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SPECTRUM REGULATION

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The radio-frequency spectrum is understood as a public good, of limited enjoyment, administered by the Brazilian National Telecommunications Agency - ANATEL, corresponding to the electromagnetic spectrum, whose electromagnetic waves propagate in space without an artificial guide and which, from the point of view of the current technological knowledge, can be used by radiocommunication systems (telecommunication that uses radio frequencies not restricted to wires, cables or other physical means). Herein we do an analysis of the regulatory aspects of spectrum management and the advances in spectrum regulation and modernization.

According to the Brazilian General Telecommunications Law (Law No. 9,472/1997 - "LGT"), it is up to the Federal Government, through the regulatory Agency ANATEL and under the policies established by the Executive and Legislative Branches, to organize the exploitation of telecommunications services, taking into account that such organization includes, among other aspects, the disciplining and supervision of

the execution, commercialization and use of services, implantation and operation of telecommunication networks, as well as the **use of the resources of radio-frequency spectrum and orbit**.

In the scope of services provided under the private regime, ensuring the efficient use of the radio-frequency spectrum in the exploitation of these services is a legal obligation. Furthermore, since it is a limited resource, the radio-frequency spectrum is a public good and must be administered by ANATEL.

ANATEL shall observe the assignment of spectrum bands according to international treaties and agreements (approved by the International Telecommunication Union - ITU) and maintain a plan with the assignment, distribution and allocation of radio frequencies, considering the rational and economic use of the spectrum, as well as the existing assignments, distributions and consignments, in order to avoid harmful interference (i.e., emissions, irradiations or inductions that obstruct, seriously degrade or repeatedly interrupt the telecommunication).

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It should be noted that the concession, permission or authorization for the exploitation of telecommunications services and the use of radio frequency, for any service, will always be made against payment, being authorized the collection of the respective price under the conditions established in the LGT and in specific regulations, constituting the product of the collection a revenue of the Telecommunications Inspection Fund - FISTEL.

The regulation of the efficient and adequate use of the spectrum can restrict the use of certain radio frequencies or bands, considering the public interest. Additionally, article 19 of the LGT also provides that ANATEL is responsible for managing the radio-frequency spectrum and the use of orbits, issuing the respective rules, in addition to issuing acts of granting and extinction of the right to use radio frequency and orbit, supervising and applying sanctions.

In this regard, ANATEL's Resolution No. 671/2016 approved the Radio-Frequency Spectrum Use Regulation, in order to discipline and establish general administration parameters, conditions of use, authorization and control of radio frequency, in national territory, including airspace and territorial waters.

The aforementioned Resolution determines that the use of radio frequencies, radio-frequency bands or channels, whether or not they are

exclusive, will depend on prior grant from ANATEL, upon authorization, except in the case of radio frequency by means of restricted radiation equipment defined by the Agency, or use, by the Armed Forces, of radio frequencies in bands intended for exclusively military purposes.

ANATEL's authorization to use radio frequencies must be preceded by an administrative process, which may include the following steps:

I) **request to use radio frequency, radio-frequency band or channel**, forwarded to ANATEL by the parties interested in using radio frequencies, which must contain the identification of the interested party, the telecommunications service provided in public/private regime or the broadcasting service to which the use of radio frequencies will be associated, the indication of the radio frequencies whose use is being required and a summary of a viable technical project that is compatible with the regulations issued by ANATEL, when required by the specific regulation of the service;

II) **holding of a Bidding for Concession, Permission and Authorization of Telecommunications Service and Use of Radio Frequencies**, by means of a public call and judgment of biddings, according to criteria such as greater public price offer, greater service offer, better quality of use, greater number of commitments made, among others, **or a procedure that justifies its unenforceability, according to**

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the applicable legal hypotheses;

III) **authorization for use and consignment of radio frequencies**, which must meet the needs of the interested party with the minimum possible impairment of spectrum, in order to avoid unavailability and damage from its use by other interested parties and allow greater availability of radio frequencies for future service demands; and which must follow the Regulation of charge of Public Price for the Right to Use Radio Frequency - PPDUR, approved by ANATEL's Resolution No. 695/2018, for the calculation of the payment for the right to use radio frequency; and

IV) **issuance of a license to operate a station.**

It should also be stressed that the use of equipment emitting radio-frequency without certification issued by ANATEL is prohibited - i.e., telecommunications products entering Brazil must undergo a Compliance Assessment process, in which they are submitted to a set of tests that indicate an adequate level of confidence about certain equipment. ANATEL's Resolution No. 715/2019 establishes the general principles and rules related to compliance assessment and homologation of telecommunications products, applying to products used in the exploitation of radio broadcasting services, their ancillary, auxiliary and related services.

Another important legal framework is ANATEL's Resolution No. 703/2018, which establishes maximum limits on the amount of radio-frequency spectrum, when determining that the same Telecommunications Service Provider of collective interest, its affiliate(s), subsidiary(ies) or parent company(ies), in the same municipality, can only hold radio-frequency bands, on a primary basis (right to protection against harmful interference), of up to 35% of the bands up to 1GHz and this limit can be extended up to 40%, subject to restrictions by the competition agency and aimed at the efficient use of the spectrum; and, for radio-frequency bands between 1 GHz and 3 GHz, operators can hold up to 30% of the sum of the spectrum of the listed sub-bands, and this limit can be extended up to 40%, under the same conditions.

Finally, Decree No. 10,402/2020 was recently published, which provides for the adaptation of the concession instrument to authorization of telecommunications service and on the extension and transfer of radio-frequency authorization, grants of telecommunications service and satellite exploration rights.

This rule establishes that the partial or full transfer of the authorization to use radio frequencies between telecommunications service providers will be carried out against payment by ANATEL and must be preceded by ANATEL's consent, in addition

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to enabling the maintenance of obligations associated to radio frequencies (serving the public interest), the application of restrictions of a competitive nature when necessary/convenient and the analysis of tax regularity of the company to which the authorization is being transferred.

Furthermore, with the proximity of the auction of radio-frequency spectrum for 5G in Brazil - which will involve bands of 700 MHz, 2.3 GHz, 3.5 GHz and 26 GHz, being one of the largest spectrum provision by the regulator -, great discussions have arisen about new mechanisms of access and revision of the Regulations for the Use of the Radio-Frequency Spectrum (RUE), being even discussed in ANATEL's Public Consultation 51/2020, to allow greater transparency on the conditions of this resource and fostering the growth of the spectrum market and its applications, avoiding scarcity and artificial dominance.

In this same regard, ANATEL is preparing a regulation capable of inducing business in the secondary market of spectrum - i.e., the possibility of a transfer of authorization to use radio frequency between telecommunications service providers, modality that started to be foreseen after the publication of Law No. 13,879/19, allowing spectrum trading in a "wholesale" aspect - in order to encourage the creation of this business environment, defended by the Inter-American Development Bank (IDB), in Brazil.

Currently, the authorization and use of the radioelectric spectrum has been facing several changes in order to adapt to the new technological and financial demands in radiocommunications. In order to promote a more efficient allocation of this resource and increase competition in the telecommunications sector (through the participation of new agents, for example), the revision of use of the radio-frequency spectrum sounds interesting for the provision of adequate services to users of telecommunications services and for the accelerated development of the Brazilian telecommunications market.

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