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FLEXIBILIZATION ON THE RENDERING OF TELECOMMUNICATIONS SERVICES

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Over the years, the exploitation of telecommunications services has been transformed by global technological developments and the emerging demands of globalization. In Brazil, the state monopoly exploitation model on telecommunications services “survived” until the 90’s, being suppressed by Law No. 9,472/97 (General Telecommunications Law - LGT), which brought new assumptions for the organization of telecommunications services, based on the opening of the market for private exploitation on a competitive basis.

Regarding the legal regime for the provision of telecommunications services (defined as of collective interest and restricted interest by ANATEL’s Resolution No. 73/1998, which approves the Telecommunications Services Regulation), LGT provided for two types of regimes: (i) public and (ii) private. Telecommunications services of collective interest could be provided under the public or private regime, while telecommunications services of restricted interest could only be provided under the private regime.

Telecommunications services under the public regime are provided by means of a concession or permission, with their

provider being subject to strict universalization and continuity obligations. The classic concession model involves: (i) economic and financial balance, (ii) tariff control, (iii) the reversal of assets affected by the execution of the service (return to the Federal Government, Granting Authority) and (iv) the intervention of the government over the concession. There is a certain “plastering” of market dynamics due to the obligations and rules for the service provision.

On the other hand, telecommunications services provided under the private regime intend to prosper in an environment of emergence of new technologies, demand for high investments and competition between providers. Such services are not subject to universalization and continuity obligations, or provision ensured by the Federal Government and the exploitation of these services depends only on prior authorization from ANATEL. There is a prevalence of free initiative and the compulsory burden on providers is reduced.

The only service provided under the public regime in Brazil until now was the fixed telephony (Fixed Switched Telephone

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Service – FSTS), in all its modalities, intended for use by the general public. Some examples of services provided under the private regime are the mobile telephony (Personal Mobile Service – PMS), fixed broadband (Multimedia Communication Service – MCS), pay-TV (Conditional Access – “SeAC”), the Global Mobile Satellite Service – GMSS (geostationary or not), in addition to the FSTS, which can also be provided under the private regime. In addition, there are also alternative means of communication, which do not fit as telecommunications services, such as Value-Added Services – VAS (messages sent by SMS, VOIP, etc.).

However, the fixed telephony service provided under the public regime has lost its relevance in recent years, mainly due to the decreased interest in the service by its users and the high costs related to its provision in comparison with services of the private regime, in addition to the stricter obligations to providers and a growing demand for the creation of new network infrastructures, which adequately respond to the current technological innovations.

For this reason, [Bill No. 79/2016](#) (originally Bill No. 3,453/2015) was proposed, aimed at updating the Brazilian telecommunications legal regime to change the telecommunications service licensing modality from “concession” to “authorization”, in order to encourage investments by the private sector and allow the expansion of the network infrastructure, ensuring a more efficient digital inclusion.

The aforementioned project generated the [Law No. 13,879/2019](#), which changes the LGT to allow the adaptation of the granting modality of telecommunications services from concession to authorization, upon request by the concessionaire. Such adaptation, however, is conditioned to the observance of some requirements, among them, the maintenance of the provision of the adapted service and investment commitments that enable the development of services in areas without adequate competition.

As a result of this law, ANATEL carried out the [Public Consultation No. 5/2020](#) (concluded on April 30, 2020), to receive contributions on the reevaluation of the Brazilian regulatory model for the provision of telecommunications services, based on public and private regimes, enabling the revision of the regime and the scope of the provision of the FSTS in the concession regime, in order to allow the voluntary migration of fixed telephony concessionaires to the authorization regime.

The proposal submitted to criticism and suggestions from the general public: (i) the Regulation for the Adaptation of FSTS Concessions to Authorizations; (ii) the Regulatory Impact Analysis Report of the adaptation; (iii) the Services Authorization Terms; and (iv) the methodology for calculating the adaptation balance. Its main topics were: the definition of areas without adequate competition (for the purpose of investment commitments, for example); the obligations of continuity of

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the adapted service; the partial transfer of the services authorization term; guarantees for the continuity of the adapted service; types of commitments and criteria for prioritizing municipalities.

Recently, the Decree No. 10,402/2020 was enacted by the President of the Republic, providing further details on the adaptation of the instrument from concession to authorization of telecommunications service and on the extension and transfer of radio-frequency authorization, grants of telecommunications services and satellite exploitation rights. The normative instrument also provides that the regulation of adaptation by ANATEL must occur within a period of six (6) months, counted from the date of its publication, extendable once.

According to the Decree, the adaptation request will be evaluated by ANATEL, which will consider as criteria: (i) the maintenance of the provision of the adapted service and the commitment to assign capacity that enables such maintenance in areas without adequate competition, keeping the commercial offers of the adapted service existing at the time of the adaptation; (ii) equivalence between the economic value associated with the adaptation and the investment commitments; (iii) alignment of investment commitment proposals with priorities established by the Federal Executive Authority; and (iv) presentation, by the applicant, of guarantees that ensure the faithful fulfillment of the assumed obligations.

Furthermore, the Decree provides that, among the investment commitments to be reached, it must be included the provision of services with high capacity transport infrastructure for Municipalities not equipped with such infrastructure and the increase in the coverage of the mobile network on federal highways and in locations without service. Providers of telecommunications services with adapted grant may contract with a third party the construction and operation of the infrastructure to meet the investment commitments.

Once the adaptation request is approved by ANATEL, the concessionaire will have a period of sixty (60) days to sign the new authorization term, and it must also present the financial guarantees associated with the fulfillment of the investment commitments. Finally, when examining requests for extension of grants (including those in effect on the date of the publication of Law No. 13,879/2019), even though they have already been subject to extension, ANATEL will consider additional aspects, such as the express and prior demonstration of interest by the grant holder, the fulfillment of obligations already assumed, competitive aspects, the efficient use of scarce resources and the service to the public interest.

The calculation of the adaptation amount should generate discussions in the next months, mainly regarding the adjustment of rules to ensure the sustainability of

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fixed telephony in the regulation of migration and the analysis of factors that may allow the concessionaires to demand the readjusting of contracts. Furthermore, taking into account that the most realistic forecast for the voluntary migration from the public regime of concession of the fixed telephony to the private regime of authorization will only occur in 2023, such delay on the part of ANATEL may cause operators to prefer to fulfill the concession agreement by the end of the term in 2025, as this might be a more economically viable alternative.

However, it is worthy emphasizing the importance of the adequate development of the flexibility in the provision of Brazilian telecommunications services, in order to avoid the onerous obligations of the providers and allow the development of a competitive market for the sector – extremely relevant factor for the development of the auction of 5G technology and the Internet of Things, for example. Furthermore, the prioritization of investments in mobile telephony and broadband tends to represent a gradual extinction of conventional fixed telephony, opening space for other means of communication, for the allocation of investments in the expansion of the Brazilian telecommunications infrastructure and better offer of telecommunications services, promoting digital equality.

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