for sale. An example of this situation is Opinion 09-2014[16] by COPROCOM, in which the Costa Rican Chamber of Commerce requests criteria in relation to the market for Reinforcing Steel Bars and Wires for Concrete and the possible implications of the entry into force of the **RTCR Technical Regulation of Specifications for Reinforcing Steel Bars and Wires for Concrete: 452-2011.**

25. The main concern of the Chamber was about the impact that this regulation would generate on the number of participants in the market, the possible establishment of barriers to entry and the price of an essential product for construction. The new technical regulation introduced additional conditions to the American quality standard ASTM A 615, arguing that this was done based on what was established in the Seismic Code, regarding the issue of steel for reinforced concrete.

26. However, COPROCOM found that the technical requirements set forth in the Seismic Code for the use of steel for reinforced concrete referred exclusively to the context of the elements of an earthquake resistant structure and not beyond these and only when the steel bar, which complies with ASTM A 615, is to be used as a substitute for ASTM A 706.

27. Therefore, this stipulation was only required for a very particular and specific use of the product, when in practice, smooth and corrugated carbon steel bars, grades 40 and 60 were, at that time, the most demanded in the country and for very diverse uses. Faced with this situation, the establishment of additional conditions to the most accepted US quality standard for manufacturing steel bars implied an important limitation for

[15] Commission to Promote Competition (COPROCOM). Third Article of the Minutes of ordinary session N° 09-2010 of the Commission to Promote Competition, at seventeen hours and thirty minutes on 6 April two thousand ten.

[16] Commission to Promote Competition (COPROCOM). Opinion N° 09-2014, at eighteen hours and forty-five minutes on the eighth of April, two thousand fourteen.

importing the product, favoring that the market was concentrated in a national producer and two manufacturers in the region.

28. The Opinion that was sent to the Ministry of Economy, Industry, and Commerce (MEIC), stated, forcefully:

> *"It is the consideration of this body that* ***given the size of the Costa Rican market, the imposition of technical standards with conditions that are only required in the country should be widely justified since they would easily become barriers to entry for imports and eventually the protection of monopolistic or oligopolistic markets****, given the little interest that international manufacturers may have in incurring the costs of being certified under a Costa Rican INTE standard compared to the relatively low volume of sales.*
>
> *Additionally, in the development of technical regulations, it is important to also introduce, whenever possible, mechanisms for the certification of conformity that are the least costly for all agents in the market, eliminating the possibility of creating barriers to entry through these mechanisms. From the study of this case, it is evident that not all the certification modalities were considered at the origin." (Highlighting does not appear in the original.)*

29. Regarding this, it is important to point out that the recommendations expressed by COPROCOM were considered by MEIC authorities and by representatives of the Technical Regulation Body in the subsequent amendments to the Seismic Code.

30. In the health sector, COPROCOM has also ruled on some regulations, specifically, in Opinion N°23-2016[17] **Technical Regulations RTCR 436-2009 (Food Supplements) and RTCA 11.03.64: 11 (Natural Medicinal Products),** which regulate the requirements and registration processes for food supplements and natural medicinal products.

31. Regarding RTCR 436-2009, it established the requirements for sanitary registration, import, removal, labeling, and verification of food and diet supplements. However, the main problem was in the recitals of the decree, in which it was indicated that there was a growing number of products marketed as food that contained concentrated sources of nutrients or other components and that were presented with the purpose of complementing their intake in the diet.

32. Therefore, the Ministry of Health pointed out the need to establish the classification for sanitary registration purposes of said products as supplements to the diet, and specify requirements related to their composition, labeling, and marketing, to promote their correct use by the population.

33. However, COPROCOM, in the analysis of this regulation, determined that what was established by the Ministry of Health in said regulation was not comparable to what was established in any country, since in Costa Rica it is applied for the content of the product and not for the recommended dose on the label, which was difficult or impossible to comply with by foreign competitors, whose main market was not the Costa Rican market, since no large multi-national company was going to produce an exclusive product for a market the size of the Costa Rican.

34. Likewise, COPROCOM, in Opinion N° 23-2016, noted about these regulations:

[17] Commission to Promote Competition (COPROCOM). Opinion N° 23-2016, at eighteen hours and thirty-five minutes on twenty-five October two thousand sixteen.

"Given the above, unlike the criteria of the Ministry of Health, it is not considered that the regulation is proportionate, especially in terms of content, since it constitutes an unjustified barrier to the entry of companies into the country, limiting the options of consumers. Furthermore, the regulation of the content does not solve the problem of excessive consumption of the drug since that depends more on the clarity of the indications on the label than on forcing the manufacturers to take the product in a single daily dose. Such rationale is not a reasonable justification because the drugs would be riskier, and it is allowed that the daily doses can be satisfied through consumption of, for example, several tablets.

Likewise, such a restriction is not necessary to avoid misleading consumers or to attribute properties to the drug that it does not have or that it contains controlled substances. This can only be achieved with a proper review of the product label and its content, as is done in more developed countries. "

35. On the other hand, always within the scope of advocacy, for SUTEL, the exclusion of potential competition has been important to analyze, as happened in the case of residential condominiums, where as a result of the high growth that has been occurring in Costa Rica of this type of housing and with it a growing number of complaints from users, the SUTEL Council decided to carry out a study called *"Access to the common telecommunications infrastructure in condominiums, apartments, and closed residentials for the provision of services to end users*", in which it was determined that there are entry barriers that are created to discourage or even prohibit access to these properties, thus limiting the entry of potential competitors, turning all clients into a captive market with no possibility of having another company enter to provide services. For this reason, SUTEL concluded that it was necessary to issue the following recommendations:

1. "To train developers, builders, and administrators of horizontal and vertical condominiums, apartment buildings, and closed residential buildings on the subject of competition, so that they avoid establishing or promoting the establishment of unjustified restrictions on the entry of telecommunications operators to this type of properties.
2. To inform users of telecommunications services that they have the right to freely choose and change operators, so that users can demand their rights, thus preventing the establishment of regulations or agreements of joint owners' assemblies that restrict the entry of telecommunications operators to certain properties constituted under the condominium regime to the detriment of the competition and the well-being of users.
3. To determine the feasibility of preparing and publishing a guide to good practices at the construction level, aimed at developers of horizontal and vertical condominium projects, apartment buildings, and closed residential buildings.
4. To determine the feasibility of preparing and publishing a guide to good practices at the administrative level, aimed at managers of horizontal and vertical condominiums, apartment buildings, and closed residential buildings.
5. To open investigations that enable determining the possible violation of the telecommunications legal system regarding the presumed existence of exclusivity agreements by certain telecommunications operators. " (Agreement 008-051-2019)

36. These recommendations are currently in their implementation stage, so the degree of effectiveness that they will be able to have cannot yet be determined.

2.2. Potential Competitors

37. As indicated at the beginning of the document, the term potential competitor was incorporated into the competition regulations of Costa Rica, starting in 2012; however, COPROCOM has always ensured that markets are not limited to potential competitors. In this sense, the different resolutions have incorporated this term: *"[…] Potential economic agents can contribute enormously to offset anti-competitive behavior that may occur in a specific market, by established companies. The foregoing is in the sense that current companies, when exposed to potential competitors, if they are achieving monopoly profits, could moderate their behavior and eventually transfer part of those benefits to consumers*."[18]

38. Regarding the effects of exclusion, in the final resolution in the administrative procedure followed in the soft drink market, for alleged relative monopolistic practices, typified in Article 12 of Law N° 7472, COPROCOM established that:

> *"Exclusive purchase obligations can lead to an anticompetitive market shutdown mainly by reducing potential competition. As determined by COPROCOM, the main anti-competitive effects of this behavior include: "The exclusion effect of other suppliers, reducing inter-brand competition, preventing economies of scale, higher transaction costs for consumers, since it would take them longer to search for their preferred products. In addition to the above, in cases where there is a high degree of substantial power in the agent imposing the restriction, the negative effects on competition are greater and therefore prohibited. " (COPROCOM, Vote 03-2011)*

39. In the same sense, in the administrative procedure in the insurance market, specifically, the dominant company was sanctioned for engaging in anticompetitive behavior established in Article 12, subsection K) of Law N° 7472, in which it was demonstrated that it had the effect of excluding competitors in the car insurance market:

> *"[…] That the anticompetitive behavior shown by INS has been the constitution of an exclusion barrier to entry, generated by virtue of the abuse of its substantial power. As a result of this and since it has been demonstrated that this conduct was constituted as a deliberate act, with the purpose and effect of preventing the entry and permanence of competitors in the Relevant Market […]". (Vote N° 28-2014 COPROCOM of 12 August 2014)*

40. Likewise, in the cable television market, COPROCOM sanctioned several companies that own the electricity poles, an essential facility to provide their service, which carried out deliberate acts to induce the exit of competitors or prevent their entry into the market, thus affecting competition in the market, in the terms established in article 12, subsection K) of Law No. 7472.

41. Thus, in Article Five of Ordinary Session N° 32-2007 held at 5:30 p.m. on 11 December 2007, COPROCOM stated:

> *"(…) COPROCOM sanctioned the Rural Electrification Cooperative of San Carlos R.L. (COOPELESCA) for denying TELEVISORA DE COSTA RICA S.A. (CABLE TICA) the rental of the electricity poles of its property to provide broadband*

[18] Inquiry sent by Mrs. Amparo Pacheco, Minister, a.i. of the Ministry of Foreign Trade, regarding the ordinary call for participation in the process of allocation of import quotas under the commitments before the World Trade Organization and the Free Trade Agreements in force for 2005, Ordinary Session N° 08-2005**,** Agreement: Article Five.

Internet service via cable modem, even though by virtue of a previous contract they had already been renting the same electricity poles to install cable television transmission lines.

In its decision, COPROCOM considered that electricity poles constituted an essential facility to be able to operate in that market, and that COOPELESCA did not provide any valid justification to deny access to it. The situation was aggravated by the fact that COOPELESCA had already shown interest in participating in that market by providing internet services, which placed it in a position of potential competitor of CABLE TICA and confirmed the anti-competitive object of the behavior. (...) "[19]

42. Regarding economic mergers, the Costa Rican competition authorities have considered potential competitors in each of these measures, and on some occasions, measures have been imposed to ensure that such acquisitions do not affect potential competitors. Such is the case of the merger between Electrodomésticos Mabeca S.A. and Atlas Eléctrica S.A. and its subsidiaries, in which COPROCOM determined that it incurred in a prohibited merger and demonstrated:[20]

- The damage caused by setting premiums after the acquisition,
- The intention of acquiring its biggest and most important competitor,
- Market shares achieved after the transaction that led to practically monopolistic markets,
- The size of the affected market, which generally encompasses all Costa Rican households, but especially those with lower incomes, and
- The permanent effects of the acquisition.

43. In this case, in addition to the economic sanction, corrective measures were established, namely:

"(...) COPROCOM imposed on ***Mabeca*** *the following measures: (i) refrain from representing or distributing potential competitors' kitchen ovens or refrigerators; (ii) report any merger intention or transaction that could cause vertical or horizontal anticompetitive effects; (iii) avoid any vertical or horizontal restrictions to competition; and (iv) regularly report market information for the two products. (...)"*[21]

44. Another relevant COPROCOM resolution is the horizontal merger of two competing companies, such as Colgate-Palmolive (Central America) lnc., which acquired assets from Punto Rojo, S.A. that included: brands, health records, production formulas, advertising materials, and other intangibles, which allowed the buyer to produce and distribute the products that Punto Rojo produced and distributed.

"(...) The Agency concluded that, although in this market the joint participation of ***Punto Rojo and Colgate*** *would substantially increase, and there were strong*

[19] Commission to Promote Competition (COPROCOM). Fifth Article of the Minutes of Ordinary Session No. 32-2007, held at seventeen thirty hours on eleven December two thousand seven.

[20] Commission to Promote Competition (COPROCOM). Vote N° 07-2011 at eight o'clock on thirteen July two thousand eleven.

[21] At that time, Costa Rica had subsequent control of mergers. As of 2013, with the amendment to Law N° 7472, the mandatory prior notification of economic mergers begins.

> *barriers to entry (such as the presence of well-established brands), current and potential competitors had the means and the incentives to increase their presence (…)." Vote N° 32-2013 at eighteen hours thirty-five minutes on the tenth of December, two thousand thirteen.*

45. In the same sense, in the economic merger in the market of commercialization of finished and semi-finished ophthalmic lenses, of equipment and consumables for the treatment of lenses, by ophthalmic laboratories and treatment and wholesale of ophthalmic lenses, COPROCOM determined:

> *"(…) It is concluded that the operation described may cause a market closure, through the blocking of inputs, which produces anticompetitive effects, if Essilor stops supplying its current or potential customers with the products or services provided through ILT de Costa Rica and OPTISA. Therefore, it is considering the probability of diminishing, damaging, or preventing competition or free competition, with respect to the same, similar, or substantially related goods or services, if this operation is approved. Therefore, it is necessary to evaluate conditions that can offset these effects, (…)" Vote N° 14-2015 of 24 March 2015.*

46. Regarding the impact of the merger analysis by the presence of potential competitors in the markets, SUTEL has considered, in the case of the residential internet market, that potential competitors are constituted as market discipline agents when they have already exceeded the entry barriers (authorization), and they are deploying a network, as indicated:

> *"(…) It is also important to consider as future competitors those operators that, in addition to being authorized, have already deployed or are in the process of deploying a telecommunications network and that therefore could decide to expand their current geographic coverage or cover the geographic area analyzed […] What has been previously described allows us to conclude that there are other competitors in the market, both current and potential, that have been contributing to discipline the behavior of Grupo ICE, and therefore while maintaining their operations and dynamic behavior in the market, they reduce the possibility for it to abuse its substantial power in the relevant market affected. (…)" (P. 52, RCS-291-2012)*

47. In another case, SUTEL recognized that the entry of competitors in a market represents an essential edge for the merger analysis, since if an acquisition does not generate entry barriers for other competitors, a more detailed analysis of the effects is not made in the market, as happened in the following case:

> *"So, although the transaction implies the acquisition or right to use the infrastructure by Telecable, it does not generate the possibility of blocking its access to other competitors in the area and of course there is no change in the competitive dynamics at this level. Therefore, no evaluations will be done in this regard; rather, the analysis of the effects will focus on the level of services offered in the retail market. " (P. 11, RCS-331-2019)*

3. Conclusions

48. Competition Authorities of Costa Rica analyze barriers to entry to the markets, as well as the participation and interference that these may have in potential competition, in relation to monopolistic practices, as well as mergers and legal cases.

49. In the establishment of some technical regulations, one of COPROCOM's concerns is that these legal instruments do not become barriers to the entry of current and potential competitors, especially in economic sectors that tend to be highly concentrated in the hands of a few companies.

50. In this sense, COPROCOM has always reiterated its position, to the Executive Power and to the different authorities that intervene in the formulation of technical regulations, that before the establishment of regulations and requirements, equal treatment must be ensured for all economic agents, both public and private, national or foreign, without granting advantages to certain companies or limitations to possible potential competitors.

51. Likewise, in the case of SUTEL, it has remained vigilant in the telecommunications sector regarding the imposition or creation of barriers to entry that limit the access of operators to a market, negatively affecting competition and therefore the benefits that it provides.

52. Furthermore, in the merger analysis, both COPROCOM and SUTEL have always tried to analyze that the proposed operations do not result in a market closure, which inhibits the possibility of expansion of current and potential competitors; also, that access to relevant inputs is guaranteed and that there is a possibility of an acceptable response from current and potential competitors who may enter with new products, services, alternative technologies and with new ideas to provide better options to customers or end consumers. In other words, that a contestability and acceptable potential competition in the market is always guaranteed.