

market intelligence

Volume 2 • Issue 4

GETTING THE
DEAL THROUGH 

Telecoms & Media

Global interview panel covering key
economies led by Laurent Garzaniti

EU's Digital
Single Market
edges closer

Regulatory developments • Major cases • Business models • 2015 trends
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GETTING THE
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Welcome to *GTDT: Market Intelligence*.

This issue focuses on global telecoms markets.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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Ricardo Barretto Ferreira

TELECOMS & MEDIA IN **BRAZIL**

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“Brazilian regulation policies in telecoms and media have increasingly turned to the promotion of new technologies.”

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GTDT: *What were the key developments in communications and media regulation in your jurisdiction last year?*

Ricardo Barretto Ferreira & Paulo Brancher: The sector’s regulations have been quite stable since their inception back in 1998, when Anatel, the Brazilian regulator, was created and all basic legislation came into being. More recently, Brazilian regulation policies in telecoms and media have increasingly turned to the promotion of new technologies involving broadband internet, mobile telephony and pay-TV, which are services provided on a private regime without obligations of continuity and universal coverage supported by the government. On the other hand, fixed switched telephony services are the only communication service delivered under the public regime (ie, awarded with a duration of 20 years) so the interest of telecom companies in developing this service has been decreasing. As regards key developments in telecoms, mention should be made of Anatel’s biddings for 4G technology bandwidth (which occurred in 2012 and 2014, with another auction expected in October 2015); Anatel’s regulations for use of the 71GHz–76GHz and 81GHz–86GHz bands for various purposes, including M2M (machine-to-machine) connections and 5G technology. Governmental policies for digital inclusion have also been well received. A good example is the bidding for the 450MHz band aimed at expanding high-speed internet and telephony in rural areas, and the

Digital Cities Project, in which local governments are to offer free Wi-Fi in public spaces with a large circulation, such as squares, parks and roads. As regards the media, a relevant government policy is the ongoing conversion of analogue TV to digital TV through successive bidding for use of analogue TV band frequencies in new technologies or services. It is also important to highlight the regulation of payment for mobile services under Law 12,865/2013 along with Brazilian Central Bank applicable regulations, and, last but not least, the approval of the Civil Rights Framework for the Internet (Law 12,865/2014), which has been in force since June 2014, pending its regulations presently under discussion. Rights and obligations of telecom companies, internet access and content providers and users have now been established.

GTDT: *Does sector-specific regulation – as opposed to the general competition regime – play a significant role in your jurisdiction? Is this expected to change?*

RBF & PB: Yes, it does. Brazil has very robust and detailed sector-specific regulation, but sound competition among the players is not neglected. Anatel does not limit itself to fixing prices, assuring quality and universality goals and establishing market policies, but also has the objective of promoting and guaranteeing free competition, this mission being accomplished side by side with the Brazilian Competition Agency – CADE. However, market reality reveals



Paulo Brancher

a concentration in large conglomerates of multiple scopes (ie, local incumbent operators) that currently provide fixed switched telephony, mobile telephony, broadband and Pay-TV services, thus resulting in a high level of market verticalisation or concentration. In 2012, Anatel launched the General Competition Plan, which aims to identify groups with significant market power (SMP) and create solutions through regulatory asymmetries (ie, measures for transparency, equal treatment, price control, obligation of access, among others). Initially, SMP groups have to run public offers for infrastructure sharing, but at the same time, they have a 'regulatory holiday' of nine years for fibre optic infrastructure sharing, in order to increase their own investment. The government has recently declared that it will grant tax credits to SMP groups investing in fibre optic infrastructure. On the other hand, the market for services provided through the use of internet platforms is more competitive, because is still apart from a strict regulatory control. For example, in 2014 a decree was enacted encouraging the adoption of M2M technology by exempting installations from the TFI inspection fee – paid by operators for each active terminal as part of the Fistel telecommunications fund.

GTDT: What is the attitude to net neutrality in your jurisdiction?

RBF & PB: Net neutrality was regulated by the Civil Rights Framework for the Internet. Article 9 establishes a general rule ensuring that entities responsible for transmission, switching or routing have the obligation to process, on an isonomic basis, any data packages, regardless of content,

origin and destination, service, terminal or application. The cases in which discrimination or degradation of traffic will be allowed are still pending specific regulation, to be introduced through a decree by the Brazilian President after public consultations promoted by the Ministry of Justice, the National Telecommunication Agency (Anatel) and the Brazilian Internet Management Committee (CGI.br). The lack of such regulation has brought about uncertainties as regards zero rating and sponsored data. If Anatel decides that these practices violate the net neutrality principle, telecom companies, applications providers and consumers will be seriously affected. Mention must be made of the Facebook project Internet.org, which has been strongly criticised by public representatives and is the subject of internal debates among the Ministries of Communications, Science and Technology,

“The market for services provided through the use of internet platforms is more competitive.”

Justice and the CGL.br. There has, however, not been any significant enforcement activity, only heated discussions and debates.

GTDT: *What is the regulator's approach to over-the-top services?*

RBF & PB: The lack of regulation on over-the-top services (OTTs) has been strongly criticised by the traditional players. There are rumours that the National Cinema Agency (Ancine) is trying to apply the Pay-TV Law, which sets quotas for national content, to Netflix and HBO Go programming, but no official notice has as yet been published. OTTs regulation is a challenge, considering the various models of applications that the TCP-IP platform can offer. OTTs are significantly increasing in Brazil and Anatel has unofficially declared that OTTs are a value-added service related to telecom services networks; therefore, their regulation by Anatel will focus on restrictive conditions and the relationship between OTTs and telecom services.

GTDT: *Has there been any recent granting of spectrum? Are any significant grants planned in the near future?*

RBF & PB: The last granting of spectrum took place in September 2014, through a public bidding held by Anatel in which the 700MHz band (previously assigned for use by analogue TV channels) was offered to 4G mobile broadband services. At the bidding, four out of six lots offered in the 700MHz band were purchased by Vivo SA (Telefonica Group), TIM Celular SA (Telecom Italia Group), Claro SA (América Móvil Group) and Algar Celular SA respectively, for approximately 5 billion Brazilian reais. TIM has filed a lawsuit against Anatel to recover the amount of 60 million Brazilian reais that exceeded the previous amount contemplated

by Anatel in the public notice. The company is still awaiting a final judgment. The next round of bidding is expected in October 2015, when Anatel will award some unsold frequencies for 4G technology. The bidding will be divided into four blocks. The first block will be the awarding of the unsold 1.8GHz frequency in cities of the Greater São Paulo area and some cities of the northeast region. The second block will include three bands of 2.5GHz frequency, for fixed and mobile telephony. The third block will encompass four 10MHz bands of the 3.5GHz frequency in every Brazilian city, prioritising small providers. The fourth block will be related to the unsold 10MHz + 10MHz of the 700MHz band, but is still being reviewed by Anatel.

GTDT: *How has the debate about 'big data' played out in your jurisdiction? What has the debate focused on?*

RBF & PB: Brazilian law has many rules concerning data protection and privacy, but as yet there is no consolidation or restatement of all the applicable principles in a single statute. An important draft bill is currently pending on data protection and privacy, which is intended to meet Organisation for Economic Co-Operation and Development guidelines and the European Union's data protection standards. Since January 2015, this draft bill has been the subject of all sorts of suggestions and comments via a public consultation held by the Ministry of Justice. The deadline for contributions was July 2015, but there is no date as to when the National Congress will vote on the bill. It is worth noting that the Civil Rights Framework for the Internet aims to establish rules on the protection of personal data on the internet, such as connection records and information with regard to access to applications, which in turn may not be communicated to third parties without the free, express and informed consent of the individual. The content of private communications may only be made available by court order, in the cases and in the manner established by law. A symbolic case on big data took place in 2014, before the enactment of the Civil Rights Framework for the Internet. The Ministry of Justice, basing its decision on the Consumer Defence Code rules protecting personal data related to consumer relationships, fined the mobile company Oi (Telemar Group) 3.5 million reais for failing to notify internet users that their browsing activities would be monitored and sold to third-party advertisers. The Brazilian market for big data has not yet matured and it is expected that by the end of 2015 about 34 per cent of Brazilian companies will have started investing in this business.

“OTT regulation is a challenge, considering the various models of applications that the TCP-IP platform can offer.”

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

In-depth knowledge and experience with applicable laws and regulatory framework. An adviser should frequently follow up on international trends and improvements. A consistent knowledge of constitutional, corporate, tax and antitrust laws. A technical background would be desirable.

What are the key things for the parties and their advisers to get right when dealing with a case in this area?

Understanding the client's business and its plans for the medium and long term, in order to optimise legal assistance.

What were the most interesting or challenging cases you have dealt with in the past year?

We have assisted clients dealing with (i) the bidding process to acquire the right to exploit Brazilian satellites; (ii) video on demand, its regulatory and liability issues; (iii) application before the Central Bank of Brazil for a licence to operate internet or mobile payment platforms; (iv) operation on the social network, its privacy, data protection and liability as well as the related judicial litigation; (v) net neutrality issues; (vi) cross-border personal data transfer; (vii) internet TV, pay-TV, broadcast TV; (viii) internet-based gaming activities/products; (ix) outsourcing agreements; (x) negotiation of joint ventures to launch mobile payment platforms; (xi) setting up in Brazil businesses providing telecom/satellite services.

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GTDT: What about media plurality? How have policymakers and regulators addressed this issue?

RBF & PB: The Brazilian Constitution expressly provides that communication media may not be subject to monopoly or oligopoly, and the Brazilian Telecommunications Law provides that all telecommunications services must be organised on the basis of free, widespread and fair competition. However, there is no specific regulation for media plurality in Brazil. Media ownership has for decades been concentrated in the hands of few, including congress representatives who hold open broadcasting television and radio licences. The licences for open broadcasting television are awarded for 15 years and those for radio are awarded for 10 years, but non-renewal thereof depends on two-fifths of the National Congress' votes. So there is a strong political influence upon the perpetuity of media conglomerates. The formulation of a democratic media regulatory framework to regulate the power of media conglomerates has been under discussion in recent years by the public, politicians and some media entrepreneurs.

GTDT: Is the global trend for consolidation in the sector also visible in your jurisdiction? If so, what were the most prominent deals in the past year or so?

RBF & PB: Yes, it is. A relevant example of consolidation is the América Móvil Group which owns Claro (mobile telephony), NET (Pay-TV), Embratel (fixed switched telephony) and Star One (satellite exploitation). In 2014, Anatel authorised it to become a single company, and it now owns 31 per cent of the Brazilian broadband market and 51 per cent of the pay-TV market. In March, 2015 the acquisition of GVT (Vivendi Group) by Telefónica was subjected to regulatory approval by the antitrust authority (CADE), though with restrictions. As part of the payment for GVT, Telefónica offered Vivendi Group a part of its voting capital in Telecom Italia. The company also offered to transfer shares in Telefónica Brazil to Vivendi Group. But the companies have signed merger control agreements so as to adopt measures seeking to eliminate competition concerns in the mobile telephony market. Such concerns resulted from the fact that the transactions as proposed would imply a direct participation of Telefónica (Vivo's controller) in Telecom Italia's capital (TIM's controlling



“The trend of conversion of traditional telecom services into technology services using the internet platform is a reality.”

company), as well as Vivendi’s simultaneous participation in the shares of both companies. Likewise, AT&T has purchased the pay-TV operator DirecTV/Sky. CADE has approved the transaction, but AT&T was required to renounce its stake in América Móvil, which will probably be purchased by Oi (Telemar Group) or TIM.

GTDT: *Have there been any major antitrust cases in the communications and media sectors in your jurisdiction recently?*

RBF & PB: A relevant antitrust case involving conduct related to Oi (Telemar Group). Oi was subjected to a penalty of 26.5 million reais by CADE for abuse of dominant position in the telecommunication market for directing the monitoring of its customers’ calls to the call centre of its competitor Vésper – a player in the market at the time. By this monitoring, Oi offered specific service plans to avoid its customers’ migration to its competitor.

GTDT: *What is your outlook for regulation in the communications and media sectors in the next two to three years? Are any major changes expected in your jurisdiction? If so, what do you predict will be the impact on business?*

RBF & PB: Several changes in telecoms and media regulation are expected in the coming years and

such changes reveal that the trend of conversion of traditional telecom services into technology services using the internet platform is a reality. In June 2015 the Ministry of Communications announced the possible creation of a National Plan for M2M and the Internet of Things (IoT) seeking to promote standardisation of IoT systems, setting up regulation to deal with issues such as privacy, security and consumer rights on IoT services, funding programmes for IoT and incentives for the adoption of IoT solutions for the public sector. Another expectation concerns the regulation of the Law 12,965/2014 (the Civil Rights Framework for the Internet), which may define the behaviour of telecom companies on zero rating and sponsored packages, in addition to encouraging the adoption of new business models. Mention should be made of public policies to enable universal access to the internet. One is the National Broadband Plan, based on which Telebrás (a Brazilian public company) would contract with small and medium-sized internet access providers as well as fixed switch telephone concessionaires (currently Oi, Telefónica/Vivo, Algar Telecom and Sercomtel). In addition, the Digital Cities programme aims to increase the modernisation of municipal management through the construction of fibre optics linking public entities, development of e-government applications and the implementation of free Wi-Fi zones.

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