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# Fixed Telephony Concessions and Reversible Assets

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In Brazil, the only type of telecommunications service the exploitation of which can occur both in the public regime, with the granting of concessions (or in certain circumstances through instruments of permission), and in the private regime, with the granting of authorizations, is the fixed switched telephone service (“STFC”).

In the case of concessions, there is more rigor in the service provision conditions and sectoral regulations impose compliance with obligations of universalization (which aim to enable access by any person or institution 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) and continuity (which, in turn, are intended to enable the uninterrupted enjoyment of telecommunications services by their users, and such services must be made available under appropriate conditions of use). Therefore, the requirement to comply with the aforementioned obligations does not apply to providers of other types of telecommunications services, as is the case,

for example, in the exploitation of mobile telephony services.

Operators Algar Telecom S.A. (“Algar”), Claro S.A. (“Claro”), Oi S.A. (“Oi”), Sercomtel S.A. (“Sercomtel”), and Telefônica Brasil S.A. (“Telefônica”) are the current concessionaires of STFC and have been providing the respective services in accordance with concession contracts which will expire at the end of 2025.

Although said contracts are currently in force, Law No. 9472, dated July 16, 1997 (General Telecommunications Law, “LGT”), in accordance with the changes introduced in its text by Law No. 13,879, dated October 3, 2019, provides for the possibility of adapting STFC concessions for this type of service to start being provided under a private regime. However, it is important to emphasize that this adaptation is not mandatory.

Precisely because of the non-compulsory aspect of the adaptation between the regimes, it turns out that the current concessionaires have at their disposal some alternatives regarding the STFC offer, namely: (i) they may proceed with the

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migration to the private regime before the end of the concession contracts in 2025; (ii) they may choose to continue exploiting the STFC under the concession modality; or (ii) they may even stop providing services at the end of the concession contracts in force.

There is a term for concessionaires to express to the National Telecommunications Agency (“Anatel”) their interest in adapting the existing concession contracts, which has already started and will expire in November 2023. However, the simple manifestation of interest is not enough for the adaptation to occur immediately. It is necessary for operators to meet a series of requirements, among which we can mention the maintenance of STFC offers and the assumption of investment commitments.

An especially important point, covered in the provisions relating to concessions and those applicable to the migration from the public to the private regime, and which has generated controversy between STFC concessionaires and Anatel, concerns the so-called “reversible assets”.

Anatel’s Resolution No. 744, dated April 8, 2021 (“Resolution No. 744/2021”, which approved the Regulation on the Continuity of STFC Provision under Public Regime), defined what reversible assets are. According to the regulation, reversible assets correspond to “equipment, infrastructure, software or any other property, movable or immovable, or rights

that are part of the assets of the Provider, its controlling company, subsidiary or affiliate, essential and effectively used to ensure the continuity and updating of the STFC under public regime”.

According to the LGT’s provisions, reversible assets, if any, must be duly indicated in the concession contracts.

In turn, Law No. 8,987, dated February 13, 1995 (“Law No. 8,987/1995”, which provides for the concession and permission regime for public services), establishes that concessionaires must keep up-to-date information on their inventory and the registration of assets linked to the concessions. Exactly in this regard, Resolution No. 744/2021 complements the aforementioned law, setting forth that all reversible assets must be duly registered in the so-called List of Reversible Assets (“RBR”). This document, it is worth mentioning, should be submitted to Anatel by the concessionaires on a yearly basis.

The concessionaires’ most recent RBRs were audited and approved by Anatel in June 2023 and refer to assets related to the fiscal year 2019. According to data published by the regulatory agency, several assets held by the concessionaires are identified in these RBRs, but Anatel itself exposes which are the main ones. As per the data: (i) 41 properties are owned by Sercomtel, 328 by Algar, 795 by Claro, 1729 by Telefônica, and 7836 by Oi; (ii) 22 towers are owned by Sercomtel, 138 by Algar, 635 by Claro, 895

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by Telefônica, and 10956 by Oi; (iii) 98 switching centers are owned by Sercomtel, 148 by Claro, 567 by Algar, 1429 by Telefônica, and 14780 by Oi; and (iv) 66 transmission centers are owned by Sercomtel, 427 by Algar, 1569 by Telefônica, 3658 by Claro, and 21207 by Oi.

It should also be noted that Anatel's consent is required for any untying, disposal, encumbrance, and substitution of reversible assets. Untying, according to the sector's regulations, corresponds to the exclusion, from the RBR, of assets not effectively used or essential to the STFC continuity and up-to-dateness. Disposal, in turn, is the transfer of ownership through sale, expropriation, donation or other transaction. Encumbrance is the act or effect of encumbering an asset with a security interest or personal guarantee in any type of legal transaction, as well as its restriction for judicial purposes, depriving the possession or parts of the ownership of its holder. Finally, substitution is the exchange of an asset in subrogation to another. There are exceptions to the aforementioned consent, an example of which is the untying that occurs (i) due to loss of the asset's essentiality for the STFC provision due to regulatory change, or (ii) due to scrapping, obsolescence, defect, theft, robbery, accident, fortuitous event or force majeure, which make the assets unserviceable for the provision of the services. This provision is indeed appropriate, since constant technological evolutions might significantly impact the utility of the assets involved in

STFC concessions.

As set forth by the LGT, upon termination of the concession, the ownership of reversible assets is automatically transferred to the Union. In general terms, considering that certain assets used by concessionaires may be essential for the provision of STFC under the public regime, their availability is justifiable, so that services can continue to be properly provided to the population in case the Union needs to undertake their operation or, also, if there is a transfer of STFC exploitation to other concessionaires. Thus, it can be said that there is a close connection between the reversibility of assets and the continuity of the STFC under the public regime.

In the same regard, Resolution No. 744/2021 sets forth that, in the event of the STFC concession's termination, the continuity of services under the public regime must be guaranteed by the reversion, to the Union or to the successor provider, of the assets and rights essential to their provision.

However, it should be considered that the concessionaires may be companies that hold authorizations also for the exploitation of other telecommunications services, as in the previously mentioned case of mobile telephony services and, as such, it is possible that these companies' assets are used for the operation not only of the STFC, but of several services simultaneously, which implies, therefore, the shared use of

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the assets between granted and authorized services.

As a result, the reversibility of assets provided for in the sectoral regulation relating to the STFC exploited under the public regime and in the concession contracts themselves may be applicable only to a specific part of the operators' assets, since the reversibility must be limited to the assets strictly necessary for STFC provision. However, another scenario must also be considered, which is the possibility of a new concessionaire intending to exploit the STFC under the public regime not using reversed assets, but using its own assets.

The issue of the possible existence of shared assets was envisaged and regulated by Resolution No. 744/2021, which provides that "at the end of the concession contracts or instruments of permission, the assignment of the right to use shared-use assets will be guaranteed under fair and reasonable conditions, in case the Granting Authority or the company that will succeed the Provider intends to make use of such assets to maintain the continuity of STFC provision under the public regime". Also specifically on the matter, it is relevant to point out that the LGT provides that "reversible assets used for the provision of other telecommunications services operated under the private regime will be valued in proportion to their use for the service granted".

With regard to the reversible assets' values, it is also appropriate to specify that, according to the LGT's terms, the reversal of assets carried out before the expiration of the concessions' contractual term will imply the payment of compensation for the parts of investments related to assets not yet amortized or depreciated, which have been made to guarantee the continuity and up-to-dateness of the STFC granted.

In addition, Resolution No. 744/2021 provides that STFC operators may receive, at the end of concessions, compensation for reversible assets that have not been fully amortized, provided that their acquisition has been previously authorized by Anatel with a view to continuity and up-to-dateness of the service provision under the public regime. However, it is relevant to emphasize that the Agency's mere authorization does not imply a guarantee to compensation, as well as that the acquisition cost of the goods and their respective book value "do not bind the amount eventually due as indemnity". In fact, the compensation depends on an assessment by Anatel that verifies the asset's need for the continuity and up-to-dateness of the STFC under the public regime. Also important, said Resolution specifies that the final term of the concession contracts is not conditioned to the payment of an eventual compensation to the operators.

As addressed in our [last article](#), discussions between the current concessionaires and

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Anatel regarding reversible assets and the concessions themselves are in progress, but there is still no definitive position on the debated issues, which directly impacts the future of the parties involved.

Although there have been manifestations of interest in continuing to proceed with the STFC exploitation by some companies, an occasional decision by operators to return the concessions to the Union has also been considered by Anatel. If this occurs, it will be up to the Agency to confer grants for the services to continue being provided by other operators, in order to prevent the Union from being compelled to undertake the exploitation of fixed telephony.

In anticipation of the possible need for new grants, Anatel opened a public consultation regarding the terms of a bidding notice draft for the STFC concession in the modalities of local, domestic long-distance, and international long-distance services. According to the Agency, what is intended is to maintain the universalization and continuity of services, but Anatel itself expressed its opinion in the sense that “the new concession may have lighter obligations in relation to the current contracts, including with regard to the locations that must be served”.

It is interesting to note that the public notice draft submitted by Anatel provides for the possibility of resources from the Fund for the Universalization of Telecommunications Services (“FUST”) complementing the

income arising from the exploitation of services and the collection of fees from users. To this end, according to the terms of the draft, the bidders’ proposals should indicate the additional amount to be obtained from FUST to fund the service commitments provided for in the public notice during the grants’ term.

With regard to the term, according to the public notice proposal, the new grants may be given for five years, a term that may be extended once for an equal period, being this factor justified by Anatel “in light of the dynamism of the telecommunications market, of the growing demand for services providing access to the Internet, to the detriment of voice services, as well as the perspective of expansion of Personal Mobile Service (SMP) networks”.

It is interesting to note that Law No. 8987/1995 stipulates that the bidding notice prepared by the granting authority with a view to contracting concessionaires must indicate the reversible assets and, in cases where a previous concession has been terminated, the characteristics of any reversible assets that will be made available should also be indicated, in addition to their conditions. Moreover, the respective concession contract must also contain a clause related to reversible assets, as well as the criteria for calculating and paying any indemnities due to the concessionaire.

However, it is worth mentioning that in accordance with the public notice draft

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submitted for public consultation, it is set forth that the “concessionaires’ assets used for the provision of STFC under the public regime will not be subject to reversibility at the end of the concession contracts’ term”.

Comments and suggestions on the text of the public notice draft submitted by Anatel, duly justified, will be received by the Agency until September 25, 2023.

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