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Telecom Infrastructure Priority Investments

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The Brazilian Ministry of Communications ("MCOM"), through Ordinance No. 502, dated September 1, 2020 ("Ordinance"; *Portaria* in Portuguese), established the procedures for the approval and monitoring of priority investment projects in the telecommunications sector, aiming at the issue of incentive debentures, in line with provisions contained in Law No. 12,431, dated June 24, 2011, which deals with the incidence of income tax, among other tax measures.

In Brazil, in simplified terms, a debenture can be conceptualized as "a security issued by corporations, representing a debt, which ensures to its holders the right to a credit against the issuing company", according to a publication contained on *Portal do Investidor*, linked to CVM - Comissão de Valores Mobiliários, the Brazilian commission which supervises, regulates, disciplines and develops the securities market in the country.

Within the scope of the Ordinance, the following are eligible for the issuance of debentures: projects aimed at implementing, expanding, maintaining, recovering, adapting or modernizing the transport network; fixed or mobile access network; satellite communication system; wireless local network (based on IEEE 802.11

standards) in places of public access; submarine cable for data communication; data center; machine-to-machine communication network, including internet of things (IoT); 5G network or higher; underwater cable; telecommunications network infrastructure; and infrastructure for virtualization of the telecommunications network (art. 3, I to XI). It is also worth mentioning that investment projects may include one or more of the aforementioned types (art. 3, § 5).

The definitions relevant for the interpretation of the paragraph above are conferred by article 2 of said Ordinance, among which we can mention that: (i) **transport network** is the telecommunications network responsible for the aggregation of traffic originating from access networks, for the distribution of traffic directed to access networks, as well as their interconnection to other access or transport networks; (ii) **access network** is the telecommunications network originating at the point where the connection of the user's terminal is carried out and finished at the concentration point; (iii) **satellite communication system** is the telecommunications network which uses a communication structure between one or more satellites and satellite land stations; (iv) **wireless local network** is the telecom-

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munications network of broadband data, based on IEEE 802.11 standards, designed to serve a limited area and an indeterminate group of access terminals, interconnecting them in the same network, which connects them, by means of radio frequency, to an access point (hotspot) for the connection to other networks; (v) **data center** is the centralized physical infrastructure, integrated with a telecommunications network and the internet, dedicated to collect, use, store, handle, protect, encrypt, manage, process and disseminate data and information, and which consists of information and communication technology (ICT) assets, systems of access control, disaster recovery, among others; (vi) **5G network** corresponds to the fifth generation of mobile communications networks; (vii) **underwater cable** is the infrastructure for the broadband communication of data, composed of underwater cable and land anchoring points; and (viii) **Infrastructure for virtualization of the telecommunications network** corresponds to machines, equipment (hardware), programs (software) and orchestration environments to support the running of network virtualized functions, including the respective physical infrastructure necessary for the packaging, performance and operation.

As explained in the Ordinance (art. 3, § 1), the infrastructures included in investment projects are required to be able to support broadband data traffic or IoT applications.

At this point, it is interesting to note that, for the purposes of application under the provi-

sions of the Ordinance, this same regulation conceptualizes **IoT** as the “cyber-physical ecosystem of interconnected sensors and actuators that enable advanced services and allow intelligent decision-making, based on information and communication technology infrastructures, including machines, equipment (hardware), programs (software) and their respective use licenses, and which allows to collect, use, store, handle, protect, encrypt, manage, process and disseminate data and information with interoperability and broadband and narrowband connectivity of IoT”. This definition, we should emphasize, differs from that contained in article 2 of [Decree No. 9,854](#), dated June 25, 2019, which instituted the National Plan of Internet of Things, having failed to mention that IoT is the infrastructure that integrates the provision of value-added services (on the subject, see the Telecoms Series article entitled “[IoT - Recent Developments](#)”).

Furthermore, the definition of **machine-to-machine communication network** conferred by the Ordinance, which is the “network that allows communication between two or more entities without necessarily requiring any direct human intervention, including machines, equipment (hardware), programs (software) and other assets, services or rights, tangible or not, intended for the implementation, expansion, maintenance, recovery, adaptation or modernization”, also differs from the definition of **machine-to-machine communication systems** mentioned in article 8 of Decree No. 9,854/2020, according to which they correspond to the

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“telecommunications networks, including access devices, to transmit data to remote applications in order to monitor, measure and control the device itself, the surrounding environment or data systems connected to them by means of these networks”, and which specifically excludes electronic debit and credit transfer terminals.

The Ordinance provides that projects might allocate the funds raised for future payment or, also, for the reimbursement of costs, expenses or debts related to priority investment projects, provided that these projects have occurred within a maximum of twenty-four (24) months from the closing date of the public offer (art. 3, §§ 2 and 3).

In addition, the investment project includes expenses for the granting of infrastructure projects, including expenses with the acquisition of national technology assets, obligations regarding network coverage and quality of services, as well as the price of the authorization for the provision of telecommunications services and authorization for the use of radio frequency spectrum. At this point, it is interesting to note that, although said expenses have been specifically mentioned by the Ordinance, the regulation itself provides for the possibility that other expenses might be included (art. 3, § 4). In addition, paragraph 6 of article 3 of the Ordinance provides that expenses related to **operation support systems (OSS)** and **business support systems (BSS)** may be encompassed within the project’s scope, being OSS and BSS un-

derstood as the “set of software tools that allow the management and automation of the collection, integration and processing of information distributed by the different areas and elements of the operators” (art. 2, XV).

In accordance with the provisions of the Ordinance (art. 4), investment projects should be sent to MCOM, electronically, with the relevant documentation. Thus, the Special Purpose Entity (“SPE”), concessionaire, permissionaire, authorization holder or lessee should submit, among others, (i) the organizational documents of the legal entity holding the project (which may be a publicly-held company, with securities traded on the market, according to the terms of art. 4, § 3 of the Ordinance), (ii) the identification of legal entities being part of the project holder or, in case the project holder is a corporation, the identification of its controlling company, as well as (iii) documents evidencing the administrators' term of office, all of which accompanied by the applicable forms. In case of non-compliance of the documentation, the legal entity holding the investment project, upon notification, must regularize the pending issues, under penalty of dismissal of the referred project (art. 4, § 1).

The Ordinance specifically establishes that the investment project must be financed with the issuance of incentive debentures, whether in full or in part (art. 4, § 2), which are issued in accordance with the terms of art. 2 of Law No. 12,431/2011.

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This article among other provisions, establishes that the income tax rates applicable to the case correspond to zero percent (0%) when the income is earned by individuals, or fifteen percent (15%) when the income is earned by the legal entities mentioned in the provision.

According to article 4, § 4 of the Ordinance, there must be an individual request for each investment project to be financed. Said projects are analyzed by the Telecommunications Office (in Portuguese, *Secretaria de Telecomunicações*) (art. 5, head provision), and the same Office prepares a draft of ordinance for the priority approval, which is forwarded to the Legal Consultancy and, later, to the Office of the State Minister of Communications (art. 5, § 3), who is responsible for approving the same as a priority project by means of the ordinance. The effects of the aforementioned ordinance begin with its publication in the Brazilian Official Gazette (“DOU”) (art. 6, head provision), being valid for five (5) years (art. 6, § 2).

The aforementioned approval ordinance, in addition to specifying the maximum amount authorized for the issuance of debentures, also makes reference to (i) the company name, the enrollment number in the General Taxpayers’ Registry (“CNPJ”) of the company holding the project and, if applicable, the list of legal entities comprising the same; (ii) the description of the project, specifying that it refers to the telecommunications sector; and (iii) the federation units included in the project (art.

6, § 1).

It is important to note that the approval by ministerial ordinance results in obligations for the project holder, which must submit to MCOM, annually, by April 30, certain documents, such as, among others, a report on the project implemented in the previous year enabling the monitoring of the physical and financial executions carried out, and which also demonstrates that the costs, expenses or payment of debts that might be subject to reimbursement have occurred within a maximum period of twenty four (24) months from the closing date of the public offer; as well as a spreadsheet including the assets or sets of assets acquired and services contracted with the funds raised, and, in the case of assets or sets of assets of ICT (**ICT asset** being understood as the asset which integrates the telecommunications infrastructure and contributes to enable the collection, storage, processing, handling, transmission and receipt of data, such as routers, transmitters, receivers, antennas, fiber optic cables and others, according to art. 2, XI of the Ordinance) with a value equal to or greater than thirty thousand Brazilian Reals (BRL 30,000.00), the latitude, longitude and physical address of the place of installation thereof must be informed (art. 7). In addition, MCOM might request additional information in order to monitor the execution of the project (art. 7, § 5).

Equally important, within ninety (90) days (or within the extension of this period, as applicable) following use of the amount

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raised by means of the investment project in full, the holder should send to MCOM a final report containing the information listed above, as well as others. This report will be evaluated by the Telecommunications Office, which will also approve it, according to a decision to be published in the DOU (art. 7, §§ 2 to 4). However, it should be noted that the approval does not prevent the adoption of legal and regulatory measures if irregularities subsequently become known (art. 7, § 6).

In the event of non-implementation of the priority project as approved in the respective ordinance of MCOM, it will inform the applicable Special Office of the Federal Revenue Service (in Portuguese, *Secretaria Especial da Receita Federal do Brasil*) in this regard, and it might, for this purpose, count on the support of the National Telecommunications Agency (“ANATEL”), the telecommunications regulatory body in Brazil (art. 8).

In addition to the provisions briefly summarized above, the Ordinance also amends the terms of MCOM Ordinance No. 330, dated July 5, 2012, so that it currently establishes the approval procedure for priority investment projects in infrastructure only with respect to the broadcasting sector. Prior to the entry into force of Ordinance No. 502/2020, Ordinance No. 330/2012 also regulated the issue of projects in the scope of the telecommunications sector, however without covering certain points such as investments in IoT and 5G, which were introduced in the latest regulation.

The possibilities brought by the new regulation of 2020 quickly resulted in the interest of investors. Therefore, for example, at the end of December 2020, by means of Ordinances No. 1,671/SEI-MCOM, 1,672/SEI-MCOM, 1,673/SEI-MCOM, 1,674/SEI-MCOM, 1,675/SEI-MCOM and 1,717/SEI-MCOM, projects were approved, having as holders companies such as Claro S.A., Mob Participações S.A. and Unifique Telecomunicações S.A. These projects amounted to approximately BRL 4.3 billion and will benefit several Brazilian states, a fact that was highlighted in the specialized press.

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