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LEGAL – REGULATORY

ANATEL'S ROLE ON M&A/CONCENTRATION ACTS INVOLVING TELECOM OPERATORS

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In 2019, the performance of M&A operations and other acts of economic concentration by telecommunication and media operators has grown in Brazil, making these national and international companies jointly reinforce their presence and become more competitive in the relevant Brazilian market. However, these concentration acts also have delicate regulatory nuances, mainly in regulated sectors (such as telecommunications), which must be observed by the competent responsible entities, in a joint and efficient way.

In Brazil, certain acts of economic concentration - such as consolidation, merger and acquisition operations - may be classified in the legal criteria of mandatory notification to the Administrative Council for Economic Defense ("CADE"), and should be analyzed and regulated based on Law No. 12,529/2011, which structures the Brazilian System of Competition Defense and provides for the prevention and repression of infractions against the economic order, guided by the constitutional principles of freedom of initiative, free competition, social function of property, consumer protection and repression to the abuse of economic power.

On the other hand, telecommunication operators are also subject to specific legal and regulatory provisions, such as the General Telecommunication Law (Law No. 9,472/1997 - "LGT"), the Resolutions of the National Telecommunications Agency (ANATEL) and other sparse laws, referring to the regulation of the most diverse types of telecommunication services.

Before its amendments, LGT provided that the general rules of protection of the economic order were applicable to the telecommunication sector, when they did not conflict with the provisions of its legal text.

In addition, it established that acts involving a telecommunication service provider, in the public or private system, aimed at any form of economic concentration, including by consolidation or merger of companies, incorporation of a company to exercise control of companies or any form of corporate group, would be subject to the controls, procedures and conditions provided for in the general rules of protection of the economic order, and should be brought to the review of CADE, through the regulatory body.

As it was prepared, the provision above caused turbulence on the regulatory aspects related to the competence of ANATEL and CADE in acts of economic concentration. This is because, even if CADE approves a certain operation, it would be possible to discuss ANATEL's competence in relation to provisions present in normative laws and regulations of the regulated telecommunication sector, which could undermine the legal certainty of decisions regarding competitive practices and economic order.

In this sense, it is possible to analyze, for example, the Concentration Act related to the acquisition operation of Time Warner Inc. (Time Warner) by ATT& Inc (AT&T), which involved both commercial aspects, requiring referral to CADE for the assessment of the operation and diagnosed anti-competitive risks, and regulatory aspects related to ANATEL's competence.

The main challenge faced in the case was related to the systematic interpretation of the articles of SeAC Law (Law No. 12,485/2011 - Law of Audiovisual Communication Services of conditioned access), which establishes limits to vertical integration between telecommunication service providers of collective interest and the concessionaires and authorized entities of radio broadcasting and sound and image services and SeAC producers and programmers.

In 2017, ANATEL's analysis was unfavorable to the operation, since the vertical structure would violate the telecommunication legislation. However, in February 2020, the majority of ANATEL's directors ended up understanding that the mentioned operation did not infringe the SeAC Law, as indicated in the Judicial Order No. 46 of February 16, 2020, published in the Brazilian Official Gazette, resulting in the declaration of full regularity of the acquisition operation of WarnerMedia by AT&T, as there is no conflict with the provisions of SeAC Law.

However, in February 2020, the Representative Paulo Teixeira submitted representations contrary to the aforementioned ANATEL's decision, before the Federal Prosecution Service (MPF) and the Federal Court of Accounts (TCU). In March 2020, the Representative submitted the Project of Legislative Decree No. 80/2020, aiming to stop ANATEL's Collegiate Administrative Act that approved the acquisition of Time Warner

by AT&T, under the argument that the agency's authorization would be illegal and unconstitutional. The legislative proposal is still awaiting order from the Speaker of the House of Representatives informing in which commissions it will proceed with, but, if approved, it may affect the regularity of the operation.

On the other hand, the ATT&Warner operation still involved the competence of the Brazilian Film Agency (ANCINE), due to the regulation on the pay-TV segment, which issued a Technical Note, in 2017, concluding that vertical integration between companies would produce negative competitive effects in the pay-TV market, also strengthening the legal basis of the SeAC Law violation. However, ANCINE's new competitive analysis on the case remains pending, which tends to release the operation, in view of the Economic Freedom Law and the economic impacts resulting from a possible prohibition.

Currently, with the changes promoted by the recent Law No. 13,848/2019 (General Law of Regulatory Agencies), the LGT establishes that the general rules of protection of the economic order are widely applicable to the communication sector, and that acts of economic concentration involving telecommunication service providers are subject to the controls, procedures and conditions provided for in the general rules of protection of the economic order, and must be submitted for approval by CADE.

The inclusion of CADE in the General Law of Regulatory Agencies had a strong influence on this change in the legal text, causing the agency to have administrative, budgetary and financial autonomy when it was classified as a regulatory agency - as well as ANCINE and ANATEL. The regulation also institutionalized the interchange between the agencies, which should act in close cooperation, aiming at the promotion of competition and efficiency in the implementation of antitrust enforcement legislation in regulated markets.

Finally, in May of this year, ANATEL and CADE entered into a Technical Cooperation Agreement, with the objective of enabling the exchange of experiences, information and technologies, aiming at training, improvement and technical specialization of human resources; and institutional and public management development, through the implementation of joint or mutual support actions and complementary activities of common interest.

The agreement also provides for the promotion of seminars to discuss topics related to the competitive environment of the telecommunication sector. The promotion of debates and the creation of a channel for the dialogue between agencies will be extremely beneficial to overcome the challenges of competence and efficient cooperation, guaranteeing the defense and dissemination of competition in the scope of telecommunication services.

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As a regulatory agent in the telecommunication sector, ANATEL is responsible for ensuring an economically healthy competition, aiming at the common good of the user/consumer community, amid so many other forms of communication that are not considered as regulated services, especially, from now on, with the consequences arising from Covid-19.

In addition to the pending regularity of the ATT&Warner operation itself, other scenarios can be envisaged in the near future that may be the object of the active participation of ANATEL, within the limits of its competence: (i) result of the judicial reorganization of the operator Oi; (ii) destination of the SMP or other assets of this same operator; (iii) possible entry of new operators in the market; (iv) bidding for 5G technology; (v) possible change in the regulation of the rules applicable to SeaC; (vi) possible concerns with network sharing agreements - initially between Oi and TIM and more recently between VIVO and TIM, the latter already questioned by CLARO, last week; (vii) security criteria of telecommunication network to guide equipment supplies; (viii) licensing and use of spectrum; (ix) provision of "direct-to-consumer" content - case of CLARO x Fox; (x) satellite communication; (xi) migration procedure from concessions to authorizations; (xii) compensation for the reversible assets and others. In a world where the relations between people are markedly virtual, with high dependence on communications, the importance of a strong regulatory agency, independent and committed to the future of the country, stands out.

To receive the main legislative news and positionings on this and other topics related to telecommunications, follow the Technology, Media and Telecommunication (TMT) team of Azevedo Sette Advogados.

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