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**Working Party No. 3 on Co-operation and Enforcement**

**Efficiencies in Merger Control – Note by Costa Rica**

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## Costa Rica

### 1. Background

1. The General Telecommunications Law, Law 8642, decreed in 2008, established the first mandatory prior notification concentration regime at the country level.

2. The sectoral regime emerged with a particular characteristic – which is maintained – the non-existence of thresholds. All concentration operations involving telecommunications operators and/or service providers must be notified in advance to the Superintendence of Telecommunications (SUTEL).

3. The modernization of competition regulations at the country level culminated in 2019 with the approval of the Law on the Strengthening of Costa Rica's Competition Authorities, Law 9736.

4. As for the analysis of concentrations, it incorporated a new standard, rules and instruments. A two-phase merger control procedure was established. The first considered a filter. Those concentrations that generate or do not generate risks to the competition process are identified, and if this circumstance occurs, a second phase begins, in which the possible effects of the transaction on the markets potentially affected by it will be assessed.

5. The regulations recognize that a concentration that significantly hinders competition may be approved if it has the capacity to develop efficiencies whose benefits outweigh the anticompetitive effects. (*Law 9736, Article 101, paragraph a*).

6. The parties are the key actors at this stage. They are responsible for demonstrating the possible efficiencies of the transaction (*Law 9736, article 98, subsection b*). They have the central role of arguing before SUTEL the possibility of reversing the anticompetitive effects and not significantly hindering competition in the market.

7. The Regulations to Law 9736, "Strengthening the Competition Authorities of Costa Rica" (hereinafter also Executive Regulations) establish in a non-exhaustive manner some of the main sources of efficiencies:

*To produce improvements in production or marketing systems, by obtaining savings in resources, lower costs or the reduction of administrative expenses.*

*To promote business competitiveness and technical progress, through the transfer of production technology or market knowledge*

*To favor the interests of consumers or users through a greater or better offer, lower prices or greater product innovation."*

8. Thus, normatively, efficiencies can be considered (1) productive and (2) dynamic<sup>1</sup>. The former related to the production process of the agents involved have a direct effect on costs. Savings are generated as a result of more efficient methods in the production chain, the generation of economies of network, scope or scale or the self-sufficiency of inputs by integrating them into the input links. The latter, linked to innovation, have an indirect effect on the benefits perceived by consumers.

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<sup>1</sup> This is in accordance with SUTEL's [Guide to the Analysis of Economic Concentrations](#).

## 2. Efficiency Analysis

9. In an industry like telecommunications, as traditional models of communication become obsolete, and the pressure is increasing. The combination of the capabilities of the Parties involved can provide consumers with differentiated, more advantageous or diverse solutions in terms of service provision.

10. It is a palpable situation at levels as basic as physical means of signal transmission, as is the case with technologies such as copper – still existing in the country – for networks entirely made up of fiber optics that allow future scalability and greater optimization. This scenario has already been addressed by SUTEL in the resolution of cases - RCS-284-2018 -, where the modernization of the network was recognized as a positive effect resulting from the transaction.

11. The efficiencies are also visible in the network, scope and scale effects present in telecommunications, which may benefit users with a greater variety and coverage of services. Situation examined by SUTEL in operations - resolution RCS-331-2019 - that imply positive effects for consumers mainly linked to the concept of efficiency, the existence of economies of scope and a multi-service offer.

12. The nature of the parties involved in the transaction, as well as the behavior patterns of the market participants, could make these efficiencies together reduce the incentives to increase prices, as well as for coordination with competitors, and also generate as a collateral effect the increase of rivalry and be an additional counterweight to the possible anticompetitive effects. However, it is a casuistic aspect to assess and not a rule in itself. In principle, the fact that the transaction generates cost reductions or some kind of benefit to consumers does not automatically translate into efficiencies that offset the negative effects of the transaction. The savings could represent higher profit margins for the parties and not be passable-forward.

13. That is precisely why efficiencies must meet the following characteristics (*Article 148 of the Executive Regulations*):

*Be directly attributable to concentration, the inherent result of the transaction, where in the counterfactual case they would not be achieved.*

*Not be achievable in a less restrictive way for competition, which implies that there are no feasible alternatives to achieve them.*

*Be verifiable, both in probability and magnitude.*

*To counteract as a whole the foreseeable damage that the concentration could generate to competition, so its magnitude must be quantified, as well as its temporality determined.*

14. Although it is common for those involved in the transactions presented to the SUBEL to invoke efficiencies, the rule has been that they are not acceptable as they do not comply with regulatory requirements.

## 3. Cases

15. Despite the lack of accreditation of efficiencies by the interested parties, SUTEL in several cases has identified positive effects that can be transferred to the end user. All of them coincide in being transactions that do not generate a significant impediment to

competition in the relevant markets defined, so they did not tip the balance in any way in the weighting of the transaction, and in its eventual approval.

16. Resolution RCS-331-2019 is an example of this. SUTEL considered that the efficiencies indicated by the parties lacked the quantification established by law<sup>2</sup>, however, it recognized that it could imply a series of positive effects for consumers, mainly linked to the fact that the seller had a very specific operation at the country level, with an offer concentrated in two fixed telecommunications services. In addition, it operated in distant geographical areas, which implied networks independent of each other. On the contrary, the buyer stood out for its national reach, a portfolio of extensive services and a visible commercial growth strategy. In that case, SUTEL considered that the transaction could generate operational efficiencies and economies of scope that could benefit customers.

17. It is currently possible to distinguish that not only in the area impacted by the transaction it was benefited, but it is possible that it generated new competitive pressures in coastal areas of the country, as a result of the expansion of the buyer's fiber optic network.

18. Also in 2021, SUTEL also recognized in the transaction approved by resolution RCS-106-2021, that it could not only generate operational savings for the buyer, but also as a result of the level of competitive pressure that it would experience after the merger, it would have incentives to pass on these benefits to users.

19. About five years after the approval of this transaction, it is possible to distinguish the materialization of some benefits to users over time. The buyer has expanded the coverage of its fibre optic network, was the first to launch the first commercial 5G mobile network and has a commercial strategy based on bundling. In addition, it is one of the three main competitors in retail markets that compete directly, showing constability with each other based on the reaction-action patterns in its commercial offering, such as prices, speeds, content, among others.

20. Although the regulations require SUTEL to consider those productive or dynamic efficiency gains *invoked by the applicants*, as long as they prove their nature, the temporality for their materialization, the effects and quantification – if possible – it is distinguished that in those transactions that SUTEL has identified efficiencies it applies the basic principle of informal valuation based on the particularities of the sector telecommunications and the benefits that consumers can obtain as a result of the concentration.

21. It is clear that the arguments of the parties of efficiencies before SUTEL do not imply that they are received, their accreditation and quantification are indispensable.

22. Where the transaction creates a significant impediment to competition in the relevant defined markets, the type and magnitude of the efficiencies are of particular attention to the parties. These are elements that, if accredited in accordance with the provisions of the regulations, could tip the balance for an eventual approval or rejection by SUTEL.

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<sup>2</sup> At that time, contained in Article 24 of the Regulations of the Telecommunications Competition Regime.