

Telecoms and Media

An overview of regulation in
43 jurisdictions worldwide

2014

Contributing editors: Laurent Garzaniti and Natasha Good



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Telecoms and Media 2014

**Contributing editors:
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Freshfields Bruckhaus Deringer LLP**

Getting the Deal Through is delighted to publish the fully revised and updated fifteenth edition of *Telecoms and Media*, a volume in our series of annual reports that provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 43 jurisdictions featured. This year's edition also benefits from an expanded overview section, with two new chapters covering Network Sharing, and Convergence in the US Telecommunications and Media Industry.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. Once again, regulatory agencies have assisted us in the verification of the factual information relating to their jurisdiction and we acknowledge their cooperation on page 14. We would also like to extend special thanks to contributing editors Laurent Garzaniti and Natasha Good of Freshfields Bruckhaus Deringer LLP for their assistance with this volume.

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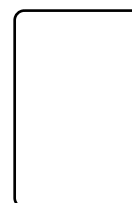
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Communications policy

1 Regulatory and institutional structure

Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The telecoms sector has as a basis Law 9472, of 16 July 1997, the General Telecommunications Law, which sets out that the executive branch is responsible for establishing the telecommunications policy whereas the National Telecommunications Agency (Anatel) is in charge of implementing such policy by regulating and supervising the sector. The Telecoms Act establishes that the telecoms policy must have two main objectives: competition and universalisation of public telecommunications services.

Broadcasting services are regulated under Law 4117, of 27 August 1962, and the policy is developed by the Communications Ministry jointly with the National Congress. It should be noted that Anatel has no authority over broadcasters, except for the technical aspects of the use of radio frequency and equipment compliance. The policy guidelines for the broadcasting sector are established by the Federal Constitution, and include fostering the national and regional culture and the independent production, regard for ethical, social and family values, and preference for educational, cultural and informative content.

Audio-visual content (in terms of registration of audio-visual works and implementation of government policies for development of the national cinematographic sector) is regulated by the National Cinema Agency (Ancine).

In general, there are no restrictions on foreign capital in the telecommunications sector; however, Decree 2617, of 5 June 1998, requires that the companies licensed to deliver telecommunications services must be organised under Brazilian laws and have their headquarters in Brazil. The Decree also requires that a majority capital of the company be owned by a person (individual or entity) domiciled and headquartered in Brazil.

The rules are different for broadcasting. At least 70 per cent of the ownership of radio and TV broadcasting companies is restricted to native Brazilians or persons who have been naturalised Brazilians for more than 10 years, and must be responsible for the company management and programming policy. In addition, foreign ownership in broadcasting companies' stocks may not exceed 30 per cent of the total voting capital of these companies, and can only occur indirectly by means of a legal entity organised under Brazilian laws and based in Brazil.

2 Authorisation/licensing regime

Describe the authorisation or licensing regime.

Telecommunications services may be rendered under either a public or private regime.

Under a public regime, telecommunications services can only be granted by Anatel through a concession or permit (in specific situations). Under a private regime, communications services may be granted through authorisation.

A telecommunications service licence can only be granted to a company organised and existing under Brazilian law, with its head office in Brazil and with the purpose of providing telecommunications services. Anatel requires certain conditions to be fulfilled for a licence to be granted, such as, for example: presentation of a technical project, evidence of the capacity of the company to contract with the public authority, and of the proper qualification to provide the services.

There is no exclusivity for telecoms services, and applying for more than one of the same kind of service licence in coinciding geographic areas is prohibited. The telecommunications service provider (or its affiliate) cannot hold more than one licence for the same service in the same area.

The duration of the concession may last up to 20 years, renewable once for an equal term, if the company has met all terms and conditions of the agreement and paid the additional amount for the extension. Authorisations do not have a final expiry date. They can only be terminated by cessation, forfeiture, resignation or repeal.

Concessions and authorisations can be transferred only with Anatel's approval, and by meeting the following requirements: the service has been rendered for at least three years, the concession conditions have been fulfilled, and the market competition is warranted.

Concessions are usually granted through a bidding process. Authorisation to provide telecoms service is subject to the payment of a fee equivalent to approximately US\$3,800 for most services, such as mobile services and fixed switched telephone services, and for simpler services, such as multimedia communications services, the fee is approximately US\$170. Regarding spectrum licences, the fee will vary depending on whether there is a bidding process. If not, Anatel Resolution No. 387 shall apply, and the fee depends on various aspects, such as the geographical area, bandwidth and duration, among other things. If there is a bid for the spectrum, then the highest offer will be the price to be paid by the interested party. There are also other fees due, such as a telecoms supervision fee paid upon completion of the telecoms system installation and a fee paid by mobile companies on a per-terminal basis.

The General Grants Plan provides for rules for the concession and authorisation of telecommunications services. According to the Plan, fixed switched telephone services are the only communication services delivered under a public regime, and may also be rendered under a private regime. Services delivered under a public regime must observe the principles of universalisation and continuance of the service delivery. Services provided under a public regime are more subject to state control than those delivered under a private regime.

Mobile services are delivered under private regimes and the authorisation gives the right to use the necessary radio frequencies; this right of use is granted for 15 years, and is renewable once for a further 15-year period. Authorisations to use 2G and 3G technology are granted by bidding processes, whereas for 4G technology, the bidding process is expected to take place in the first half of 2014.

The delivery of satellite services depends on the right to exploit Brazilian or foreign satellites. In the case of Brazilian satellites, the right to exploit ensures an orbit occupation and use of radio frequencies for controlling and monitoring telecommunications; to obtain the right to exploit Brazilian satellites, a bidding process is required. In the case of foreign satellites, they can be operated in Brazil through a licence granted to a local and legal representative. The right to exploit foreign satellites authorises the provision of foreign satellite capacity in Brazil and the use of associated radio frequencies. The exploitation right is granted for 15 years, and is extendable for an equal term.

3 Flexibility in spectrum use

Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

Law 9472, of 16 July 1997, the General Telecommunications Law, provides that spectrum is owned by the public authorities and companies can only use it as authorised by Anatel. Also, Anatel is responsible for (i) preventing damaging interference and maximising its economic use, (ii) altering the destination of frequency bands, and all the characteristics and technical requirements of its use, to serve public interest, and (iii) cancelling authorisations or imposing new obligations on telecommunications service providers.

The General Telecommunications Law sets forth that some radio frequency bands are designated for certain telecommunications services, such as fixed-switched telephone services or mobile services, and, because of that, spectrum licences can only be granted to companies that exploit the same telecommunications services assigned on the bands.

In accordance with the Law, authorisations granted by Anatel are not tradable without the Agency's permission, and are regulated by specific laws and can be subject to analysis by the Administrative Council for Economic Defence (CADE), the Brazilian antitrust agency, when appropriate. Furthermore, the Agency expressly determines that the licensed spectrum can only be transferred along with the corresponding telecoms service licence.

4 Ex-ante regulatory obligations

Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

Basically, all telecommunications services must comply with ex-ante regulations. The General Telecommunications Law provides that all telecommunications services must be organised on the basis of free, wide and fair competition.

Resolution No. 600/2012, which launched the General Competition Plan, provides general guidelines for verification of competition in the relevant markets, making the regulatory remedies more accurate. The Plan also provides for several specific measures for transparency, equal treatment, price control, obligation of access, among others.

Anatel has other actions to control competition: it establishes a maximum value for public service tariffs (fixed switched telephone services), and performs the analysis and the homologation of all pricing plans of mobile operators.

There is also Resolution No. 101, which provides for rules on control verification and control transfer in telecommunications services.

5 Structural or functional separation

Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

There is no legislation regarding structural or functional separation even though there is a lot of discussion on the issue. However, Resolution No. 600/2012 provides that Anatel can apply structural, functional or accounting separation to achieve the objectives of the General Competition Plan.

6 Universal service obligations and financing

Outline any universal service obligations. How is provision of these services financed?

All public service concessionaires are required to comply with both the universalisation and the continuity obligations, which are periodically reviewed by Anatel. If a concessionaire violates such obligations, it will be subject to the imposition of a fine, forfeiture or intervention decree, as appropriate.

The fixed switched telephone services are the only services delivered under the public regime, and they are the only services subject to compliance with the universalisation and continuity obligations. The General Universalisation Plan provides that in locations with more than 300 inhabitants the switched fixed telephone service must be installed with individual access; the Plan also sets out that for every 1,000 inhabitants the operators must install four public telephones.

Operators subject to these obligations have to finance the accomplishment of their obligations. To finance part of the costs sustained by the concessionaire for compliance with the universalisation obligations, the Universalisation Fund for Telecommunications Services (FUST) was created.

7 Number portability

Describe the number portability regime in your jurisdiction.

Brazil has adopted number portability only between providers of the same class of telecommunications services, limited to fixed switched telephone service (FSTS) and personal mobile service (PMS). For example, a user may request number portability provided that he or she remains in the same area, and this request relates to the same telecommunications service (FSTS or PMS). According to the regulations, applying for number portability from FSTS to PMS or vice versa is not permitted.

8 Customer terms and conditions

Are customer terms and conditions in the communications sector subject to specific rules?

All concessionaires are required to submit a template of the user agreement to Anatel for approval; this user agreement must comply with the rules provided for in the Civil Code and in the Consumer Defence Code. Also, the agreement must comply with the regulations that establish some mandatory clauses for FSTS and PMS agreements such as: object, service plan, conditions to change customer's access code, and installation address, termination, and customer service, among others.

9 Net neutrality

Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

Net neutrality is not regulated in relation to internet service providers under Brazilian laws. Because of that, internet service providers cannot control or prioritise data; however, net neutrality will soon

be regulated by the Internet Civil Mark, scheduled to become law in 2014.

The draft bill of law for the Internet Civil Mark indicates that internet service providers will not be free to control the data, and must treat equally any form of data package, without any distinctions.

Also, the Communication Media Service Regulations (Resolution No. 614/2013) already state that communications media service providers must respect net neutrality.

10 Next-Generation-Access (NGA) networks

Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

Brazil has no specific regulations for NGA networks. Basically, NGA networks follow the same regulations that apply to telecommunications networks.

11 Data protection

Is there a specific data protection regime applicable to the communications sector?

Although there are no specific regulations for data protection in Brazil, the Internet Civil Mark will address the matter. Additionally, the Federal Constitution sets out as fundamental rights the inviolability of data and telephone communications, and the Telecoms Act sets out as one of the users' rights the respect of privacy and personal data. The Consumer Defence Code also has a section regarding databases. It provides for companies' obligation to give access to consumers to their log and records. Law No. 12737/2012 addresses some internet crimes, such as computer invasion, for instance.

12 Key trends and expected changes

Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

2014 will be a year of many discussions and new regulatory laws for telecommunications services, such as the Internet Civil Mark (Draft Law No. 2126/2011), the General Law of Antennas (Draft Law No. 5013/2013), the auction of 700MHz for 4G technology, bidding for additional Brazilian satellite licences, and review of the agreements of fixed switched telephone services.

The Internet Civil Mark is scheduled to be released in the first half of 2014; it will contain regulations for net neutrality, protection of personal data, organisation of the large corporations' data centres in Brazil and other matters.

The General Law of Antennas will establish federal rules for the installation of antennas and rules for the environment related to the telecommunications infrastructure.

The auction of the 700MHz band is expected to occur in mid-2014, to expand the supply of 4G technology in Brazil. Anatel already auctioned the 2.5MHz band for the 4G technology, but the 700MHz band is necessary because it offers a better spread and farther reach when compared to the 2.5MHz band.

The bid for additional Brazilian satellite licences was announced in December 2013, and as a result information on the process is sparse. Public invitation to bid is likely to be published in the beginning of March, and the bid will grant at least four satellite operation rights for 15 years, renewable only once.

A review of the agreements for fixed switched telephone services takes place every five years, and in 2014, Anatel is reviewing the agreements relating to 2015. Anatel has also opened a public inquiry for parties interested in collaborating in certain matters, such as the universalisation and quality of services.

Media

13 Regulatory and institutional structure

Summarise the regulatory framework for the media sector in your jurisdiction.

Broadcasting services are regulated by the provisions of Law 4117, of 27 August 1962 (the Telecommunications Code), and by Decree 52795, of 31 October 1963, which approved the broadcasting service regulations. According to Law 4117, broadcasting services are subject to the control of the Communications Ministry, an agency of the direct federal administration, subordinated to the President of the Republic. Pay-TV services are basically governed by the terms of Law 9472, of 16 July 1997 (the General Telecommunications Law), which revoked the provisions of Law 4117, except with regard to the broadcasting precepts.

Although broadcasting services do not fall within the authority of the National Telecommunications Agency – Anatel, the General Telecommunications Law has assigned to Anatel the responsibility for drawing up and maintaining the radio frequency spectrum allocation plan, and for controlling the technical aspects of the radio and television broadcasting stations.

In addition to the provisions of the General Telecommunications Law, pay-TV services are also subject to Law 12485, of 12 September 2011, which defines conditioned access service (SeAC).

14 Ownership restrictions

Do any foreign ownership restrictions apply to media services? Is the ownership or control of broadcasters otherwise restricted? Are there any regulations in relation to the cross-ownership of media companies, including radio, television and newspapers?

The ownership of radio and TV broadcasting companies is exclusive to native Brazilians or naturalised Brazilians who have been citizens for over 10 years, or legal entities organised under the Brazilian laws and controlled by Brazilian nationals. The Federal Constitution requires that foreign ownership of broadcasting companies should not exceed 30 per cent of the total voting capital of these companies, and can only occur indirectly, by means of a legal entity organised under Brazilian laws and based in Brazil.

15 Licensing requirements

What are the licensing requirements for broadcasting, including the fees payable and the timescale for the necessary authorisations?

The delivery of broadcasting services is subject to a concession or permission contract executed with the federal government. The granting of such licences is subject to a bidding process conducted by the Ministry of Communications. Applicants must comply with all requirements established in the public invitation to bid, including the ownership requirement, as detailed above. Before taking effect, the concession has to be approved by the National Congress. The concession fee will depend on the results of the bidding process. The timescale for the final conclusion of a concession allocation process for the provision of broadcasting services is not established by law and may be lengthy.

16 Foreign programmes and local content requirements

Are there any regulations concerning the broadcasting of foreign-produced programmes? Do the rules require a minimum amount of local content? What types of media fall outside this regime?

Although the Constitution establishes as a principle that the production and programming of radio and television broadcasting stations should promote national and regional culture, artistic and journalistic production, and should encourage independent production, the transmission of foreign programmes is permitted.

Regarding the pay-TV sector, newly approved Law 12485/2011 establishes a minimum local content quota in order to promote national and regional culture, artistic and journalistic production, as well as to encourage independent production. The Law allows transmission of foreign programmes; however, it imposes a minimum of 210 minutes of local content at prime time, and half of these minutes must be produced by an independent Brazilian producer. Notice that Law 12485 only applies to pay-TV (conditioned access service), and the rules of such law do not apply to online media and mobile contents.

17 Advertising

How is broadcast media advertising regulated? Is online advertising subject to the same regulation?

Commercial broadcasting stations are required to limit the time used for commercial advertising to a maximum of 25 per cent of the daily programming time. Commercial advertising of tobacco, alcoholic beverages, agricultural chemicals, medications and therapies is subject to the restrictions set forth by law. In Brazil, publicity is also controlled by a self-regulation code. Any complaints, claims and disputes are settled by a private entity called the National Publicity Self-Regulation Board (CONAR). As far as online advertising is concerned, there are no specific regulations, and therefore, all related matters are subject to the Consumer Defence Code and to the regulations set forth by CONAR.

18 Must-carry obligations

Are there regulations specifying a basic package of programmes that must be carried by operators' broadcasting distribution networks? Is there a mechanism for financing the costs of such obligations?

Law 12485/2011 establishes that pay-TV companies, including cable TV, DTH and MMDS services, must carry a basic package of programmes containing the specific channels listed in Law 12485. There is no mechanism for financing the costs of such obligations, the pay-TV companies must deliver the mandatory channel at its expense; however, in case of technical or economic impracticability, pay-TV companies will not have to comply with the must-carry rules, but so as not to be required to comply with the obligations, Anatel must either accept or reject the reasons presented by the pay-TV operator.

19 Regulation of new media content

Is new media content and its delivery regulated differently from traditional broadcast media? How?

There are no specific regulations for new media content and its delivery.

20 Digital switchover

When is the switchover from analogue to digital broadcasting required or when did it occur? How will radio frequencies freed up by the switchover be reallocated?

The digital switchover had already begun in 2007 in Brazil's major cities. However, Decree No. 8061/2013 stipulates a switchover term from analogue transmission to start in January 2015 and end in December 2018.

During the transition period, television broadcasting stations must conduct the programming in analogue and digital technology. To allow transition to digital technology without interruption of analogue signals, a new radio frequency channel with a 6MHz bandwidth will be assigned to the broadcasting concessionaires for each channel granted. After the transition term, the range of 700MHz

used for analogue transmission should be returned to the government and will be used for the offer of 4G technology.

21 Digital formats

Does regulation restrict how broadcasters can use their spectrum (multi-channelling, high definition, data services)?

No, although the Ministry of Communications is responsible for controlling broadcasters, the technical aspects relating to the use of radio frequency are regulated by Anatel. Anatel, however, fails to establish which technologies must be used by the broadcasters in a particular range of radio frequency. In the case of digital TV, for example, Decree 5820/06 establishes the digital TV standards to be adopted in the country; Anatel, in turn, has only established technical aspects related to the use of radio frequency.

22 Media plurality

Is there any process for assessing or regulating media plurality (or a similar concept) in your jurisdiction? May the authorities require companies to take any steps as a result of such an assessment?

There are no specific regulations for media plurality in Brazil, but Law 12485/2011 establishes as one of the principles of conditioned access service the diversity of information fonts, production and programmes.

23 Key trends and expected changes

Provide a summary of key emerging trends and hot topics in media regulation in your country.

The key emerging trend in the media is the switchover of analogue television to digital television, which will start taking place in the whole country in 2015 and end in 2018, but the Ministry of Communications has already started to accelerate the process of switchover for 2014.

Regulatory agencies and competition law

24 Regulatory agencies

Which body or bodies regulate the communications and media sectors? Is the communications regulator separate from the broadcasting or antitrust regulator? Are there mechanisms to avoid conflicting jurisdiction? Is there a specific mechanism to ensure the consistent application of competition and sectoral regulation?

Telecoms services are regulated and supervised by Anatel, which is responsible for implementing the national telecoms policy and for carrying out most administrative activities relating to telecoms service providers. Broadcasting services are subject to control by the Ministry of Communications. In addition, the Federal Constitution prescribes that mass media must not be directly or indirectly subject to a monopoly or oligopoly. Furthermore, all companies that deliver radio, television broadcasting or any telecommunications services are subject to the general legislation regarding prevention and repression of violations of the economic order, especially Law No. 12529, of 30 November 2011 (the Antitrust Act). All acts that violate such laws should be submitted to CADE.

Law No. 12,529 changed the competition scenario for Anatel because it lost some of the competition control-related functions granted by Law No. 9472/97, since Anatel used to play the Economic Defence Secretariat's (SDE) role in cases involving telecommunications companies. As the SDE no longer exists in accordance with Law 12,529, concentration acts shall be assessed directly by CADE in matters relating to antitrust matters. Anatel continues to make its analysis on the competition aspects under the regulatory framework.

Also, there is no separate national regulatory authority for the broadcasting sector responsible for handling competition issues.

Accordingly, CADE and the Economic Supervisory Secretariat are responsible for the control, prevention and repression of antitrust practices in this sector. In the telecoms sector, Anatel may be required to provide all assistance and cooperation that may be requested by CADE, including the preparation of technical reports. In both industries, CADE is the board that renders a final decision on antitrust issues.

25 Appeal procedure

How can decisions of the regulators be challenged and on what bases?

The decisions of the regulators are administrative decisions, and as such they can be challenged by means of administrative or judicial appeals. Please note that any entity can have access to the judiciary, regardless of an administrative process still being in progress. A judicial court decision prevails over an administrative decision. Each regulatory agency has its own internal procedural set of rules that provide for the appeals and their requisite conditions.

26 Competition law in the communications and media sectors

Describe the key merger and antitrust decisions in the communications and media sectors adopted over the past year by your antitrust authority.

The Administrative Board for Economic Defence has just held the company TelemarNorteLeste SA (operating under the 'OI' brand) liable for abuse of its dominant position in the switched fixed telephone market, in the areas of Rio de Janeiro, Minas Gerais and Bahia, as the company was monitoring its competitor and had privileged information.

In addition, the Spanish group Telefónica, which is the Vivo's controller in Brazil, announced in October an increase in its participation in Telecom Italia, Tim's controller in Brazil. Vivo and Tim are competitors in the mobile market and, with that increase Telefónica would be deemed to be the controller of both Vivo and Tim, and would consequently hold a 50 per cent share in the market. In this situation, CADE has required that Telefónica sell its interests in Tim, or search for a new partner for Vivo.

CADE also approved without restrictions the merger of Portugal Telecom and OI, given that Portugal Telecom only operated in Brazil's market by means of its participation in OI. This merger will result in the creation of CorpCo, and will simplify the company structure.

Another key merger will be Embratel, NET and Claro, all companies owned by the Mexican company AméricaMóvil. There is information that the companies will merge into a single company, and this process could take at least two years.

* *This chapter has been updated with the valuable contribution of Isabella Maria de Azevedo Vidigal, a member of BKBG's telecommunications and media practice group.*

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