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Telecommunications Services x VAS x
PMS x MVNO – Administrative Litigation
at Anatel

BRASIL

Telecommunications Services x VAS x PMS x MVNO – Administrative Litigation at Anatel

By Ricardo Barretto Ferreira and Sylvia Werdmüller von Elgg Roberto

Against the background of the difficulties imposed by the Covid-19 pandemic, the Brazilian government enacted Law No. 14,172, dated June 10, 2021 (Law No. 14,172/2021), which provided for the guarantee of internet access to students and teachers of public basic education, in an initiative aimed at promoting economic and social development, which was later regulated by Federal Decree No. 10,952, dated January 27, 2022.

Within the scope of this initiative, more than BRL 3.5 billion were made available for use in actions benefitting students from families registered in the Unified Registry for Social Programs of the Federal Government (CadÚnico) and enrolled in state, district, and municipal public schools, students from schools in indigenous and quilombola communities, in addition to basic education teachers from the public school system.

The amount was intended for the contracting of mobile connectivity solutions to carry out and monitor non-face-to-face pedagogical activities using information and communication technologies (ICTs),

prioritizing, in the following order, high school students, middle school students, high school and middle school teachers; as well as for the acquisition and temporary or permanent assignment of portable terminals with access to the mobile data network for high school students and teachers (for this specific purpose, up to 50% of the aforementioned amount may be spent). Other possibilities for contracting internet access services were also provided for by Law No. 14,172/2021.

Importantly, at first, the aforementioned law determined that the application of the resources made available should take place by December 31, 2021. If there was no use by that date, or if the application occurred in non-compliance with the terms of the law, the amounts should be returned to the public treasury by March 31, 2022. However, these deadlines were extended to December 31, 2023 and March 31, 2024, respectively, pursuant to Law No. 14,351, dated May 25, 2022.

Several bidding processes were then conducted for contracts in line with Law No.

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14,172/2021. In these processes, not only personal mobile service (PMS) providers appeared as bidders, but also companies that were not telecommunications services providers, or which by then did not hold a license from the National Telecommunications Agency (Anatel) to provide PMS. Some of these bidding processes, it is worth mentioning, were challenged.

In the State of Amazonas, for example, the auction was suspended as a result of a request submitted by Claro S.A. (Claro), based on the fact that the winning company did not hold a license from Anatel to provide PMS at that time, which would be contrary to Law No. 14,172/2021, since, as mentioned, this law establishes that the contracting must be focused on mobile connectivity solutions.

In the State of Bahia, Telefônica Brasil S.A. (Telefônica) challenged the bidding notice claiming that its object referred to the provision of PMS. In this case, the public entity defended that parts of the bidding notice could be subcontracted and that, therefore, a company that does not hold an authorization to provide telecommunications services could win the bidding process. About this, Telefônica, in a later statement, affirmed that according to the terms of the telecommunications sector's regulation, there would be resale of PMS, which is illegal.

Base Serviço de Integração Móvel Ltda.

(BM), provider of value-added services (VAS), not a provider of telecommunications services, was one of the participants in bidding processes the objects of which, in its own words, would be mobile connectivity solutions. As stated by BM, the company was declared the winner in bidding processes held in the States of Amazonas and Alagoas and, within the scope of these processes, the company must provide connectivity platforms developed by it, corresponding to ICTs which merely constitute VAS, being in accordance with the needs and the objectives set forth by Law No. 14,172/2021.

Also according to what was mentioned by the company, since it is not a telecommunications services provider, in order to provide the VAS for which it was contracted in the bidding processes won, BM needs to contract PMS from operators holding an authorization for the provision of these services. According to its understanding, the PMS that it needs are only inputs of the connectivity platform that it has developed.

In order to contract such services, BM would then have contacted the Brazilian telecommunications operators Telefônica, Claro, and Tim Brasil Serviços e Participações S.A. (Tim). However, as mentioned by BM, such contracting attempts were frustrated.

Due to the alleged failure in contracting mobile telecommunications services, the

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company deemed appropriate to file administrative proceedings within the scope of Anatel against the aforementioned operators, which, according to BM, would have refused to make “electrical profiles” available, which consequently prevents BM from providing the relevant VAS being the objects of the bidding processes in which it was the winning bidder.

“SIM Card electrical profile”, as clarified by Telefônica in a document contained in an administrative proceeding filed against it by BM, consists of a technical specification of what must be contained in the directories and files of a SIM Card, being identified by two characters. The electrical profiles “are standardized and interoperable for all manufacturers of SIM cards, networks, and devices” and use the standards of the European Telecommunications Standards Institute (ETSI) of the 3rd Generation Partnership Project (3GPP), as stated by the operator. According to clarifications published in the specialized press, the “electrical profile is just a code, commands that need to be programmed in the SIM and which allow activation in an operator. The profile is per operator, not per user”. In turn, BM also expressed its understanding regarding the electrical profiles, stating that they are “technical configurations that allow the activation of a voice, voice and data, or just data line” from different operators.

It is worth mentioning that in BM's business model, as specified by the company, there is

the operation of an eSIM Card in which the electrical profiles negotiated with the mobile telephony operators holding an Anatel authorization are pre-installed, enabling the use of their networks, but which also allows the remote migration between PMS providers, for example, in case more favorable commercial conditions are offered. In Brazil, this model has been colloquially called “neutral chip”.

Thus, the mere availability of electrical profiles intended by BM does not imply that the VAS can be provided immediately; a negotiation between BM and operators is required for the PMS to be activated, subject to remuneration. According to BM, in addition to the eSIM Card, the solution developed by the company also includes an Internet content filter, “with which the educational manager indicates which web addresses can be accessed by students and teachers”, as well as “individual monitoring tools of each chip used”.

Thus, in early 2023, BM filed an administrative claim with a request for a provisional remedy against Telefônica, “with an indication of an alleged refusal to contract an essential element of access to mobile networks, specifically with regard to the acquisition of electrical profiles”, as stated by Anatel. Also according to the same Agency, mentioning the information brought by BM, in the context of the contracts referred to in the applicable bidding processes, “Internet access would

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be an input and not the main object of the contract, since the connectivity solution gathers several tools and functionalities necessary to meet the need in question". BM also filed similar administrative claims against Tim and Claro, affirming, again, that the provision of internet would configure only one of the inputs of the VAS provided by the company.

BM's claim brought before Anatel, it is worth mentioning, was in the sense of ordering to each of the mentioned PMS providers the supply, at market price, of at least 650,000 electrical profiles, VAS inputs, so that the company could provide the VAS developed by it, as well as to prevent the telecommunications operators from taking measures in order to cause the interested public bodies to transfer the objects of the bidding processes only to PMS providers, with non-compliance with such orders subject to daily fines set by Anatel.

Anatel decided to accept the allegations brought by BM, considering the granting of a provisional remedy appropriate and, in early March 2023, it ordered, among other items, that operators should ensure BM up to 650,000 electrical profiles related to BM's obligations contracted with the States of Amazonas and Alagoas, having set a daily fine of BRL 50,000.00 for non-compliance with this order, limited to the amount of BRL 2 million; and that BM and the PMS providers should conduct negotiations to establish a contractual relationship in accordance with the regulations, aiming at

the adequate provision of services to the aforementioned States.

The abovementioned operators filed their defenses against Anatel's decisions issued against them. For example, in its defense, Telefônica stated that the processes related to Law No. 14,172/2021 should have as their object the necessary contracting of a mobile connectivity solution, which would imply being the winner of the bidding processes PMS providers, and that this erroneously would not have occurred in the states of Amazonas and Alagoas. The company also brought an argument in the sense that by participating in the bidding processes, BM would be aware that the provision of PMS would be necessary to meet the public notice obligations, as well as that said company did not hold an authorization to provide the PMS. Such factors, as alleged, would lead to the need to contract the services of telecommunications providers or, alternatively, to enter into partnerships (e.g., mobile virtual network operators, MVNOs, which exploit PMS by means of a virtual network). Additionally, it defended that no legal or regulatory rule obliges PMS providers to offer electrical profiles to third parties, and that the supply of said profiles would not be part of Telefônica's products portfolio. Then, it requested the denial of the granting of a provisional remedy, denial of BM's requests, sanction of BM for malicious prosecution, and the right to present additional information on the matter discussed in the administrative proceeding.

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Notwithstanding the defenses filed by the operators, Anatel upheld the decisions in favor of BM, having only extended the period initially granted to PMS providers to comply with the Agency's orders. Additionally, it should be emphasized that since these Anatel's decisions were issued, the interested parties have been taking various measures, both administrative and judicial, to settle the issue.

Telefônica, for example, filed an administrative appeal with a request for suspensive effect in which it argued that it is not possible to supply the intended SIM Cards' electrical profiles due to technical issues, nor the amount ordered by Anatel on a precautionary basis, but that it could provide a budget for the supply of SIM Cards or eSIMs along with connectivity solutions available in its products portfolio. Additionally, the company stated that the offer of SIM Card electrical profile would characterize PMS resale, without BM holding the necessary authorization to provide this kind of service. Furthermore, as reported by Anatel itself, Telefônica argued that "the appealed decision is at odds with the principle of legal certainty, either (i) by treating connectivity as VAS and not as a telecommunications service, concepts that have already been discussed and had already been consolidated by this Agency, either (ii) by creating a complex regulatory obligation for PMS providers through a non-definitive administrative decision".

It is worth mentioning that an

administrative proceeding is currently underway within the scope of Anatel, which seeks to settle the conflicts between BM and Telefônica, but still without a definitive resolution.

The relevance of the subject involved in the administrative proceedings in progress at Anatel also attracted the interest of third parties, such as, for example, the Brazilian Association of Competitive Telecommunications Service Providers (in Portuguese, Associação Brasileira de Prestadoras de Serviços de Telecomunicações Competitivas, TelComp), composed of PMS providers and MVNOs. This association made a statement in the case record recognizing that the expansion of connectivity, as well as digital inclusion, is essential for the country, but must occur in accordance with legal dictates, the sector's regulation, and applicable business rules, so that legal certainty and isonomy are ensured. TelComp's understanding of BM's business model is consistent with that of Telefônica, Claro, and Tim, i.e., that there would be the resale of telecommunications services. The Brazilian Association of Virtual Mobile Operators and Companies Providing Value-Added Services to Telecommunications Services (in Portuguese, Associação Brasileira de Operadoras Móveis Virtuais e Empresas Prestadoras de Serviços de Valor Adicionado aos Serviços de Telecomunicações, Abratual) and other companies also made statements in the administrative proceedings, also affirming

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that BM, a VAS provider, could not provide PMS. It is important to say, however, that Anatel denied these entities' request to join the administrative proceedings as interested third parties, with an appeal to the decision having been filed by TelComp, for example.

As can be seen from the foregoing, the divergence of understanding between the parties involved in the discussion concerns some truly relevant points.

First, it encompasses the issue of telecommunications services and VAS. In this sense, the respective concepts were stipulated by Law No. 9,472, dated July 16, 1997 (General Telecommunications Law, LGT). According to the terms of the LGT, telecommunications service corresponds to the set of activities that enable the offer of telecommunication. Telecommunication, in turn, was also defined by the LGT as the "transmission, emission, or reception, by wire, radioelectricity, optical means or any other electromagnetic process, of symbols, characters, signs, writings, images, sounds, or information of any nature". Value-added service, still according to the text of the LGT, "is the activity that adds, to a telecommunications service that supports it and with which it is not to be confused, new utilities related to access, storage, presentation, transfer, or retrieval of information". It should be noted that the LGT itself clarifies that VAS are not telecommunications services, as well as that VAS providers are users of

telecommunications services and, as such, have rights and duties.

However, the LGT further sets forth that VAS providers are guaranteed their right to use telecommunications service networks. And BM seeks to see this right ensured by filing administrative proceedings, since, in this regard, Anatel has not only competence to regulate the conditions of telecommunications services, but also to regulate the relations between VAS providers and telecommunications operators.

On the other hand, as explained above, it has been alleged within the scope of the administrative proceedings that BM would intend to carry out the resale of telecommunications services, which is prohibited by the LGT. On the subject, the LGT determines that the exploitation of telecommunications services in the private regime depends on prior authorization from Anatel, which entails the right to use the necessary radio frequencies. Additionally, the LGT stipulates that telecommunication activities carried out without "concession, permission, or authorization of service, use of radio frequency, and satellite exploitation" are clandestine. It should be emphasized that clandestine activities are crimes subject to public criminal action, punishable by imprisonment from 2 to 4 years (a penalty that is increased in case of damage to third parties), in addition to a fine of BRL 10,000.00, sanctions to which those who contribute directly or indirectly

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to the crime are subject.

Another point that should be assessed concerns BM's intention to offer connectivity on its platform by contracting with all three abovementioned PMS operators. As TelComp pointed out in its statement in the administrative proceedings, the offer of telecommunications by BM, "by an agreement with all mobile providers with PMS, requires that contracts be entered into concurrently with all of them, which is currently a barrier for MVNOs since the ORPA [wholesale product reference offerings] impose exclusivity". Also according to TelComp, Anatel's decision established differentiated treatment for BM, "to the detriment of all other MVNOs in the market that are bound to a single PMS provider with radio frequencies in the same geographic area".

However, as reported in the press at the time Anatel's preliminary decisions were issued, through its orders the Agency would be seeking to maintain the possible entering of new models of mobile telephony exploitation in the market, which would be relevant at a time in which the respective telecommunications market is heavily concentrated in the three mentioned operators. More recently, Anatel referred to the matter mentioning that when granting the provisional remedy, the Agency did not endorse BM's business model, "did not say whether it can operate, whether it is resale, whether it can be MVNO or any other manifestation of regulatory compliance of the specific business model".

In view of the allegations brought in the administrative proceedings, Anatel's decision concerning the controversy should imply an in-depth analysis of BM's business model and its characteristics, at the end of which the Agency must pronounce its understanding regarding the nature of the platform developed by the company, be it a value-added service or a telecommunications service. From the result of this evaluation, different aspects of rights and obligations may arise, not only for the parties that make up the administrative proceedings, but also for the users of the services provided. Therefore, the relevance of the Agency's performance and its final decision on the matter is indisputable.

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Authors



Ricardo Barretto Ferreira da Silva - Senior Partner
barretto@azevedosette.com.br



Sylvia Werdmüller von Elgg Roberto - Associate
selgg@azevedosette.com.br