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OTT X TELECOMMUNICATIONS SERVICES

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The transmission of content via internet is part of the daily life of modern society - however, behind the scenes, regulatory issues permeate quite winding roads. The regulation of content distribution of linear channels on the internet by OTT companies, directly to the consumer and through monthly payment, faces several discussions about its regulatory classification as a telecommunication service or other type of service. The emergence of the new market requires an analysis of the traditional regulatory scope, in order to adapt it to the dynamic nature and technological innovations in pay TV services.

The Conditional Access Service ("SeAC") is the telecommunications service of collective interest, provided under the private regime, destined to the distribution of audiovisual content in the form of packages, of separate programming channels (separate modality of programming and separate modality of programmed content) and programming channels of mandatory distribution, using technologies, processes, electronic means

and other communication protocols, whose reception is conditioned on paid contracting by subscribers. For all purposes, SeAC is considered a pay-TV service.

Conditional access audiovisual communication and its activities (such as production, programming, packaging and distribution and other interactions and applications inherent to the service) are regulated, in Brazil, by Law No. 12,485/2011 ("SeAC Law") and ANATEL's Resolution No. 581/2012, which approves the Regulation of SeAC, as well as the provision of the Cable TV Service ("TVC"), the Multichannel Multipoint Signal Distribution Service ("MMDS"), Distribution Service of Pay-TV and Audio by Subscription via Satellite, or Direct-To-Home ("DTH") and the Special Pay-TV Service ("TVA"), enabling the Agency to manage the quality of these services.

Over-The-Top services (OTTs) are defined by the International Telecommunication Union (ITU), based on the Brazilian proposal presented in 2018, as

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applications accessed or delivered on the public Internet network, that can directly replace, in a technical/functional way, the traditional international telecommunications services. Although this definition may vary between Member States as it is a matter of national sovereignty, it is possible to interpret that these are services that use telecommunications infrastructures and operate in the Internet application layer, competing directly with traditional telecommunications services in the transmission of audiovisual content, voice and messages over IP.

The provision of OTT services faces regulatory challenges globally - and it is not different in Brazil. Such services are not regulated by ANATEL, and there is a tendency to regulate these services in accordance with the definition provided for in the General Telecommunications Law (Law No. 9,472/1997), as a Value-Added Service (“SVA”), defined as “the activity that adds to a telecommunications service that supports it and with which new utilities related to access, storage, presentation, transfer or retrieval of information are not to be confused”, which expressly does not constitute a telecommunications service.

However, since 2018, there has been a pressure by pay-TV providers for ANATEL to analyze the legality of the availability model of linear audiovisual content on the internet by OTT companies directly

to the consumer (D2C), considering that the distribution of linear programming of pay TV on the internet would be configured as a pay-TV service, subject to the regulatory obligations related to this telecommunications service provided for in the SeAC Law and to the restrictions that the programming companies are telecommunications operators, creating yet another obstacle to the offer of channels directly to the subscriber. Therefore, there would be a “barrier” to the entry and development of linear transmission of content by OTTs in Brazil, since the classification of the factual situation as SVA would create a competitive asymmetry that would make the pay-TV offer unfeasible, due to the high tax charges and telecommunications services obligations.

Broadcasters argue that the classification of the content distribution of linear channels on the public internet through OTT applications, through the “direct-to-consumer” model, as a conditional access service, would not only hurt consumer rights and the competition, but would also restrict free access to information, content and application, in an affront to the principle of net neutrality protected by the Civil Rights Framework for the Internet (Law No. 12,965/2014). It is argued that the supply of linear content on the internet would correspond to the SVA, since said distribution does not involve an infrastructure for the transmission of the content managed by the provider, since

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the OTT application alone cannot deliver the content to the end consumer, requiring transmission through the public internet - and, being a value-added service, it would not be included in the attributions of the telecommunications regulatory body.

It is important to note that the SeAC Law establishes a series of obligations to providers of conditional access services, such as the granting of authorization by ANATEL, mandatory channels, compliance with quotas and restrictions to the cross ownership, for example, which are not compatible with the open and decentralized nature of the Internet and its free applications regime, as established in the LGT and in the Civil Rights Framework for the Internet. Therefore, such classification could provide a disincentive to the development of new applications and technological innovations.

In this regard, in a relevant case on the subject discussed in the Brazilian administrative instance, ANATEL's technical and legal opinions expressed the understanding that the offer of linear channels on the internet would be considered a value-added service, and it is not necessary to follow the obligations of the conditional access service. In the same regard, the Federal Attorney General's Office ("AGU"), the Presidency's Legal Affairs Sub-section ("SAJ") and the Ministry of Science, Technology, Innovations and Communications ("MCTIC") also expressed

their opinions. In addition, the Brazilian Film Agency (Ancine) recently closed a public consultation of Regulatory News on the classification of the services of Audiovisual Content Offers in Linear Programming via Internet, for analysis of impacts on activities related to the service.

Such administrative process is being analyzed by ANATEL and the agenda should be taken to the Agency's Board of Directors for a final resolution until the end of July 2020. However, there is a requirement to suspend the process, to ensure legal certainty on the subject, in face of legal analysis of the matter by the Federal Supreme Court, in the Direct Unconstitutionality Action ("ADI") No. 6334 against ANATEL, which argues that the availability of audiovisual content via the internet violates the principle of isonomy, harming the Constitution and the SeAC Law.

Some alternatives to the issue are discussed, such as the creation of a new legal milestone for the audiovisual industry, which would be "obsolete" in the face of current technological disruptions; the elaboration of isonomic rules for the actors of the national audiovisual market; or even the market self-regulation and the service deregulation. The Brazilian National Congress discusses a series of bills that deal with changes in the legal milestone of pay-TV and, among them, proposals that specifically deal with the distribution of content through internet application.

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With the constant evolution of audiovisual distribution technology, in cross-platforms, in addition to the growing relevance of digital services, the importance of resolving reasonable legal doubts about the extent of the scope of the SeAC Law is highlighted, in addition to the regulatory classification and the definition of the nature of the service provided by the OTTs, preserving the production of content and, at the same time, valuing the democratization of the market, free initiative and free competition in the technological innovation environment that is experienced.

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