

# market intelligence

## Telecoms & Media

Regulators remaining watchful  
of consolidation

Global interview panel  
covering key economies  
led by Laurent Garzaniti

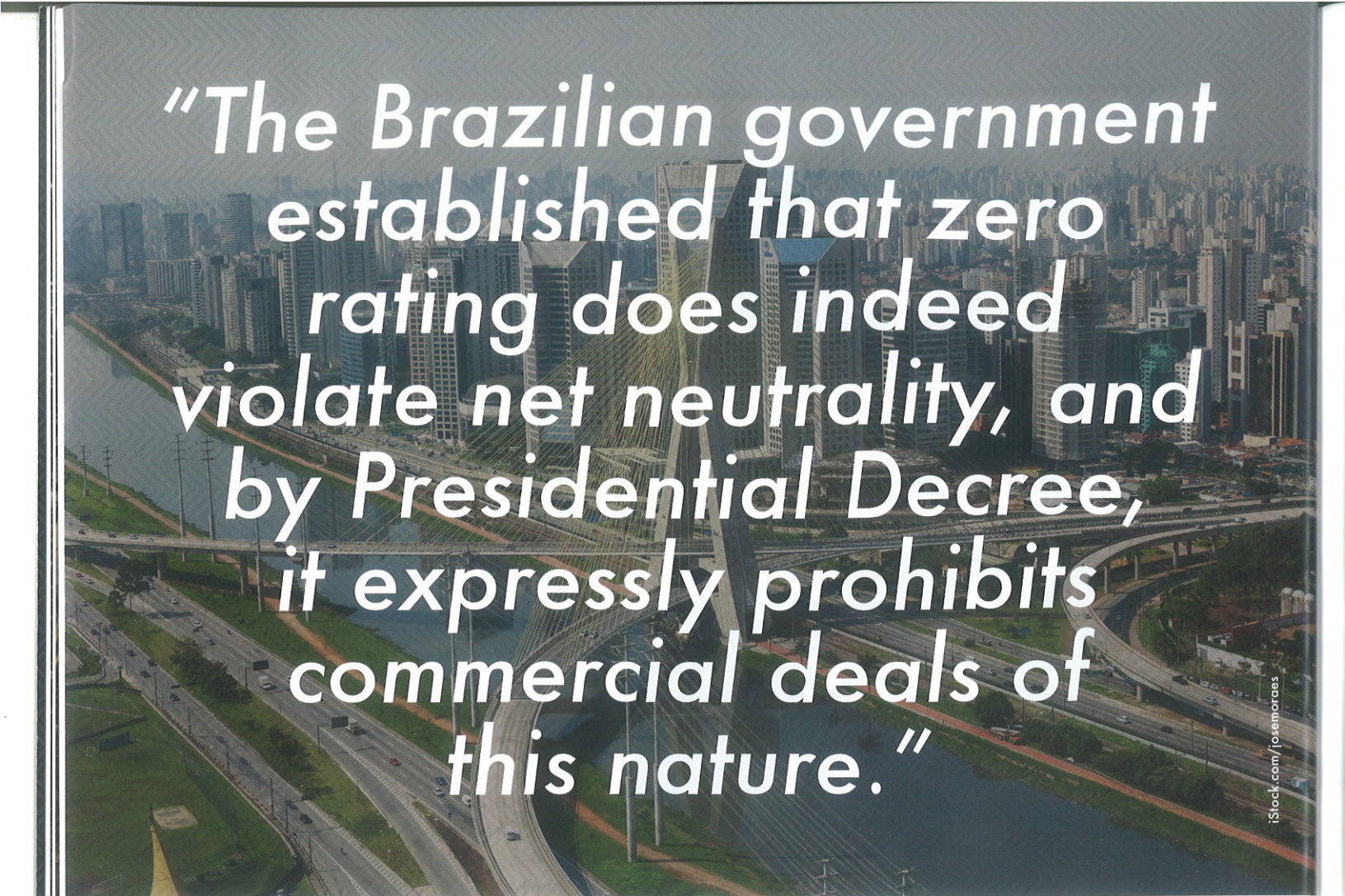


Ricardo Barretto Ferreira

## TELECOMS & MEDIA IN **BRAZIL**

Ricardo Barretto Ferreira is a partner at Azevedo Sette Advogados, where his principal areas of practice are corporate, M&A, tax, IT, telecommunications, media and entertainment, and agribusiness. He is editor and co-author of *Computer Law in Latin America*; co-editor of *Doing Business in Brazil*; and leading editor and co-author of the second *Legal Guide to Doing Business in South America*. He is listed in various publications including *Who's Who Legal: Telecoms & Media*; *Getting the Deal Through: Telecoms & Media*; *Expert Guide: The Legal Media Group Guide to Telecoms Lawyers*; and *Chambers Latin America*. He is a member of the Latin American Corporate Counsel Association (LACCA); the Federal Communications Bar Association (FCBA), Washington, DC; and founder and past president of the Brazilian Association of Computer and Telecommunications Law (ABDI) (1995-1998).

Paulo Brancher is a partner at Azevedo Sette Advogados. Paulo is a professor of business law at the Catholic University of São Paulo law school. He also acts as an arbitrator in international and national chambers of arbitration and has been an expert witness in Brazilian law before the US District Court for the Southern District of New York. He is a former board member of the International Technology Law Association (ITechLaw), former chairman of the Brazilian Association of Information Technology and Telecommunications Law (ABDTIC), and former board member of the Brazilian Arbitration Committee (CBAr). Paulo speaks at national and international seminars and has authored many books, including *Intellectual Property and Antitrust*; *Software Agreements*; and *Challenges on Regulation and Antitrust*, among others.



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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 2015–2016 developments in communications and media regulation reveal that the Brazilian government is attempting to address technological convergence. After an intense debate between telecoms operators, over-the-top (OTT) service providers and civil society, the implementing regulation for the Internet Act (Law 12,965/2014) was finally enacted in May 2016. This is provided by Presidential Decree 8,771/2016, which establishes rules on the principles regarding discrimination of internet data packets and traffic degradation; transparency of requests for registration data by the public administration; procedures for storage and protection of personal data by internet service providers; and the approach of the authorities to supervision and verification of violations. The most polemical point was the offer of free access packets by telephony operators (known as zero rating) in relation to the net neutrality principle. At the end of the day, the Brazilian government established that zero rating does indeed violate net neutrality, and, by Presidential Decree, it expressly prohibits commercial deals of this nature.

Also, a Normative Ruling enacted by the Ministry of Culture addressing the exploitation of audiovisual works on the internet provides that cinematographic companies, pay TV and internet service providers that make use of audiovisual works aiming at commercial exploitation for profit will be required to pay copyright fees to the Central Bureau for Collection and Distribution, and provides further information as regards the execution of Brazilian audiovisual works.

*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, which holds telecoms operators to several obligations, such as continuity of service, coverage goals, minimum quality standards, consumer services, and which demands high levels of investment in infrastructure. On the other hand, new generation networks such as M2M, OTTs and IoT fall within the definition of value-added services and are still outwith regulatory control. At the same time, the government has been stimulating new generation networks. For example, in 2014 a decree was enacted encouraging the adoption of M2M technology by reducing the TFI (an installation

inspection fee paid by telecoms operators for each active terminal as one of the two charges that comprise the Fistel telecoms fund. Currently, there is a draft bill under discussion by the National Congress that aims at exempting M2M technology from Fistel. As of April 2016, Brazil registered 11.6 million M2M connections.

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

**RBF & PB:** Net neutrality is regulated by article 9 of the Internet Act, which 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 are allowed are regulated by Presidential Decree 8,771/2016. Article 9 of the Decree prohibits unilateral practices and agreements between providers of connections and applications that 'compromise the public and unrestricted character of internet access' or prioritise data and applications packets to the detriment of other offers. As a consequence, the offer of free access packets by telephony operators (known as zero rating) is now prohibited in Brazil.

The Decree also provides for exceptional circumstances that permit discrimination or traffic degradation, with the latter being subject to compliance with 'technical requirements deemed essential for the adequate provision of services and applications', namely web security issues; for example, control over bulk messaging – spam – and handling exceptional situations of network congestion.

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

**RBF & PB:** By legal definition OTT services are added-value services, so they are not subject to strict regulation by Anatel, the Brazilian regulator. However, the lack of regulation on OTT has been strongly criticised by the traditional players. In the face of this pressure, the Brazilian National Cinema Agency (Ancine) and Anatel are reviewing their regulatory framework to include OTT services. Ancine is considering applying the Pay TV Law to video-on-demand (VOD) providers by imposing quotas for national content, as well as the CONDECINE – the special 'Contribution for the Development of the National Cinema Industry', but as yet no public notice has been published. In turn, Anatel intends to draft a new General Interconnection Regulation that would provide more transparency regarding the deals between telecoms operators and OTT service providers. As recently announced in the press, a new General Interconnection Regulation would set standards prohibiting telecoms operators

from denying OTT service providers access to the wholesale networks. As a consequence, telecoms operators, for example, would be required to negotiate with all OTT service providers for a peering or CDN agreement, and always under the same conditions. However, no official notice has been published yet.

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

**RBF & PB:** In December 2015, Anatel carried out a bid for authorisations to use radio frequencies in the 1,800MHz, 1,900MHz, and 2,500MHz bands, with the possibility of the grant of personal mobile services (mobile telephony) and multimedia communication services (wireless and broadband). Anatel approved the sale of 40 lots of types A and B (mobile telephony and broadband), which were awarded to Nextel, Telefónica, Claro (América Móvil Group), TIM (Italia Telecom Group), Sercomtel, TPA Telecomunicações and Ligue Telecomunicações, for 762.5 million reais in total.

The aim of these auctions is to comply with Ministry of Communications Administrative Ruling 275/2013, which lays down policies for offering radio frequency bands to provide access to broadband internet by small-sized providers of telecommunications services and by new competitors.



Paulo Brancher

## THE INSIDE TRACK

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

Deep knowledge and experience of the 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 is also 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, to be able 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 video on demand – its regulatory and liability issues; an application to the Central Bank of Brazil for a licence to operate internet and mobile payment platforms; the operation of a social network, regarding its privacy, data protection and liability, as well as the related judicial litigation; net neutrality issues; cross-border personal data transfer; internet TV, pay TV, broadcast TV; internet-based gaming activities and products; and outsourcing agreements.

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*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 has not been any consolidation or restatement of all the applicable principles in a single statute. At present, there is an important draft bill on data protection and privacy, which is intended to meet the OECD guidelines and the European Union's data protection standards.

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

The Brazilian Constitution expressly provides that communications media may not be subject to monopoly or oligopoly, and the Telecommunications Act provides that all telecommunications services must be organised on the basis of free, wide and fair competition. However, there is no specific regulation of media plurality in Brazil. Media ownership has for decades been concentrated in the hands of a few, including Congressional representatives who hold open-broadcast television and radio licences. The licences for open-broadcast television are awarded for 15 years and those for radio are for 10 years, but non-renewal of these requires votes to this effect by two-fifths of the National Congress. So there is a strong political influence involved in sustaining media conglomerates. The formulation of a democratic regulatory framework for the media, which would regulate the power of the media conglomerates, has been under


discussion in recent years, but we do not expect it to be approved.

*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. Anatel does not limit itself to fixing prices, assuring quality and universal goals, and establishing market policies; it also has the objective of promoting and guaranteeing free competition, a mission it accomplishes side by side with the Brazilian competition authority – the Administrative Council for Economic Defence (CADE). However, the reality of the market is evidenced by a concentration of large conglomerates operating across multiple areas (typically local incumbent operators that currently provide fixed switched telephony, mobile telephony, broadband and pay TV services), resulting in a high level of verticalisation or concentration.

In 2012, Anatel launched the General Competition Plan, which aims at identifying groups with significant market power (SMP) and creating solutions through regulatory asymmetries, including measures for transparency, equal treatment, price control and access obligations, 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, with the purpose of increasing their own investment.

A relevant example of consolidation is the América Móvil Group, which owns Claro (mobile telephony and pay TV), NET (pay TV), Embratel



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(fixed switched telephony), and Star One (satellite exploitation). At the end of 2015, Anatel and CADE authorised the takeover of Blue Interactive Group's Brasil Telecomunicações (BrTel) by Claro. In a corporate reorganisation following the takeover, BrTel, which currently operates only in five cities in the pay TV and broadband markets, will operate in another 18 cities where previously other Blue Interactive Group companies operated. BrTel will still operate fixed telephony in 10 cities through a commercial partnership with Transit do Brasil SA, which is not part of the Blue Interactive Group but holds fixed telephony licences in these cities.

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

**RBF & PB:** In January 2016, CADE imposed a fine of 30 million reais on Cisco Systems Inc and Technicolor SA for gun-jumping – the practice of concluding an obligatory-notification transaction before CADE has approved it. The practice is expressly forbidden by Law 12,529/2011, which regulates the Brazilian System for Protection of Competition. This is one of the highest fines levied by CADE in a gun-jumping case.

**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 these reveal the Brazilian government's attempts to keep pace with the process of technological convergence. As regards telecoms, a new regulatory framework for concessions and authorisation is foreseen, in view of the termination of public concessions for fixed telephony in 2025, and no possibility of renewal. Notably, in November 2015, the Ministry of Communications launched a public consultation on the review of the Brazilian telecommunications model. On the basis of this public consultation, the Ministry of Communications will be able to redesign public policies and the current regulatory framework (enacted in the 1990s) to allow an expansion of access to land and mobile wideband services, which currently constitute the sector's main social demand, to the detriment of fixed telephony services.

As regards media, a regulatory approach to VOD is foreseen for 2016–2017 to increase Ancine's control of OTT service providers that exploit Brazilian audiovisual works. As a consequence, OTT service providers will be subject both to quotas for national content and to the CONDECINE