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CROSS-OWNERSHIP BETWEEN TELECOM OPERATORS AND BROADCASTERS/PROGRAMMERS

A CONTROVERSY NEEDING A SOLUTION

By Ricardo Barretto Ferreira and Isabella De Castro Satiro Aragão

"Cross-ownership" is understood as the control and concentration of several media channels by the same company or group of companies. Although its restriction is based on a noble value of protection of competition and competitiveness - since the simultaneous holding, by the same economic agent, of successive segments of the production chain could hinder the access to essential infrastructure - the current Brazilian national market yearns for the flexibility of corporate operations, in order to generate more economic and investment benefits than the current forecast in the Country's regulatory model.

In this regard, Law No. 12,485/2011 ("SeAC Law"), which provides for conditional access audiovisual communication, establishes, in its article 5 and paragraphs, that the control or ownership of more than fifty percent (50%) of the total capital with right to vote of companies providing telecommunications services of collective interest may not be held, directly, indirectly or through a company under common control, by concessionaires and permissionaries of radio and sound and image broadcasting services and by producers and programmers headquartered in Brazil, which are prohibited from directly exploiting those services.

Furthermore, the control or ownership of more than thirty percent (30%) of the total capital with right to vote of concessionaires and permissionaires of radio and sound and image broadcasting services and of producers and programmers headquartered in Brazil may not be held, directly, indirectly or through a company under common control, by telecommunications service providers of collective interest, which are prohibited from directly exploiting those services.

Such provisions made it possible to restrict cross-ownership between the telecommunications and audiovisual sectors: on the one hand, the telecommunications service providers of collective interest, i.e., the operators; and, on the other hand, the concessionaires and permissionaires of radio and sound and image broadcasting services (TV and radio stations) and producers and programmers of SeAC (pay TV).

The provisions were created in a context where competition for the internet was still incipient, justifying itself from economic reasons and with the objective of avoiding discriminatory practices in the offer of content - such as a possible price increase for pay-TV distributors competing in the sale of content, for example - and competitive disturbances, in order to curb the abuse of economic power and avoid excessive concentration in the production chains of conditional access audiovisual communication.

However, currently, the legal impediment to the full freedom of these economic agents tends to be often disconnected from the Brazilian market reality because when anticipating the prior control of structures, the sealing rule ends up preventing massive investments in the national market and the entry of new competitors in Brazil, blocking the possibility of beneficial business to the competition and to the Brazilian pay-TV and entertainment market. In addition, vertical integrations reduce transaction costs, transferring positive efficiencies to the market and consumers.

As an example, in 2016, there was a major controversy around the acquisition of the controlling interest of a foreign content programmer company, by a Brazilian operator controlled by a group of North American telecommunications companies. The main argument about the merger permeated the fact that the North American telecommunications group controls the Brazilian company; thus, considering that the headquarters of the content producer and programmer would be abroad, there would be doubts about the violation of the Brazilian law (in this case, the SeAC Law) and about the performance by the Brazilian regulator.

The opinion of the Competition Superintendence of the Brazilian National Telecommunications Agency (ANATEL), in 2017, defended the referred merger, under the argument that the headquarters of the producer and programmer would be abroad and, therefore, the Brazilian legislation would not apply to the specific case. The Agency's technical department also pointed out that, as the Brazilian telecommunications company held about 30% of the pay-TV market (SeAC), it would not be expected, from an economic and competitive point of view, any type of discrimination against other providers of pay-TV in accessing content produced by the foreign group.

In addition, the Brazilian Antitrust

Authority (CADE) issued an opinion in a process that analyzed the competitive issue of the regulatory restrictions existing in the SeAC Law on cross-ownership in the situation, considering that CADE would be responsible only for the analysis of the operation - which was approved by the body, with restrictions, in October 2017 -, under the competitive aspect. Therefore, it would not prevent the regulatory agency ANATEL from acting, to the extent of its legal attributions (which may include the competitive analysis of a transaction in the market), to analyze the regulatory issue, if the merger were to take place.

However, in contrast to the aforementioned arguments, the Brazilian Film Agency (ANCINE) issued an opinion on the matter, understanding that it would be under its competence due to the performance of the foreign programmer and producer in Brazil, arguing that the acquisition operation in question would violate Article 5 of the SeAC Law. The Agency also sent a technical note to CADE, concluding that the vertical integration of the economic groups involved would have great potential for anticompetitive effects in the Brazilian pay-TV segment.

In addition, the Brazilian Association of Radio and Television Broadcasters (Abert) and the Brazilian Association of Radio and Television (Abratel) expressed their opposition to the referred acquisition, understanding that the operation, in addition to facing the legal provisions related to the cross-ownership, would also offend Article 9 of the SeAC Law, which obliges programmers, producers and packagers to be headquartered in Brazil, which would bring competitive losses to the pay-TV market.

Such inquiries influenced the Anatel's Board to approve a provisional measure to the companies involved, suspending the transaction and prohibiting the practice of acts that would produce effects on the pay-TV market by the companies involved, until ANATEL's pronouncement regarding compliance of the corporate transaction in question.

In the administrative process for ANATEL's regulatory analysis on the subject, new opinion from the Agency's technical department and statement from ANATEL's Specialized Federal Office of the Attorney condemned the abovementioned merger, under the argument that it would injure the restriction to cross-ownership between producers and distributors of audiovisual content. Furthermore, they affirmed that the corporate operation in question would exercise programming from abroad to Brazil through their representatives, being subjected to Brazilian laws.

However, in February 2020, by 3 votes to 2, ANATEL formed majority and decided for the regularity and approval of the referred merger, justifying that there would be no express prohibition, in the SeAC Law, of vertical integration between producers and distributors when involving

companies located abroad. Furthermore, it was argued that the SeAC Law is a restrictive rule of rights and, therefore, would not include extensive interpretation.

In response to the approval, there was a presentation of the Project of Legislative Decree (PDL) No. 80/2020, which proposed to suspend the decision of ANATEL's Board of Directors, under the justification that the decision would be irregular and would not have legal support in Brazilian legislation. Currently, the matter is awaiting order from the President of the House of Representatives, but it may undermine the approval of the analyzed corporate transaction.

Additionally, ANCINE requested the Agency's Market Analysis Superintendence, in January 2020, a complementary competitive analysis about the present case, based on more flexible legal provisions than the SeAC Law, such as the Law of Economic Freedom (Law 13,874/2019) and the Law of Introduction to the Rules of Law (Decree Law 4,657/42, updated by Law 13,655/2018). However, in contrast to the aforementioned PDL, the trend of the analysis that started on August 04, 2020 is that the Agency follows the same direction as ANATEL, without imposing an obstacle to the operation of the companies involved in Brazil.

It is true that, currently, there is consensus among the various bodies mentioned, in the sense that it is necessary to mobilize, with the National Congress, to change the SeAC Law - in particular, the provision that prohibits cross-ownership. In this regard, currently, there are several bills in progress in the Congress awaiting progress, with emphasis on Bill No. 3,832/2019, which aims to revoke the reciprocal limits of corporate participation of the SeAC Law.

It is also necessary to note the relationship between cross-ownership and the legal classification of over-the-top services - OTT, in the case of offering linear channels directly to the consumer over the Internet (which are pending decision on their normative definition as value-added services - SVA or as telecommunications services, depending on an understanding of the extent of scope of the SEAC Law, as addressed in a previously published article). In this regard, if said service is considered a telecommunications service, it is possible that there will be an even greater pressure for adjustments to cross-ownership, through a new regulation of the matter.

From the economic perspective, all regulation has the function of correcting a market failure; however, if that failure ceases to exist, some regulations and laws may cease to make sense or lose their purpose. In this regard, the general understanding is for the need to revisit legal provisions of obsolete regulations, such as Article 5 of the SeAC Law,

in order to adapt them to the new realities presented and allow the development of both the entertainment market and the pay-TV market.

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