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# SHAREHOLDING CONTROL IN THE TELECOMMUNICATIONS SECTOR

## CONCEPT – CROSS-OWNERSHIPS

By Ricardo Barretto Ferreira and Isabella De Castro Satiro Aragão

After the drafting of the Constitutional Amendment No. 8/1995 to the Brazilian Federal Constitution, it was crystallized the break of the monopoly that reserved the exploitation of telecommunications services for companies under state shareholding control, allowing the authorization, concession or permission of telecommunications services. The privatization and the competitive environment in the telecommunications sector made the development of economic groups more complex and the determination of “shareholding control” requiring more sophisticated criteria.

The Brazilian General Telecommunications Law (Law 9,472/1997 - “LGT”) determines, in its article 71, that, in order to promote effective competition and prevent economic concentration in the market, the Brazilian National Telecommunications Agency – ANATEL may establish restrictions, limits or conditions for companies or business groups regarding the acquisition and transfer of concessions, permissions and authorizations.

In addition, according to article 7, § 1 of the rule, acts involving a telecommunications service provider, in the public or private system, aimed at any form of economic concentration, including by consolidation or merger of companies, incorporation of a company to exercise control of companies or any form of corporate group, would be subject to the controls, procedures and conditions provided for in the general rules of protection of the economic order.

In this regard, in order to serve the public interest and allow the good development of Brazilian telecommunications, it is up to ANATEL to exercise the legal competences in terms of control, prevention and repression of infractions of the economic order related to telecommunications, except those owned by the Brazilian Antitrust Authority - CADE. Such provision is reinforced by the Technical Cooperation Agreement between ANATEL and CADE, signed in May this year, which should promote joint actions and mutual support between entities, aimed at the defense, promotion and dissemination of

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competition within the scope of telecommunication services.

It should also be noted that, pursuant to article 97 of the LGT, the spin-off, consolidation, transformation, merger, reduction of the capital of a company or the transfer of its corporate control, which will be granted if it is not harmful to the competition and does not jeopardize the performance of the contract, will depend on ANATEL's prior approval.

Following the intention to prevent the illegal transfer of sharing control, ANATEL's Resolution No. 101/1999 has emerged, which approves the Regulation for Determination of Control and Transfer of Control in Companies Providing Telecommunications Services. The legal provision establishes, in item II of its article 1, the concept of "control" in companies providing telecommunications services, i.e., the "power to manage, directly or indirectly, internally or externally, in fact or in right, individually or by agreement, the social activities or the operation of the company".

The "controller", in accordance with the aforementioned regulation, is considered to be the natural person or legal entity or even the group of people that, individually or jointly, has the power of control over the legal entity. It should be noted that, for a company providing telecommunications services that originated from the

privatization process of companies controlled by the Government, the person who, through a consortium or capital subscription, would acquire shares held by the Government and the power to participate in the control of the respective company, would be considered as controller.

Furthermore, without prejudice to other factual or legal situations that fall under the concept of "controller", in order to avoid fraud against legal and regulatory restrictions on cross-ownership and economic concentration and to protect free competition and the right of the consumers of telecommunication services, the controller is considered to be a person who, directly or indirectly:

- I) Participates or appoints a person to be a member of the Board of Directors, of the Executive Board or body with equivalent attribution, of another company or its controller;
- II) Has a statutory or contractual veto right on any matter or resolution of the other;
- III) Has sufficient powers, by any formal or informal mechanism, to prevent the verification of a qualified quorum for the installation or resolution required, by virtue of a statutory or contractual provision, in relation to the other's resolutions, except in the cases provided for by law;

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IV) Holds shares or membership interest from the other, of such a class to ensure the right to vote separately referred to in art. 16, III, of Law No. 6,404/76.

The Resolution also provides that ANATEL, either on its own initiative or by provocation, may institute administrative proceedings if there is evidence of the existence of a control prohibited by legal, regulatory, by publication or contractual provisions, between telecommunications service providers, such as:

- I) The existence of significant financing transactions, passive or active, in any form;
- II) Provision of security interest, personal or of any kind;
- III) Transfer of goods under conditions, terms or values different from those practiced in the market;
- IV) Existence of a process for transferring strategic technological knowledge;
- V) Provision of telecommunications services or related services under favored or privileged conditions;
- VI) Existence of an operational agreement that stipulates favored or privileged conditions;

VII) Common use of resources, whether material, technological or human;

VIII) Joint contracting of goods or services;

IV) Existence of a legal instrument with the object of transferring shares between the providers or assigning preemptive rights in relation to the reciprocal transfer of shares;

X) Adoption of a brand or common marketing or advertising strategy.

According to the regulation (and in line with the LGT), any change in the transfer of shareholding control - considered the legal transaction that results in partial or total assignment, by the controller, of control of the telecommunications service provider - must be previously submitted to ANATEL. In addition, the Resolution determines that a legal entity will be considered affiliated to another one if it holds, directly or indirectly, at least twenty percent (20%) of participation in the voting capital of the other, or if the voting capital of both is held, directly or indirectly, in at least twenty percent (20%), by the same natural person or legal entity.

ANATEL's Regulation No. 101/99 establishes comprehensive concepts of "sharing control" and "transfer of sharing control", endeavoring to create mechanisms that prevent the "clandestine" and undeclared transfer of sharing control of companies that provide

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telecommunications services, a practice that would violate the general principles of competition, through market concentration and price manipulation, for example.

However, the innovations brought by the regulation are also controversial due to conceptual vagueness: on the one hand, there are those who argue that the ANATEL's Resolution replaced the term "sharing control" already existing in the national legislation, previously established in the Law of Joint-Stock Companies (Law No. 6,404/1976), in its article 116 (which defines the controlling shareholder), for a broader concept of "control", comprising both internal and external control, and situations in which there is no dominant influence, even creating a new concept of "company operation".

On the other hand, however, there are those who defend the full validity of the concept of control established in the ANATEL's Resolution No. 101/99, arguing that the Brazilian Law of Joint-Stock Companies did not define "control", but rather the controlling person (subjective element), which would differ from the definition of situations that actually characterize a power or influence (objective element). In addition, the normative context and purpose of the rule should be taken into account.

Over the years, many interpretations have been assigned to the provisions of Resolution No. 101/99 by ANATEL, in the specific cases submitted to analysis and/or approval by the Agency, in situations such as internal corporate reorganization of the telecommunications service providers and/or economic groups to which they belong; mergers and acquisitions of concessionaires and entities that authorize the Fixed Switched Telephone Service (FSTS); among other factual circumstances.

Also, in situations related to the verification of cross-ownerships - taking into account the provision of article 5 of Law No. 12,485/2011 ("SeAC Law"), which prohibits cross-ownership between companies providing telecommunications services of collective interest, concessionaires and permissionaires of radio and sound and image broadcasting services, and producers and programmers headquartered in Brazil -, Resolution No. 101/99 is the basic instrument of analysis, by ANATEL, on the existence (or not) of restrictions on cross-ownership prohibited by the SEAC Law.

Regardless the different positionings related to ANATEL's Resolution No. 101/99, the definition of the concept of "shareholding control" in the telecommunications sector must be applied clearly, both to promote aspects related to free and fair competition, and to allow the defense of the legal certainty to which the administrators are entitled, through a judicial decision that definitively ends the vagueness, so that the rule becomes an effective instrument to promote the purposes for which it is intended.

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