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FDI IN THE TELECOMMUNICATIONS SECTOR A MORE SUITABLE APPROACH

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Due to factors such as technological evolution, economic globalization and the speed of changes in the market and of the needs of users and consumers, the Brazilian telecommunications sector went through a process of market opening in the 90's, reaching its peak in 1997/1998, through the authorization of the privatization of the Telebrás System and the creation of the National Telecommunications Agency ("ANATEL").

In the context of the break of state monopolies, the Brazilian General Telecommunications Law (Law No. 9,472/1997 - "LGT") was published – which provides for the organization of telecommunications services, the creation of ANATEL, among other aspects related to the telecommunications sector –, where there is an express provision that the Brazilian Executive Branch, taking into account the country's interests in the context of its relations with other nations, may establish limits to foreign participation in the capital of a telecommunications service provider.

In addition, the LGT also provides, in its Article 86, that the concession can only be granted to a company organized under Brazilian law, with headquarters and administration in Brazil, created to exclusively exploit telecommunications services; and, in article 133, it establishes a subjective condition for obtaining authorization for services of collective interest by a company providing telecommunications services, i.e., being organized under Brazilian law, with headquarters and administration in the Country.

As a result of the attribution conferred by LGT, it is important to mention the Decree No. 2,617/1998, which provides for the **capital composition of companies providing telecommunications services**, establishing that concessions, permissions and authorizations for exploration of telecommunications services of collective interest may be granted or issued only to companies organized under Brazilian law, with headquarters and administration in the Country, **in which the majority of**

LEGAL – REGULATORY

membership interest or shares with voting right belong to natural persons resident in Brazil or to companies organized under the Brazilian law and with headquarters and administration in the Country.

Although this decree was appropriate in the historical and temporal context in which it was created, it is noteworthy that, currently, the restriction on the participation of foreign capital in the composition of the capital of companies providing telecommunications services of collective interest proves to be anachronistic, taking into account the difficulties faced by foreign groups to operate in the Brazilian telecommunications sector, such as the adoption of costly and complex corporate and operational arrangements for legal adequacy, which makes the entry of foreign capital into the national market more burdensome and bureaucratic.

Furthermore, the real need to maintain Decree No. 2,617/19 for the defense of the Brazilian national interest is questioned, in accordance with the LGT's precepts. This is because generic limitations to the capital composition of telecommunications companies – such as national security, restrictions of payments balance, political and economic orientation aimed at national self-sufficiency, among other factors – do not seem to be sufficient to justify the permanence of the aforementioned decree in the Brazilian legal system, because, according to the

provisions of the LGT, there is still prerogative to the Government and to the Brazilian authorities of sectoral regulation to take necessary decisions when appropriate, since every company providing telecommunications services in Brazil responds to Brazilian laws and is subject to Brazilian and ANATEL regulations, which also applies to foreign companies operating in the Country.

Considering the restrictions on the participation of foreign capital in the composition of the capital of telecommunications providers, the Brazilian Ministry of Communications questioned the Decree No. 2,617/1998, also requiring the revocation or revision of the legal instrument. In this regard, after technical studies, opinion of the Office of the General Counsel for the Federal Government (AGU) and unanimous manifestation of ANATEL's Board of Directors, the Agency responded to the consultation of the Ministry of Communications, positioning itself favorably to the amendment of the aforementioned decree in a news release published in July 2020. It is worth mentioning that ANATEL's positioning follows the internal responsibilities aligned by the Agency in its Regulatory Agenda of 2019-2020, mainly related to regulatory simplification and transparency, in order to review and improve the regulation of the telecommunications sector.

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According to ANATEL's statement, in addition to allowing greater flexibility to the rules that regulate investments by foreign groups in the telecommunications sector, the revision or revocation of said instrument would also allow the implementation of new corporate governance practices, overcoming difficulties related to the significant dilution of share control in companies and allowing beneficial effects, mainly in reducing the costs involved.

The revocation or revision of the decree tends to promote greater economic freedom for the business organization, following both the general principles of economic liberalism and the economic policies of the Federal Government for the Brazilian economic development and growth. It is also important to highlight the Law of Economic Freedom – Law No. 13,874/19, which characterizes the wording of statements that prevent the entry of new national or foreign competitors into the market as an abuse of regulatory power.

Considering the Brazilian legislation and current rules that regulate foreign capital in the Brazilian economy – such as Law No. 6,404/1976 (Brazilian Corporate Law), which has a specific section on how to represent investors resident or domiciled abroad, for example –, it is possible to argue that the limitation imposed on the capital composition of telecommunications service providers of collective interest seems a disproportionate measure.

The unlocking of these bureaucratic obstacles to foreign investments in the telecommunications sector depends on the orientation of the subject by the Ministry of Communications and the Office of the President's Chief of Staff.

ANATEL's institutional effort, together with current demands regarding the dynamics and technological innovation of the telecommunications sector – such as the implementation of 5G technology and new digital markets –, may influence the decision of the Executive Branch to revoke or revise the Decree No. 2,617/1998, in order to impose lower restrictions on the participation of foreign capital in the Brazilian telecommunications sector and allow greater regulatory clarity regarding the possible direct participation of foreign shareholders and investment funds as shareholders or members directly in Brazilian companies operating telecommunications services, making the Country even more competitive in the sector and making room for new and advantageous foreign direct investments.

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