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VOD (VIDEO-ON-DEMAND) REGULATIONS

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From the perspective of the entertainment industry, the expressive technological and communication changes of the last decades have increased the frontiers of expansion of the audiovisual sector, creating different formats of access to content and giving the user more power to choose what they want to consume in this market. In this regard, Video-On-Demand (VOD) is gaining more and more space, nationally and internationally.

The concept of VOD is understood as the audiovisual content made available in catalog, to be watched at any time, on any device, on user demand, mainly via streaming - i.e., the content is consumed on the internet and is being loaded as the user watches it. Access to VOD depends on a technology for the distribution of content over the internet (being considered an over-the-top service - OTT), internet (or satellite) connection and, generally, subscription to some service of this type, offered by a platform.

From the telecommunications perspective, there is legal uncertainty about the

definition of the legal nature of streaming and VOD offerings in Brazil, derived from a question already discussed in a previous article about whether OTT services (used to provide streaming videos and VOD) would be considered as: (i) **conditional access services (SeAC)**, due to the similarity of its content with that available on pay-TV; or (ii) **value-added services (VAS)**, ceasing to be considered as a telecommunications service.

Some other challenges faced by VOD, nationally and internationally, are: i) the similarity of its content with that available on pay-TV; ii) the editorial responsibility of the VOD provider, linked both to the selection of content in catalog and to the organization of such content; iii) the incentive to the promotion of national content; iv) the taxation, mainly from the perspective of “sharing” the economic success of the service of an extraterritorial nature; and v) the territoriality of the service and the relevant regulation, considering the coverage and heterogeneity of the market, which affect corporate arrangements and foreign investments.

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In Brazil, the Brazilian Film Agency (“ANCINE”) opened a Public Consultation, between December/2016 and March/2017, on the Regulatory Article on Audiovisual Communication on Demand. The report with ANCINE’s recommendations for the regulation of Audiovisual Communication on Demand was an object of controversy, considering the expansive scope of regulation; the determination of CONDECINE’s contribution payers as providers of the VOD service and those responsible for the content sharing platforms, as well as the incidence of the calculation basis on the taxpayers’ gross annual revenue, progressively; and the heavy quotas of national content, among other obligations.

In September 2019, ANCINE opened a new Public Consultation for the Analysis of Regulatory Impact for the video-on-demand (VOD) market, with considerations on a possible regulation of VOD services and their taxation. The report prepared by ANCINE’s technicians and placed under consultation called attention to the tax and market asymmetry between VOD and pay-TV, the constitutional responsibilities of VOD platforms and the ANCINE’s power to regulate on the topic.

With regard to the tax issue, the aforementioned report suggested the taxation of VOD services by charging a percentage on the revenue for exploiting the content - i.e., a replacement of the CONDECINE-Título (Contribution to the

Development of the National Film Industry, which focuses on the broadcasting, production, licensing and distribution of cinematographic and video-phonographic works for commercial purposes, as well as on payment, credit, employment, shipping or delivery, to producers, distributors or intermediaries abroad, of amounts related to income resulting from the exploitation of cinematographic and video-phonographic works or by their acquisition or import, at a fixed price) by a charge on the revenue of regulated economic agents.

Also, ANCINE called attention to the tax asymmetry between pay-TV, which pays State Goods and Services Tax (ICMS), and VOD services, which collect Municipal Services Tax (ISS). From a comparative analysis related to other countries, the Agency demonstrated that the tax paid in Brazil for VOD services (ISS) is substantially lower than the amounts paid in other countries, which collect Value-Added Tax (IVA, or VAT).

Regarding the asymmetry between the traditional pay-TV market and the VOD market, ANCINE pointed out that such imbalance could be observed both in the differences between regulatory and tax obligations of pay-TV programmers in competition with OTT services in the domestic market, as well as in the impact on the conditions of internal competition due to the extraterritoriality of the service.

The Agency, however, stressed that pay-TV

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and VOD are different services that intersect and compete and, therefore, the VOD regulatory framework should assess the specific characteristics of the segment and, in parallel, the effects of the rules on the competition between services. Thus, ANCINE argued that VOD regulation should be implemented through a single legal statute, which addresses the variety of topics covered by the service, according to its legal organization, including institutional conditions for the provision of services, tax treatment, issues related to the provision of independent Brazilian content and issues related to the editorial responsibility of providers and platforms.

Right after the conclusion of the Public Consultation in November 2019, a Working Group (WG) was appointed by the Brazilian Higher Film Council, in December 2019, which was in charge of proposing a law to the National Congress to regulate VOD services, in order to define the nature of these services, the conditions for their provision to users in Brazil and the regulatory and tax obligations of the provider agents, including on the incidence of CONDECINE.

In May 2020, the WG released a Preliminary Report of the Working Group for the preparation of a legislative proposal for the regulation of Video-on-Demand (VOD) services. Although it has only a preliminary character, as it is not a legislative proposal, the report brought significant changes to the model

previously discussed, especially related to the calculation of the incidence of CONDECINE by billing.

It is also interesting to note the legislative proposals on the topic - in particular Bill No. 8,889/2017, which provides for the provision of audiovisual content on demand (CAvD) and is awaiting the appointment of a Rapporteur in the Commission of Science and Technology, Communication and Informatics in the House of Representatives. This is because, in November 2019, representative Benedita da Silva submitted a substitute report to the referred Project, pointing to regulatory changes related to Law No. 12,485/2011 (Law of Conditional Access Service - SeAC), bringing an expansion of the scope of models for contracting audiovisual services and extrapolating the logic of the traditional “pay-TV service”.

The substitute report brought the definitions of “Distributor by Telecommunications Service” and “Distributor by Value-Added Service”, segregating these modalities from the Conditional Access Service, in order to clarify that SeAC could be exercised not only by telecommunications service providers, but also by Internet application providers (OTTs), through value-added service (VAS). Furthermore, it was even proposed to end restrictions on cross-ownership between content producers and programmers and SeAC distributors, with profound changes to SeAC Law.

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VOD regulation must be analyzed from several perspectives, such as the coverage and heterogeneity of the VOD market - which has been growing exponentially, especially during the COVID-19 pandemic, giving rise to several modalities of content transmission via Internet -, extraterritoriality, the tax factor and the consumer. However, the legal nature of the service is an essential factor to be taken into account in the VOD regulatory framework, in view of the influence exercised by the possible revision of SeAC Law and the regulatory fit of linear channels in the OTT model, VOD and streaming, in order to guarantee the development of the disruptive effect caused by the distribution of audiovisual programming via Internet.

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