THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

NINTH EDITION

Editor
John P Janka

THE LAWREVIEWS

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PREFACE

This fully updated ninth edition of *The Technology, Media and Telecommunications Review* provides an overview of evolving legal constructs in 26 jurisdictions around the world. It is intended as a business-focused framework rather than a legal treatise, and provides a general overview for those interested in evolving law and policy in the rapidly changing TMT sector.

Broadband connectivity (regardless of the technology used) continues to drive law and policy in this sector. Next-generation wireless connectivity will be provided by a network of networks, with multiple technologies – both wired and wireless, using licensed and unlicensed spectrum – playing an integral role in delivering service to the end user. By way of example, free WiFi service in homes and businesses today carries the majority of the data that is transmitted to smartphones and wireless tablets that also rely on paid service from a wireless carrier. And wireless carriers otherwise rely on a variety of technologies to ultimately connect the customer to the internet or someone on the other end of the phone.

The disruptive effect of new technologies and new ways of connecting people and devices creates challenges around the world as regulators both seek to facilitate digital inclusion by encouraging the deployment of state-of-the-art communications infrastructure to all citizens, and also seek to use the limited radio spectrum more intensively than before. At the same time, technological innovation makes it commercially practical to use large segments of 'higher' parts of the radio spectrum for the first time. Moreover, the global nature of TMT companies requires them to engage on these issues in different ways than before.

A host of new demands, such as the developing internet of things, the need for broadband service to aeroplanes, vessels, motor vehicles and trains, and the general desire for faster and better mobile broadband service no matter where we go, all create pressures on the existing spectrum environment. Regulators are being forced to both 'refarm' existing spectrum bands and rewrite their licensing rules, so that new services and technologies can access spectrum previously set aside for other purposes that either never developed or no longer have the same spectrum needs. Regulators also are being forced to seek means for coexistence in the same spectrum between different services in ways previously not contemplated.

Many important issues are being studied as part of the preparation for the next World Radio-communication Conference (WRC) of the International Telecommunication Union (ITU), to be held in 2019. No doubt, this conference will lead to changes in some long-standing radio spectrum allocations. And the conference also may include some political spectrum allocations that are based on pressures brought by well-heeled industries, rather than logic or sound policy. Indeed, these pressures already exist around the world in decisions being made by national regulators outside of and before the WRC.

Legacy terrestrial telecommunications networks designed primarily for voice are being upgraded to support the broadband applications of tomorrow. As a result, many governments

are investing in or subsidising broadband networks to ensure that their citizens can participate in the global economy, and have universal access to the vital information, entertainment and educational services now delivered over broadband. Many governments are re-evaluating how to regulate broadband providers, whose networks have become essential to almost every citizen. However, many policymakers still have not solved the problem caused when their incumbent service providers fail to extend service to all of their citizens for business reasons – because those businesses deem 'unprofitable' those who are the hardest to serve. Curiously, policymakers sometimes exacerbate this failure by resorting to spectrum auctions to award the right to provide service in a given frequency band to the highest bidder, failing to require service availability to everyone in the auctioned area, and then making the auction winner the gatekeeper for anyone else who wants to use the same spectrum. Too often, decisions are based (explicitly or implicitly) on expected auction revenues, which consumers end up paying for in the end through higher costs of service. Far too infrequently do policymakers factor in the benefits of ensuring ubiquitous connectivity: new jobs, economic growth, security, social inclusion, and improvements in healthcare, education and food production, to name a few. Indeed, treating spectrum as a property right rather than as the valuable public resource it is often leads to perverse results in the marketplace.

Convergence, vertical integration and consolidation can also lead to increased focus on competition and, in some cases, to changes in the government bodies responsible for monitoring and managing competition in the TMT sector. Similarly, many global companies now are able to focus their regulatory activities outside their traditional home, and in jurisdictions that provide the most accommodating terms and conditions.

Changes in the TMT ecosystem, including increased opportunities to distribute video content over broadband networks, have led to policy focuses on issues such as network neutrality: the goal of providing some type of stability for the provision of the important communications services on which almost everyone relies, while also addressing the opportunities for mischief that can arise when market forces work unchecked. While the stated goals of that policy focus may be laudable, the way in which resulting law and regulation are implemented has profound effects on the balance of power in the sector, and also raises important questions about who should bear the burden of expanding broadband networks to accommodate capacity strains created by content providers and to facilitate their new businesses.

The following chapters describe these types of developments around the world, as well as the liberalisation of foreign ownership restrictions, efforts to ensure consumer privacy and data protection, and measures to ensure national security and facilitate law enforcement. Many tensions exist among the policy goals that underlie the resulting changes in law. Moreover, cultural and political considerations often drive different responses at the national and the regional level, even though the global TMT marketplace creates a common set of issues.

I thank all of the contributors for their insightful contributions to this publication, and I hope you will find this global survey a useful starting point in your review and analysis of these fascinating developments in the TMT sector.

John P Janka
Latham & Watkins LLP
Washington, DC
November 2018

Chapter 4

BRAZIL

Raphael de Cunto and Beatriz Landi Laterza Figueiredo[1]

I OVERVIEW

This chapter describes the most relevant issues involving the TMT legal framework in Brazil, and recent and ongoing changes in TMT policies, mainly driven by the challenges posed by technological innovation, new emergent business models, continuously growing demand for infrastructure and the need for digital social inclusion across the country.

Although the TMT sector has experienced great progress in recent years, the regulatory landscape still needs remodelling to become a more simple, less regulated and less expensive environment for service providers in order to incentivise private investments and achieve digital social inclusion targets.

II REGULATION

i The regulators

The offer of telecom services in Brazil is supervised by the National Telecommunications Agency (Anatel), a regulatory agency reporting to the Ministry of Science, Technology, Innovations and Communications (Ministry of Communications). Anatel's authority involves, *inter alia*:

a granting and forfeiture of licences to offer telecom services;
b supervision and control of use of spectrum and the use of orbital slots;
c issuance of guidelines to regulate the relationship among telecom service providers, such as interconnection and unbundling and sharing of infrastructure, and ensuring compatibility and integrated network operations;
d supervision and control of consumers' rights related to telecom services;
e homologation of telecom equipment to ensure electronic compatibility;
f quality and safety requirements; and
g supervision and control of net neutrality rules.

Telecom services in Brazil are regulated by a number of laws, decrees and other regulations specific to each type of service. The General Telecommunications Law (LGT) is the main law related thereto. A bill of law introducing a deep reform to the LGT had been approved by the Brazilian Congress at the end of 2016 under a controversial voting procedure, but its presidential sanction was stayed by an interim order issued by the Supreme Federal Court

1 Raphael de Cunto is a partner and Beatriz Landi Laterza Figueiredo is an associate at Pinheiro Neto Advogados.

(STF) when the opposition filed a writ of *mandamus* requesting the bill to be put up for a floor vote. In October 2017, the STF determined the President of the Senate must review the appeals filed by the opposition, and the matter has not evolved since. Whether or when it will be approved is uncertain. Anatel and the Ministry of Communications have endorsed the bill.

As regards television, there are two separate legislative frameworks for free-to-air television and pay-TV services. Pay-TV is considered a telecom service subject to the LGT and under the authority of Anatel. Free-to-air broadcasting is not subject to the LGT and is mostly regulated by laws dating from the 1960s. The broadcasting sector (including radio) is still subject to the direct authority of the Ministry of Communications.

The cinema and audiovisual industries are also subject to regulation by the National Film Agency (ANCINE), a regulatory agency reporting to the Ministry of Culture. The Provisional Measure that created ANCINE also established the National Cinema Policy and set guidelines for the industry. In 2011, the SeAC Law[2] created a new telecom service to embrace all types of pay-TV technologies. A subscription-based access service (SeAc) is defined as a telecom service rendered by private initiative in the community's interest, access to which is conditioned on paid subscription by subscribers and which is intended for distribution of audiovisual content through packages, programming channels in the channel-on-demand modes, and compulsory channels, by means of any technologies, processes, electronic media and communication protocols whatsoever.

The SeAC services were a convergence of (and replaced) all types of pay-TV services then existing under Anatel's regulations, which were separately regulated according to the technology used, and which were subject to different licences required for their provision.[3]

The activities encompassed by the SeAC Law are the distribution, production, programming and packaging of audiovisual content. Except for the distribution of content, which is an activity under the scope of Anatel's regulation, the other three activities fall within the regulatory authority of ANCINE.

Free-to-air broadcasting (TV and radio) was not included in the scope of the SeAC Law, except for a few provisions related to cross-ownership between broadcasters, and telecom and production and programming companies.

ii Regulated activities

As a general rule, the provision of telecom services requires a licence to be obtained beforehand from Anatel. Licences are issued for specific services (i.e., no one licence covers several or all types of telecom services). Anatel is responsible for defining the types of service, considering primarily their purpose for users, and the requirements for obtaining each licence vary depending on the type of service.

The main telecom services addressed by the current regulation are:

a the fixed telephony service (STFC);
b the mobile telephony service (SMP, SME, MVNO);
c the multimedia communication service (SCM); and
d pay-TV (SeAc).

2 Law 12,485.

3 The then-existing pay-TV services were the CATV service, MMDS, DTH and a special subscription TV service.

In an effort to simplify the regulatory landscape and incentivise broadband expansion and small service providers in the industry, in 2017 Anatel exempted from licensing small broadband providers that meet certain criteria and that do not use spectrum. In the opposite direction, there are discussions and more than one bill of laws under debate in Congress proposing a change of the SCM (broadband) service's status to become a service offered under the public regime in certain situations.

The LGT classifies services according to their regime: public or private. In the public regime, services are rendered under concessions whose rules are driven by universalisation and continuity principles. Concessions for public services may be granted for up to 20 years, and may be extended only once for the same period. The only service currently provided under the public regime is the STFC.[4] Under the private regime, services are provided under authorisations, which are typically valid for an indefinite term and less regulated.

The timing, procedures and documents required for an application for a telecom licence vary according to the type of service and licence. Generally, the documents required aim at providing Anatel with evidence that the applicant fulfils the required legal, economic–financial and technical qualifications, and is in good standing as regards its tax obligations. Authorisations to provide telecom services under private regimes in general are not auctioned and usually take from two to six months once all documents are submitted to the agency.

If services require the use of spectrum, a separate application must be made to Anatel. The timing and process for the granting of this authorisation will depend on the particular RF to be used and whether it must be auctioned.

Licences to provide free-to-air broadcasting services (TV and radio) are granted by the Ministry of Communications and the President, as concessions, and are preceded by auctions. A concession is valid for 15 years, renewable for equal and successive periods. Broadcasting licences refer to a limited geographical area (typically, a municipality). At the beginning of 2017, some rules involving free-to-air broadcasting were amended in an attempt to reduce regulation. Changes to licensees' corporate purposes and partners that before were subject to the Ministry's prior approval now only need to be informed to the Ministry. The process and requirements for concession renovation were also simplified.

The use of the RFs needed to execute broadcasting services is licensed separately by Anatel.

iii Ownership and market access restrictions

A licence to provide any type of telecom service in Brazil will only be granted to companies headquartered and incorporated under the laws of Brazil. In addition, licences for the provision of collective interest services (services offered to the public in general) can only be granted to companies that have the majority of their corporate capital held by a Brazilian individual or a company established in Brazil. Although direct foreign control of collective interest services providers is prohibited, a foreign company may indirectly own and control a Brazilian telecom subsidiary by means of a local holding.

Broadcasting business is also restricted to companies incorporated under the laws of Brazil with head offices in the country. In addition, at least 70 per cent of the voting capital of

4 The current STFC concessions will expire on 31 December 2025.

broadcasting companies must be held, directly and indirectly, by Brazilian citizens, individuals who have held Brazilian citizenship for more than 10 years, or companies incorporated under Brazilian laws and with headquarters in Brazil.

Restrictions also apply to the intellectual guidance of broadcasting companies (including editorial responsibility, and the selection and direction of programming and content), which must be held, directly and indirectly, by native Brazilians or individuals who have held Brazilian citizenship for more than 10 years.

News companies are also subject to restrictions on foreign capital and foreign intellectual guidance (including editorial responsibility, and the selection and direction of programming and content). The extension of these restrictions has been subject to debate in the past, especially with regard to companies that carry out journalism-related activities through the internet. There are also cross-ownership restrictions among broadcasters, content producers and programmers on one side, and telecom carriers on the other: broadcasters, content producers and programmers cannot own, directly or indirectly, more than 50 per cent of telecom carriers, and ownership of broadcasting companies, content producers and programmers by telecom carriers is limited to 30 per cent (directly and indirectly).

A broadcasting company cannot hold more than 10 concessions in the national territory or more than two concessions per state. These restrictions also apply to the shareholders and managers of broadcasting companies (i.e., an individual cannot be manager or shareholder of more than one broadcasting company in a manner that exceeds these limitations).

iv Transfers of control and assignments

Changes of control of telecom service providers require prior approval by Anatel.[5] Under Anatel's broad concept, control is the power to directly or indirectly, internally or externally, in practice or legally, individually or by agreement, manage the operation or corporate activities of a company. Powers to appoint management, veto rights, rights to preclude completion of qualified quorum for installation or deliberation of any matters, for instance, are considered controlling powers by Anatel.

Anatel's approval for a change of control will generally consider whether a transaction will harm competition or affect the provision of services or obligations undertaken by a provider towards Anatel, whether the telecom provider is in compliance with its regulatory obligations, and the effect of the transaction in the telecom market from a regulatory perspective (e.g., overlap of licences and RFs, consumer rights).

Direct transfer of telecom licences may only take place if the service is being provided for at least three years and the service provider is in compliance with all its regulatory obligations; the assignee meets the requirements to be a telecom licensee, including with regard to the legal, economic, financial, technical qualification and tax good-standing requirements; and the transfer does not harm competition, or affect the provision of services or obligations undertaken by the provider towards Anatel.

While the transfer of broadcasting licences depends on the prior approval of the Ministry of Communications and the President, the transfer of control of broadcasting

5 There are a few exceptions concerning specific services and transactions. For example, if the involved telecom provider only holds a licence to provide SCM and the transaction is not subject to an antitrust filing, Anatel's prior approval is not required.

companies must only be notified to the Ministry of Communications within 60 days. No transfer is allowed during the period for installation of the related transmission stations, or in the five years thereafter.

Review and approval of direct transfers of licences (either related to telecom services or free-to-air broadcasting) are not subject to a time limit, and the timing varies depending on the status of the company, the complexity of the transaction and the general workload of the governmental authority involved.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

Internet services went largely unregulated in Brazil until 2014, when the Internet Act was enacted. It establishes basic principles, guarantees, rights and obligations for the use of the internet, and deals with protection of privacy, record-keeping to assist law enforcement, liability for third-party content and net neutrality.

The coordination and integration of internet services in Brazil are performed by the Brazilian Internet Steering Committee (CGI.br). CGI.br is not a regulatory body, but an organisation created by presidential decree composed of members from the government, corporate sector, third sector and academic community. Although CGI.br does not have the authority to issue binding regulations, it was given the role of proposing policies and procedures, recommending technical standards, establishing strategic directives and promoting studies.

While the provision of internet access is considered a telecom service regulated by Anatel, businesses built OTT of telecom operators' networks, such as messaging applications, VOD and VoIP, are viewed as value-added services that avail themselves of a telecom platform. No licence is required to provide OTT services, and there are no requirements that must be complied with by OTTs or restrictions on ownership unless the activity to be carried out through the internet is itself regulated.

Currently, no regulatory agency has authority over OTTs. The scenario where OTTs grew to compete with traditional telecom and media services but were subject to a far simpler legal landscape, and at the same time continuously caused an increase of data flooding the networks, came to the attention of government authorities from two perspectives: the need to establish fairness in competition and the need to incentivise network expansion. In this context, government initiatives have been twofold: on one side, government authorities have been demonstrating a willingness to reduce (to some extent) regulation over traditional services, and on the other, they have been debating whether and how to regulate OTTs. ANCINE, for instance, has made efforts towards regulating certain aspects of audiovisual streaming, VOD services and online video advertisements. After promoting public debates, it is now discussing with Congress having a law enacted that will give it authority over the industry. The debate around creating a level playing field for OTT and traditional regulated services, however, has been around for a long time with few practical changes so far.

ii Universal service

The expansion of broadband access has occupied an important part of the agendas of Anatel and the Ministry of Communications since 2010, when the National Broadband Programme (PNBL) was approved with the purpose of driving the expansion of broadband access throughout the country.

The PNBL's implementation was lengthy and faced several obstacles. A new phase of the PNBL, the Intelligent Brazil Programme, was launched in 2016, covering new milestones for subsequent years, including the construction of undersea cables, the setting up of a fund to promote investments in infrastructure by small carriers and incentives to public–private partnerships. At the end of 2017, the Ministry of Communications sponsored a public debate about the National Connectivity Plan, which should replace the PNBL. At the beginning of 2018, the Ministry announced the new Plan was ready, but it has not been enacted or released so far.

One result of the PNBL – a bill of law proposing that the SCM becomes subject to the public regime – is currently being debated in Congress. The immediate consequences, if the bill is approved, include tariff controls, heavier regulatory obligations aimed at the service's universalisation and continuity, and the possibility to use resources from the Telecommunication Universalisation Fund (which was created as part of the aim to universalise services provided under the public regime) to finance broadband expansion initiatives. The rationale behind it is to acknowledge the essential nature of these services. This bill, however, is contrary to a general market call for less regulation and to Anatel's latest efforts to simplify the regulatory environment to spur market growth.

The universalisation of broadband services was also addressed in the above-mentioned LGT reform bill, which provides that the government's rights over certain assets held by incumbents under fixed-line concessions (reversible assets, which are supposed to revert to the federal government's ownership upon termination of the concessions) would be waived in exchange for commitments from these companies to invest in broadband expansion.

A similar approach was adopted by Anatel in relation to the interest and fines arising from debts owed by incumbents to Anatel (other than tax debts). Anatel has discussed with Congress in the past about having a bill of law approved allowing incumbents to convert that interest and those fines into investments consistent with Anatel's priorities for the sector (which would likely cover broadband infrastructure), but these discussions have not turned into any actual rules or actions.

Although broadband expansion remains a topic of major importance in the regulators' speeches and agendas, in practice there were few effective actions during 2018 to spur it on, probably as a consequence of Brazil's long-term financial crisis and political turmoil.

iii Restrictions on the provision of service

The Internet Act defines access to the internet as essential for the exercise of citizenship, and establishes that one of the purposes of regulating the internet is to promote the universal access right. Other users' rights expressly acknowledged by the law include the maintenance of connection quality and a prohibition on suspending internet access except in the event of payment default.

Based on these provisions, and in some other scattered provisions in the telecom regulation, some have defended the position that carriers may not discontinue connection after a data cap is achieved (i.e., they should only implement business models that limit and charge for speed, but not for data flow). Data caps are contemplated in existing mobile broadband agreements, and Anatel has already indicated its view that the law does not prohibit the practice.

As regards fixed broadband, carriers' ability to impose data caps has been subject to intense debate in the past few years as some have argued it would be contrary to universal access targets. In 2016, Anatel issued a temporary order staying and prohibiting the practice

until a regulation is enacted, and since then, Anatel and Congress have promoted debates on the matter. Anatel undertook a wide public consultation to collect technical subsides to ground its decision, and is conducting a study to issue a final decision and regulation. Although the Ministry of Communications has determined that Anatel's future regulation regarding the matter (if any) must ensure the offer of at least one broadband plan with unlimited data allowance by carriers, the current Minister of Communications has also asserted that data caps are a reasonable and inevitable market practice to be implemented in the short term. Meanwhile, a bill of law is being debated in Congress that will, if approved, prohibit data caps in fixed broadband. Data cap business models are also contained in the net neutrality discussions.

Under the net neutrality rules, all data packages must be treated equally, and without distinction of content, origin and destination, service, terminal or application. Traffic discrimination or degradation is only permitted to satisfy technical requirements or when emergency services need priority, and as long as reasonableness, fair treatment and transparency principles are abided by, no injury to users is caused and no anticompetitive practices are undertaken. The only technical requirements acknowledged by law that may justify traffic discrimination are the handling of security and safety issues, and of extraordinary network congestion situations. Traffic management based on international standards is also permitted, provided that Anatel and CGI.br guidelines are adhered to. It is not clear under the Brazilian net neutrality rules whether certain business models such as zero rating would be acceptable or considered a net neutrality violation. The Administrative Council for Economic Defence recently shelved investigations involving zero rating practices on the grounds that they do not harm competition.

Network operators are not allowed to block, monitor, filter or analyse the content of data packages, and cannot keep records of users' logs on internet applications.

Anatel has the authority to investigate offences against net neutrality following the guidelines of CGI.br. Agreements between carriers and internet applications are prohibited if they prioritise data packages under commercial arrangements; favour applications offered by the carriers themselves; or jeopardise the public and unrestricted access to the internet or the dictates, principles and objectives governing the use of the internet in Brazil.

iv Security

Brazil has passed a General Data Protection Act (GDPA), which was published in the Federal Official Gazette on 15 August 2018 and will take effect after 18 months (i.e., in February 2020). The GDPA brings about deep changes in the conditions for the processing of personal data, laying down a set of rules to be observed in personal data processing activities. The enactment of the GDPA took place along with a presidential veto on the creation of a Data Protection Authority (DPA), which was contemplated as a government entity in charge of monitoring compliance with the GDPA and imposing sanctions for non-compliance. The articles establishing the DPA were vetoed by the President on constitutional grounds in the law-making process. The provisions on the creation of a DPA are expected to be reintroduced by the President by means of another bill of law or a provisional measure.

Privacy has been always protected by the Federal Constitution and several other statutory rules, which have since served as a guidepost to define the practices that are permissible for companies as regards people's data, but the GDPA has now set out detailed rules, rights and obligations for these practices. The GDPA applies to any data processing operation performed by individuals or by private or public entities, regardless of the country where

they are headquartered or where data is hosted, as long as the processing operation takes place within the Brazilian territory, the processing activity is intended to offer or supply goods or services or to process data of individuals located in the Brazilian territory, or the personal data being processed has been collected within the Brazilian territory. The application of the GDPA is not restricted to data processing activities performed through digital media or on the internet. It also regulates data processing activities in all industry sectors.

The GDPA establishes the lawful basis for data processing activities (similar to those provided under the European General Data Protection Regulation), and sets out more stringent requirements for the processing of sensitive data and of personal data of minors, and for cross-border transfers of data. It affords, however, a lower level of protection to anonymised data and to data made manifestly public by the data subject.

It does not contain detailed parameters for the implementation of security measures, and defers to the DPA to do so in the future. For now, the GDPA only determines, vaguely, that controllers and processors must implement appropriate technical and organisational measures to ensure the security of the data processed, and that data breaches that may result in a material risk or damage to data subjects must be communicated to both the DPA and the respective data subjects within a reasonable time frame. In addition, governance rules under the GDPA are not mandatory, but a choice for both controllers and processors (although their implementation might be considered as a parameter for the application of penalties).

Under Decree 8,771/2016, which regulates the Internet Act (applicable only for data processing in the context of internet services and applications), internet application service providers must follow the security standards below in their storing, recording and processing activities:

a stringent data access controls;
b authentication mechanisms for access to logs and records;
c detailed histories of access to application and connection logs comprising the time, duration and identification of the accessing employee or designee and accessed files; and
d adequate solutions to ensure the inviolability of data (such as encryption).

Data protection is an issue that increasingly attracts attention from law enforcement authorities. Brazilian citizens, however, are still quite casual about their data, and data privacy is not an issue frequently debated in court, except for litigation involving the identification of internet users and criminal and civil liability for content posted online.

With regard to content liability, the Brazilian legal system in general, and specifically the Internet Act, protect freedom of speech, balanced with other constitutional principles such as privacy and dignity. If content or an action on the internet is considered illegal, it is possible to obtain a court decision or order for its removal. As a general rule, internet application providers are not responsible for third-party content on their websites, except if after receiving a specific court order they do not take action to make unavailable infringing content. Exceptions apply to nudity and sexual content, which content is subject to notice-and-take-down obligations, and to copyright infringements, which were left to be dealt with by future law (however, no such law has been enacted to date).

Internet application providers that perform their business in a professional, economic and organised manner are also required to guarantee law enforcement by keeping records of application access logs (date and time of use of a specific internet application from a certain

IP address) for six months. Likewise, network operators must keep connection logs (date and time of an internet connection, its duration and IP address) stored for one year. Record keeping must be made in a confidential, secured and controlled environment.

A court order may also determine that application access logs are stored for a longer period provided that they relate to specific facts within a determined time frame. Administrative authorities may also request certain data (without a court order) in specific circumstances provided in law.

The secrecy of communications is protected by the Federal Constitution and by the Internet Act, and content can only be disclosed under a court order by those who hold the records in the context of a criminal investigation or for the gathering of evidence for criminal procedures. Real-time interception is further regulated by the Wire-Tapping Law, which establishes that a court order for interception may only be rendered if there are reasonable signs of the commission of a crime, if the evidence cannot be produced through other means or if the investigated fact does not constitute a misdemeanour subject, at the most, to a penalty of detention.

The law does not determine that providers must have the capability to comply with an interception or communication content delivery order, but unless they provide evidence of technical impossibility (i.e., because the communication is encrypted and the provider involved does not hold the keys), failure to comply with a court order would be considered a felony and therefore exposes providers to penalties.

IV SPECTRUM POLICY

i Development

RF spectrum is defined under the LGT as a limited resource in the public interest administered by Anatel. It is part of Anatel's duties to devise plans for the allocation, distribution and destination of RFs in relation to the various existing services and technologies and for pursuing efficiency. The use of spectrum, whether on an exclusive basis or not, is generally conditioned upon Anatel's prior authorisation, which is granted directly related to a licence for the rendering of a certain telecom service. Rights to use spectrum are currently granted for a definite period, and are in general renewable only once.

The main regulation on the use of spectrum currently in force dates back to 2001, and its revision is part of the scope of the Broadband Expansion Plan and of the telecom regulatory framework general review currently being debated in Congress and by Anatel.

The spectrum policy review aims mainly at increasing efficiency on spectrum management. Changes under discussion involve, for example, harmonising the spectrum policy with technologies' convergence trends, RF refarmings and the implementation of spectrum systems for the management of the temporary use of frequencies. Although discussions have been ongoing for quite a while, actual material changes in the legislation have been minimal to date.

The LGT reform bill of law also introduces changes to spectrum policies by allowing the successive renewal of spectrum authorisations (currently renewable only once), permitting the conversion of the spectrum renewal fee into investment obligations and allowing the transfer or resale of spectrum authorisations (which is currently prohibited), subject to Anatel's prior approval. The bill of law also provides that Anatel may impose conditions to approve a spectrum transfer in order to protect competition, such as a limitation on the number of RFs transferred (to the same company).

ii Flexible spectrum use

Mobile carriers have introduced radio access network (RAN)-sharing deals in recent years, following a trend initiated by tower sale and leaseback transactions.

RAN-sharing agreements depend on Anatel's prior approval. Anatel has indicated that sharing is a basic principle to be pursued in spectrum management aimed at guaranteeing the efficient, rational and adequate use of this scarce resource, as long as it is technically viable.

The creation of a secondary market for spectrum is an old industry request and, as mentioned above, is addressed in the LGT reform bill.

iii Broadband and next-generation mobile spectrum use

Anatel has been alert to the rapidly growing demand for broadband and next-generation mobile services in Brazil. In 2007, Anatel auctioned the 1.9GHz and 2.1GHz bands for 3G technology broadband services, and in 2012, the 2.5GHz and 450MHz bands for 4G services. In 2014, another auction was carried out with the intention of expanding 4G services in Brazil by using the 700MHz spectrum. Although the 700MHz band was successfully licensed to telecom carriers, it is currently used for analogue TV in many parts of the country, and its refarming depends on the conclusion of a TV digitalisation plan that is being implemented. Later in 2014, Anatel carried out a 'leftover' multi-band spectrum auction, also aimed at expanding 4G services and fixed broadband, which comprised frequencies in the 1.8GHz, 1.9GHz and 2.5GHz bands that had not been sold in previous auctions. Switching off the 2G network is also being discussed, which would free the 900MHz and the 1.8GHz bands for 4G technology.

The 2014 leftover spectrum auction offered several municipal lots with low minimum average prices and special payment conditions in an attempt to encourage small and medium-sized ISPs to bid. Anatel has announced that giving incentives to small broadband providers to increase their market share is part of a strategy to disseminate the broadband offer.

In all the spectrum auctions, Anatel imposed coverage and quality requirements with targets for carriers to achieve.

Some material issues remain unaddressed to date and have been raised by carriers as being essential to encourage private investment in broadband expansion, such as the termination of spectrum caps for carriers, and the simplification of the regulations regarding towers, especially those involving zoning and permitting restrictions and land-use restrictions.

iv Spectrum auctions and fees

Although some RF bands are still available (left over from previous auctions), no future auction has been scheduled by Anatel to date. For the next rounds, Anatel has announced it is also considering making more spectrum available, such as the 2.3GHz and the 3.5GHz bands, the latter depending on conclusive studies regarding interference with the C Band.

Regarding the next auctions to be scheduled, the former Minister of Communications announced an intention not to prioritise Anatel's revenues so that carriers may focus on enlarging infrastructure. Anatel has also announced that it intends to simplify the rules of future auctions in a further attempt to encourage small and medium-sized carriers to participate.

V MEDIA

i Restrictions on the provision of service

Media content is offered in Brazil through three main telecom services – SeAC, free-to-air broadcasting and internet broadband – which are regulated by the telecom rules and regulatory bodies mentioned earlier in the chapter. Provision of content that does not involve a network operation (but that, rather, relies on a third party's service to have its signal transmitted) is not a regulated telecom activity.

As mentioned above, content broadcasting is considered a service of national interest regulated directly by the Ministry of Communications, and has to serve educational and cultural purposes. At least 5 per cent of daily programming must be devoted to news services, and five hours per week must be used for transmission of educational programmes. Advertising is capped at 25 per cent of daily programming. Broadcasting companies are also required to transmit official programmes and announcements of public authorities. Other than the above, broadcasting companies are free to organise their programming, which may include programmes produced by it directly and programmes licensed or purchased from third parties.

Under Anatel's rules, SeAc providers are required to make a basic package of channels available to all subscribers. Requirements on the types of channels to be carried by SeAc providers and their content were established by the SeAc Law and complemented by regulations issued by ANCINE. There are requirements in respect to minimum Brazilian content and minimum content produced by Brazilian independent producers to be included during peak viewing hours on certain channels. These obligations mainly lie with the channels' programmers, although it is incumbent on the SeAc provider or, if applicable, the respective packaging company, to verify compliance with this obligation. As in broadcasting, advertising in pay-TV channels is capped at 25 per cent of the daily programming.

ii Internet-delivered video content

Internet video distribution is considered a value-added service currently outwith the scope of the existing telecom regulation. ANCINE's rules do not apply, either.

In the past, ANCINE promoted a public debate involving VOD regulation. ANCINE's proposed rules originally included obligations similar to those currently applicable to pay-TV, such as obligations to register companies and content with the Agency, employ Brazilian nationals with editorial responsibilities and give prominent position to Brazilian content in their catalogues.

However, given the complexity of implementing rules that would consistently apply to the different existing industry business models, the Superior Cinema Council recently narrowed the scope of the regulation under debate, in the short term, to comprise only tax and industry incentives, and the government and industry players have been discussing draft rules during the entirety of 2018.

Although internet-delivered content has increased at a rapid pace in the capitals and more developed cities in the country, there is still limited access to this service in less-developed areas in the country, especially considering the overall Brazilian population's economic capacity and the broadband infrastructure.

Because internet-delivered content faces significant restrictions in penetrating the general population, free-to-air broadcast and pay-TV are still important distribution channels

in Brazil. Free-to-air TV broadcast has traditionally played a significant role in low-income regions, and the pay-TV market has increased its penetration among the middle classes as its affordability increases.

VI THE YEAR IN REVIEW

Brazil is still struggling to recover from the worst financial recession in its history. Together with the financial crisis, the country is facing a severe and long-term political crisis marked by various corruption scandals, the impeachment of President Dilma Rousseff in 2016 and, in 2018, after 14 years of a left-wing Workers Party's government, the country's most polarised general election to date. All of this has contributed to a lack of political leadership in the country that continues affecting Brazil's legislative and political agendas. Although several initiatives in the TMT industry were debated during the past few years, most have remained on paper, and few effective actions have in fact been implemented.

In the context of a high turnover in the government, the past few years have also been marked by a lack of a uniform and cohesive position among regulators and lawmakers. As a consequence, the industry has witnessed different draft rules pointing in opposite directions and several overlapping public consultations sponsored by different authorities, resulting in a high level of uncertainty about what is coming next in the industry's regulatory landscape.

VII CONCLUSIONS AND OUTLOOK

The regulatory landscape faces significant challenges.

Incumbents face problems related to their legacy landline concessions, such as their scheduled termination in 2025, decreasing voice revenues, competition from OTTs and mandatory investments that do not provide an attractive return. Oi's bankruptcy in 2017 has highlighted incumbents' financial and management woes. Mobile companies also have problems.

Anatel itself is not free from criticism. Even though services are provided under a private regime, which theoretically means that freedom is the rule, Anatel throughout the years has been a heavy-handed regulator. As such, while consumer advocacy groups claim that it has been lenient with the quality of services offered by telecom companies, the companies themselves condemn its harshness when imposing disproportionate and unreasonable fines. Anatel has only recently been empowered to settle fines out of court. At the same time, it has been under the scrutiny of the Federal Budget Oversight Board, an accountability federal court, and may soon also need to look into whether more consolidation is an answer to companies' problems.

Political turmoil in 2015, 2016, 2017 and 2018 has contributed to a lack of political leadership that could steer the much-needed adjustments to the 20-year-old LGT. One of the most pressing questions is whether the incumbents will be allowed to free up their fixed assets that are currently tied to concessions and redirect funds owed to the federal government for broadband investments. One final, not-unimportant aspect that has an impact on the industry is the heavy taxation currently imposed on telecom companies, which are the largest taxpayers in Brazil. However, with Brazil's continuing fiscal problems, this may be the last thing to be changed.

Appendix 1

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