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# Fixed Telephony Concessions and Arbitrations

By Ricardo Barretto Ferreira and Sylvia Werdmüller von Elgg Roberto

In the late 1990s, the end of the monopoly of telecommunications services took place in Brazil, which was until then held by companies under state shareholding control and with the exploitation of services being managed by the Telebrás system, which controlled all telephone operators of the country.

The restructuring of the sector began with the advent of Constitutional Amendment Number 8, dated August 15, 1995, which amended the text of the Federal Constitution of 1988 and determined that the exploitation of telecommunications services could occur either directly by the Union, or through grants given to private capital under authorization, concession, or permission regimes.

The enactment of Law No. 9,472, dated July 16, 1997, known as the General Telecommunications Law ("LGT"), was another essential factor in the restructuring process. The LGT established the new regulatory structure for the industry and created the National Telecommunications Agency ("Anatel"), the Brazilian authority

which regulates and supervises telecommunications services. Anatel's actions are geared towards the development of Brazilian telecommunications and service to the public interest and, since its inception, it has been playing a key role in tracing the contours of sectoral regulation.

Later, as a result of the restructuring process, the state telecommunications companies were sold through bidding processes, thus allowing the entry of new players in the market.

This is exactly what happened with the exploitation of the fixed telephony service (which, according to the terms of the regulation in force in Brazil, is called Fixed Switched Telephony Service, "STFC"), in the modalities of local service, domestic long-distance service, and international long-distance service. The companies that covered the entire Brazilian territory were auctioned and the operation of the services was transferred to the private sector (at the time of privatization, for example, to the Telefônica group; consortia that had the

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participation of companies such as Telecom Itália, Banco Opportunity, Construtora Andrade Gutierrez and other entities; and MCI International).

The respective transfers to the new service providers were carried out under the concession regime, in accordance with the LGT. Currently, as a result of several changes that took place after the privatization process, STFC concessions are held by operators Algar Telecom S.A. (“Algar”), Claro S.A. (“Claro”), Oi S.A. (“Oi”), Sercomtel S.A. (“Sercomtel”) and Telefônica Brasil S.A. (“Telefônica/Vivo”), under concession contracts expiring at the end of 2025.

At this point, it is interesting to clarify that, in Brazil, fixed telephony is the only type of telecommunications service that can be exploited both in the public regime and in the private regime.

Under the public regime, exploitation depends on a concession granted by Anatel, as occurred in the aforementioned privatizations, with concessionaires being subject to universalization and continuity obligations. The universalization obligations, which are the object of periodic targets prepared by Anatel, are intended to enable access by persons or institutions of public interest to telecommunications services, regardless of their location and socioeconomic status, as well as to allow the use of telecommunications in essential services of public interest. Continuity

obligations, in turn, are intended to enable users of telecommunications services to enjoy them uninterruptedly, without unjustified downtime, and the services must be available to users under appropriate conditions of use. Therefore, when the exploitation of the STFC takes place in the public regime, there is more rigor in the control of the service provision conditions.

In the private regime, the exploitation of services occurs by means of authorizations, which are also granted by the same Agency. In this model, however, there is more flexibility in the conditions of its provision. Authorizations for the provision of STFC in accordance with the private regime were granted by Anatel after the privatization, resulting in competition in the market for this type of service.

Due to changes introduced in the LGT pursuant to Law No. 13,879, since 2019, there is the possibility of adapting the grants of telecommunications services provided under the concession modality to the authorization regime. The adaptation, it is worth saying, depends on a request by the concessionaires in this sense, which implies that the adaptation is not mandatory.

However, for Anatel to authorize the adaptation and with this to occur the early termination of the concession contracts (i.e., before the final term in 2025), certain requirements must be met by the operators, among which might be

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mentioned the maintenance of the services offered, the assumption of investment commitments and the presentation of guarantees to ensure such obligations.

In addition, Anatel shall carry out financial calculations to determine the economic value associated with the adaptations. This economic value, according to the terms of the LGT, corresponds to the “difference between the expected value of the exploitation of the adapted service under an authorization regime and the expected value of the exploitation of this service under a concession regime, calculated from the adaptation”, which may be converted into investment commitments in line with guidelines established by the government. The LGT also sets forth that in the calculation of the economic value, “will be deemed reversible assets, if any, the essential assets and assets effectively used in the provision of the service granted”. This means that such calculations determine, in the end, the amounts to be paid by the concessionaires to the Union or, if applicable, to be received by the companies from the Union.

According to the STFC operators, relevant imbalances occurred in the concessions over the time that has elapsed since the privatizations. Among the factors that allegedly caused the imbalance, as reported by the press a few years ago, delays in tariff approvals, obligations imposed by the General Consumer Regulation, in addition to

other factors, would have been mentioned, thus potentially resulting in billionaire balances in favor of the companies. In view of this, providers have been seeking the recognition of such conditions by Anatel. Telecommunications companies also stated that the concessions became economically unsustainable, with the situation worsening due to the negative impact resulting from the decrease in the use of the STFC. This unsustainability, in other words, makes it possible for providers to defend the unfeasibility of services and require exemption measures from Anatel, or even the unilateral termination of contracts.

In fact, given the wide availability of modern voice communication alternatives, fixed telephony has been losing ground in Brazil, similarly to what is happening worldwide. According to data made available by Anatel, in June 2023 there were 26.2 million accesses to the STFC, with the Federal District and the states of São Paulo, Paraná, and Rio de Janeiro leading (in descending order) the number of accesses, mostly dedicated to urban services. In the previous month, May 2023, there were 26.38 million accesses, which shows that there was a decrease of 0.7% in this period alone. Twelve months earlier, therefore in June 2022, there were 27.87 million accesses in the country. Thus, this difference reflects an annual decrease of 6% in the use of this type of service. In the third quarter of 2021 alone, there was an accumulated drop in the STFC that exceeded 485 thousand



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accesses. However, it is worth mentioning that the numbers informed by Anatel include offers both by STFC authorized entities and concessionaires. On this specific point, it is relevant to note that from 2021, authorized companies started to offer more fixed lines than the service concessionaires. Claro is the leading company in the STFC market, with 7.66 million accesses, followed by Oi (7.31 million accesses), Telefônica/Vivo (6.82 million accesses), and Algar (1.23 million accesses), according to data made available by Anatel, updated until August 1, 2023.

Still regarding the amounts applicable for companies to proceed with the possible adaptation of concessions to the private regime, it is worth mentioning that consulting services from a consortium led by Axon Partners Group were contracted to carry out the related calculations. In the first quarter of 2023, Anatel stated that operators should spend a total of BRL 22.6 billion to adapt the contracts. According to the calculations, which were individualized per concessionaire, BRL 167.1 million would be paid by Sercomtel; BRL 275.3 million would be paid by Algar; 2.2 billion would be paid by Claro; 7.7 billion would be paid by Telefônica/Vivo; and BRL 12.1 billion would be paid by Oi. This amount was recently readjusted and, according to the Agency, the current total amount would be BRL 33.6 billion, of which BRL 19.9 billion would be owed by Oi, BRL 8.7 billion by Telefônica/Vivo, BRL 4.1 billion by Claro, BRL 579 million by Algar, and BRL 227 million by

Sercomtel. In turn, the concessionaires understand that the Union owes them an amount of BRL 36 billion as a result of the financial imbalances.

The divergent understandings between Anatel and the telecommunications companies regarding the aforementioned points led operators to request the initiation of arbitration procedures in order to obtain recognition of the factors and values alleged by them, a possibility that had been provided for in the concession contracts, after the exhaustion of attempts to settle the controversies at the administrative level.

The first Arbitration Commitment Instrument was entered into by and between Anatel and Telefônica/Vivo in June 2021; the arbitration is being conducted by the International Chamber of Commerce, having as its object the economic and financial balance, the sustainability of the concession, eventual indemnities related to unamortized reversible assets, and other items, as informed by Anatel. Later in the same year, the Agency and Claro also started an arbitration proceeding involving the STFC concession and its economic imbalance. Another arbitration involves the concessionaire Oi. In arbitration proceedings, the amounts claimed in 2022 would be BRL 16 billion in the case of Oi; BRL 10 billion in the case of Telefônica/Vivo; and BRL 6.6 billion in the case of Claro.

The termination of concessions also involves the relevant issue of the so-called

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“reversible assets”. These are goods related to the provision of services, such as infrastructure and equipment items, including towers, networks, ducts, and antennas, among other assets, which may have been transferred to the concessionaires or incorporated by them during the concessions’ term. With the termination of contracts, in the first case, the assets must be returned to the public authorities; but in the second hypothesis, the assets must be compensated as provided for in the respective contracts, if their amortization has not yet occurred.

For many years, the value of reversible assets has been the matter of controversy between concessionaires and Anatel. According to data provided by the Federal Accounting Court (“TCU”), in 2013 there were more than 8 million reversible assets, equivalent to an amount of BRL 105 billion. At this point, it is worth noting that the TCU previously considered, based on monitoring carried out on Anatel’s performance, that the work carried out by this Agency until 2021 would not be sufficient to “evaluate the economic-financial balance of STFC concession contracts”. Moreover, according to the results of an audit carried out in 2015, the TCU stated that the control regulations prepared by the Agency did not ensure “the compliance and up-to-dateness of information on reversible assets”, as well as that it had verified “ineffectiveness in the process of investigation of irregularities and in the eventual application of penalties, the existence of obstacles for the social control

of reversible assets, and failures in the inspection of these assets” and that, therefore, the control and monitoring methods for reversible assets then employed by Anatel were not “sufficient to ensure the continuity and up-to-dateness of the telephony service”.

The definition of all these issues is relevant for the possible migration of concessions in force to the authorization regime. Noteworthy, already in 2022 the concessionaires would have indicated that, in case the conditions to be fulfilled for the adaptation are unfavorable, the companies can simply return the concessions at the end of their terms. If this occurs, it will then be up to Anatel to give STFC grants to other providers, but should this not be possible, the Union itself must undertake responsibility for the continuity of services.

Although in March 2023 Anatel has mentioned seeing a potential consensus in the arbitration involving Oi, the Agency also recognized the possibility that the definitive resolution of the controversies might only occur in 2025. However, the involved parties have been adopting measures that reflect their intention to try to resolve the issues.

Finally, it is worth mentioning that the deadline for STFC concessionaires to present their requests for adapting their contracts to the authorization regime has already started, ending in November of this year. Thus, the topic is extremely relevant for the scenario of Brazilian

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telecommunications and must be monitored.

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