

In brief: telecoms regulation in Brazil

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Communications policy.

Regulatory and institutional structure

Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The Brazilian telecommunications sector has as its basis Law No. 9,472/1997, the General Telecommunications Law, which sets forth that the national government is competent to organise the exploitation of telecommunications services, as per the terms of policies established by the executive and legislative branches. The organisation of telecommunications services includes the regulation and inspection of the services' execution, trade and use, deployment and operation of telecommunications networks, in addition to the use of orbit resources and radio frequencies spectrum. Moreover, telecommunications services' organisation is based on free, broad and fair competition among providers thereof.

The National Telecommunications Agency (Anatel) is the sector's regulatory body, having the competence to implement the national telecommunications policy, issue rules concerning the grant, provision and enjoyment of telecommunications services in the public and private regimes, administer the radio frequencies spectrum and the use of orbits, conduct inspections and apply sanctions, in addition to other roles.

Broadcasting services in Brazil, in turn, are regulated by Law No. 4,177/1962 and Decree No. 52,795/1963, according to policies instituted by and subject to the control of the Ministry of Communications. The Federal Constitution, moreover, sets forth that radio and television broadcasters' productions and programmes shall:

- give preference to educational, artistic, cultural and informative purposes;
- promote national and regional culture and stimulate independent production aimed at dissemination thereof;
- regionalise cultural, artistic and journalistic production; and
- respect ethical and social values.

However, as opposed to free-to-air television broadcasting, pay television services are called conditioned access services, which are deemed telecommunications services, being subject to the provisions of Law No. 12,485/2011.

Anatel does not regulate broadcasting services, except for certain technical aspects concerning radio frequency use and compliance of equipment. The National Cinema Agency regulates audio-visual content regarding the registration of works and implementation of governmental policies intended to develop the national cinematographic sector.

In general, there are no restrictions concerning foreign ownership, but telecommunications service providers shall be companies organised in accordance with Brazilian laws, having their headquarters and administration in Brazil. Broadcasting companies, however, shall be owned by native Brazilians or individuals naturalised as Brazilian citizens for over 10 years, or by legal entities organised under Brazilian laws, headquartered in Brazil. Additionally, at least 70 per cent of the total capital and voting capital of broadcasting companies shall be directly or indirectly held by native Brazilians or individuals naturalised as Brazilian citizens for over 10 years, who will mandatorily manage their activities and establish the programming content, thus limiting foreign ownership.

Authorisation/licensing regime

Describe the authorisation or licensing regime.

Telecommunications services in Brazil might be provided under the public or private regime. In the public regime, a concession or permit (in specific circumstances and on a temporary basis) granted by Anatel is required for the service provision. In the private regime, an authorisation shall be granted for the services to be provided. Notwithstanding, according to the terms of Law No. 13,879/2019, if the applicable requirements are met, concessionaires might request the adjustment of a concession into an authorisation.

Only companies organised according to Brazilian law, with headquarters and administration in Brazil, having as their corporate object the provision of telecommunications services, might be granted the relevant licences. Capacity to bid and enter into agreements with the public authority, and a technical qualification to provide the services, in addition to other requirements, also apply. Moreover, a company might not hold more than one licence to provide the same kind of service in the same area. The transfer of both concessions and authorisations depends on an approval by Anatel.

Fixed-switched telephone services (FSTS) are the only telecommunications services provided under the public regime, although they might also be provided under the private regime. Concessions are granted by means of a bidding procedure for a period of up to 20 years, renewable for equal terms, provided the applicable conditions for this purpose have been fulfilled.

Mobile services and multimedia communications services are provided under the private regime, with authorisations being granted for 20 years, and renewable for equal terms. Spectrum for the deployment of 3G, 4G, and 5G technologies has been granted in bidding procedures. Implementation of 5G technology in Brazil began in 2022.

The cost for issuing an authorisation is 400 reais (approximately US\$80), but regarding the bid for spectrum, the highest offer is to be paid by the winning party. Other fees might also be due, such as, for example, the installation inspection fee and the operating inspection fee.

According to Brazilian regulations, the provision of satellite capacity does not constitute a telecommunications service. However, when there is communication with earth stations in Brazil, satellite exploitation over the country's territory is dependent on the grant of the right to exploit satellites (which authorises the use of orbit resources and radio frequencies for satellite control and monitoring, satellite communications, and provision of satellite capacity over the country's territory, whether by a Brazilian or a foreign satellite), in addition to other requirements, depending on the specific case. The party interested in being granted such rights shall be a private or public legal entity, organised under Brazilian laws, with headquarters and administration in Brazil, have the

legal and technical qualification to exploit satellites, in addition to other requirements, and submit an application in this regard to Anatel. Once the right to exploit satellites is granted, the respective operator might provide the satellite capacity to companies holding a concession, permission or authorisation to provide telecommunications and broadcasting services, or even to the armed forces. Satellite operators are not forbidden to be telecommunications services providers as well. The exploitation right might be granted for up to 15 years, extendable for further 15-year periods for the remainder of the authorised satellite's useful life. The need to conduct bidding procedures for an orbital position has recently been eliminated. Compliance with the Radiocommunication Regulations of the International Telecommunication Union and guidelines of the United Nations Office for Outer Space Affairs might be applicable.

Concerning public Wi-Fi services, Decree No. 7,175/2010 instituted the National Broadband Plan, intended to provide broadband connection and digital inclusion. Said Decree was later revoked by Decree No. 9,612/2018, which provides on telecommunications public policies. Presently, the Wi-Fi Brasil programme relies on a partnership with Telebrás to provide high-speed connectivity throughout the country, especially to socially vulnerable communities, having benefitted schools, healthcare units, indigenous villages and others so far.

Flexibility in spectrum use

Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

According to the General Telecommunications Law, the spectrum of radio frequencies is a limited resource and public asset, which might only be used as authorised by Anatel according to a prior licence. In this regard, it should be noted that in the destination of radio frequency bands, Anatel takes into consideration the rational and economic use of spectrum, as well as the existing attributions, distributions and consignations, to avoid damaging interference.

The possibility of transferring authorisations among telecommunications services providers is foreseen by the General Telecommunications Law, but depends on Anatel's approval, and for this purpose, the regulatory agency might set forth certain conditions, including limitations to the number of radio frequencies being transferred. In addition, the analysis of the Administrative Council for Economic Defence (CADE), the Brazilian antitrust authority, might also be required.

Ex-ante regulatory obligations

Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

In general, telecommunications services in Brazil shall comply with ex-ante regulations, and the General Telecommunications Law sets forth that such services are to be organised based on free, broad and fair competition.

Anatel's Resolution No. 600/2012, which approved the General Competition Plan, also sets forth guidelines regarding:

- competition aspects;
- measures concerning transparency, isonomic and non-discriminatory treatment;
- price control;
- the obligation of access and provision of specific network resources;
- the offer of wholesale products according to conditions set by such agency;

- obligations aimed to remedy specific market failures or to comply with the legal and regulatory rules in force; and
- accounting, functional or structural separation.

CADE's analysis and approval might also be required in the case of risk of impact on market competition, according to Law No. 12,529/2011.

Structural or functional separation

Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

There is no legal basis concerning the structural or functional separation between an operator's network and service activities, but Anatel might impose accounting, functional or structural measures to achieve the General Competition Plan's objectives, as per Resolution No. 600/2012.

Universal service obligations and financing

Outline any universal service obligations. How is provision of these services financed?

Universal service obligations are applicable to services provided under the public regime. In Brazil, only FSTS are provided by concessionaires under the public regime, which, in addition thereto, shall also comply with continuity obligations. Failure to comply therewith might lead to a fine, forfeiture or an intervention decree.

Decree No. 10,610/2021 approved the current General Universalisation Goals Plan for 2021–2025, setting forth obligations and universalisation goals for FSTS, among which the obligation to deploy fibre optic backhaul in 100 per cent of municipalities, villages, isolated urban areas and rural communities by the end of 2024, and install individual access to FSTS in locations with over 300 inhabitants.

Concessionaires shall bear the costs of their obligations, but such costs might be financed in part with resources from the Universalisation Fund for Telecommunications Services, created by Law No. 9,998/2000.

Number allocation and portability

Describe the number allocation scheme and number portability regime in your jurisdiction.

Number allocation is presently ruled by Anatel's Resolution No. 749/2022, which approved the Regulation of Telecommunications Services Numbering.

According to Anatel's Resolution No. 73/1998, as amended by Anatel's Resolution No. 750/2022, number portability in Brazil is allowed between providers of the same class of telecommunications services, being applicable to FSTS, personal mobile services (PMS), and multimedia communications services (MCS), if the relevant user remains in the same area. It is not possible to apply for portability between different kinds of services, such as FSTS to PMS.

Customer terms and conditions

Are customer terms and conditions in the communications sector subject to specific rules?

Terms and conditions applicable to the provision of telecommunications services must be included in end-user agreements, which shall also comply with rules set forth by the Brazilian Civil Code, Consumer Defence Code and General Data Protection Act, in addition to being in line with rules applicable to the relevant class of service. Mandatory clauses relate to the service's object, plan, conditions for changing the user's access codes, installation address, termination, customer services, and others. Moreover, a template of terms and conditions

shall be submitted to Anatel for approval. Anatel's Resolution No. 632/2014, which approved the General Regulation on Rights of Consumers of Telecommunications Services, regulates the rights of users of fixed and mobile telephone, multimedia communications and paid television services, and also applies.

Net neutrality

Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

Net neutrality is set forth by Law No. 12,965/2014 (the Internet Law). According thereto, preserving and ensuring net neutrality is one of the principles applicable to Internet use in Brazil, and the party in charge of the transmission, switching or routing has the duty to process any data packages in an isonomic manner, with no distinction related to content, origin and destination, service, terminal or application. Therefore, 'throttling' in general is not allowed.

However, traffic discrimination or degradation might be possible, if resulting from technical requirements essential for the proper provision of services and applications, and for the prioritisation of emergency services, in which cases the provider shall:

- not cause damage to users;
- act with proportionality, transparency and isonomy;
- inform users in advance, in a transparent, clear, and sufficiently descriptive manner, with regard to traffic management and mitigation practices adopted, including those related to network security; and
- offer services in non-discriminatory commercial conditions, refraining from practising anticompetitive conduct.

It is also forbidden to block, monitor, filter or analyse data packages' content.

Decree No. 8,771/2016 regulated the Internet Law and specifies that traffic discrimination and degradation are exceptional measures, aimed at maintaining the stability, security, integrity and functionality of networks, of which users should be aware. For these purposes, technical measures consistent with international standards, developed for Internet good operation and in accordance with Anatel's regulatory parameters and guidelines established by the Internet Management Committee in Brazil are required.

Platform regulation

Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

There is no specific legislation or regulation in place regarding exclusively digital platforms. Legislation such as the Internet Law (Law No. 12,965/2014) and its Regulatory Decree (Decree No. 8,771/2016); and the General Data Protection Act (Law No. 13,709/2018) (LGPD) provide guidance and establish rules regarding the use of the internet and the processing of personal data in physical and digital media.

There are, however, a lot of bills regarding the regulation of platforms, such as the Bill of Fake News (Bill No. 2,630/2020), which aims to establish rules regarding the transparency of social networks and private messaging services, especially with regard to the responsibility of service providers to combat misinformation and increase transparency on the internet, transparency in relation to sponsored content and the performance of public authorities, as well as it establishes sanctions for non-compliance with the law. This Bill is currently on its way through the House of Representatives.

There is also Bill No. 21/2020, which establishes foundations and principles for the development and application of artificial intelligence in Brazil, listing guidelines for the promotion and performance of public authorities on the subject. This Bill is currently in the Federal Senate.

Next-Generation-Access (NGA) networks

Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

No specific regulatory obligations are presently applicable to NGA networks in Brazil. However, the Brazilian government has been continuously promoting access to broadband since 2010, when Decree No. 7,175/2010 launched the National Broadband Plan. In the following years, several bids granting rights to use spectrum bands allocated for 3G, 4G, and 5G technologies were held. The largest auction of Anatel's history granted authorisations aimed to expand telecommunications services in Brazil; and as a result, 5G technology deployment began in 2022. Such expansion is also expected to positively impact the internet of things and machine-to-machine communications markets.

Data protection

Is there a specific data protection regime applicable to the communications sector?

There is no specific regime of data protection for the communications sector. The LGPD applies to all sectors in Brazil, including communications.

The LGPD applies to all processing operations carried out by a natural person or by a legal entity governed by public or private law, regardless of the format, the country of its headquarters or the country where the data are located, provided that the processing operation:

- is carried out in the national territory;
- the processing activity has the objective of offering or providing goods or services or the processing of data of individuals located in the national territory; or
- personal data subject to processing have been collected in Brazilian territory.

The LGPD also establishes principles that must be observed when processing personal data, with emphasis on purpose, adequacy, necessity, transparency, security and accountability, among others.

The communications sector may process personal data based on several legal bases, among which are consent, compliance with legal or regulatory obligations, the performance of a contract, protection of an individual's life, and the legitimate interest of the controller (provided that the legitimate expectations of the individual are respected). It is important to mention that there are specific legal bases when the processing of personal data involves sensitive data such as:

- data related to racial or ethnic origin;
- religious conviction;
- political opinion;
- affiliation to a union or organisation of a religious, philosophical or political nature; or
- data related to health or sex life, genetic or biometric data, when linked to a natural person.

With regard to controllers, they have a legal duty to:

- appoint a data protection officer;
- prepare a data protection impact assessment, with a description of the processes that may generate risks to civil liberties and fundamental rights, as well as measures, safeguards and risk mitigation mechanisms; and
- notify the Data Protection Authority (ANPD) and the data subjects of the occurrence of a security incident that may cause significant risk or damage to the holders.

They also have to respond to requests from personal data subjects, which may include requests such as:

- access to the data;
- correction of incomplete, inaccurate or outdated data;
- anonymisation, blocking, or erasure of unnecessary or excessive data or data processed in non-compliance with the provisions of the LGPD;
- portability of data to another service provider;
- deletion of the personal data processed with the consent of the data subjects;
- information about public and private entities with which the controller has shared data; or
- review of decisions taken by the controller solely based on automated processing of personal data that affects the data subject's interests, including decisions intended to define his or her consumer or credit profile, among others.

All processing agents must also maintain records of the processing of personal data, especially when based on legitimate interest, in addition to adopting security, technical and organisational measures.

Finally, it is worth mentioning that failure to comply with the provisions of the LGPD may give rise to the opening of an administrative process by the ANPD, which may impose sanctions such as warning, blocking of data, deletion of data, prohibition of processing activities and even fines that can reach the limit of 50 million reais per infraction. The administrative process by the ANPD does not prevent the filing of lawsuits by data subjects and the action of specific regulatory bodies such as Anatel.

In addition, Anatel has made an online page available about the processing of personal data carried out by the Agency, as well as privacy notices and contact information for the data protection officer, in compliance with the LGPD.

Cybersecurity

Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

Anatel's Resolution No. 740/2020 approved the Regulation of Cybersecurity Applied to the Telecommunications Sector, setting that conduct and procedures intended to promote cybersecurity in telecommunications networks and services shall ensure the principles of authenticity, confidentiality, availability, diversity, integrity, interoperability, priority, responsibility and transparency. Accordingly, individuals and legal entities directly or indirectly involved in the management or development of telecommunications networks and systems shall:

- adopt national or international rules and standards and good cybersecurity practices;
- seek the safe and sustainable use of such networks and services;
- identify, protect, diagnose, reply to – and recover – cybersecurity incidents; and
- stimulate the adoption of security by design and privacy by design concepts in the development and acquisition of products and services in the telecommunications sector, in addition to other guidelines.

Some of the Resolution’s provisions, however, might not apply to all telecommunications service providers.

Also, Decree No. 10,222/2020 (the National Strategy of Cybersecurity) determines in its annex the federal government’s goals to be achieved and actions to be taken, nationally and internationally, regarding cybersecurity, with an agenda from 2020 to 2023.

Decree No. 9,637/2018 establishes the National Information Security Policy, which determines the governance of information security to assure the availability, integrity, confidentiality and authenticity of the information in Brazilian territory.

Big data

Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

There is no specific legislation or regulation regarding exclusively big data in Brazil. Nevertheless, several pieces of legislation apply to big data. The LGPD, for instance, applies when addressing these matters as it determines the rules on personal data processing and establishes duties and rights for both processing agents and data subjects, ruling to protect the subjects’ privacy and self-determination regarding their personal data.

The Consumer Protection Code (Law No. 8,078/1990) establishes rules regarding consumers, granting consumers access to their data compiled in databases. The Internet Law also promotes as a goal the adherence to open technological standards that allow communication, accessibility and interoperability between applications and databases.

Data localisation

Are there any laws or regulations that require data to be stored locally in the jurisdiction?

There are no rules requiring the storage of personal data in Brazil. The Internet Law and LGPD cover matters related to the application of Brazilian law, rules on international data transfers and security measures to be adopted when storing information, but are silent on the subject of data localisation.

However, different economic sectors, especially the regulated ones (eg, banking, insurance and pensions, and health) may establish specific requirements. The Brazilian Central Bank, for example, issued Resolution No. 4658/2021, which provides for cybersecurity policy, in addition to the requirements for contracting storage and cloud computing services to be observed by financial institutions. According to the Resolution, the contracting of data storage services must be previously communicated to the Brazilian Central Bank, including information about the countries and regions where the services may be provided and the data may be stored.

Also, Complementary Norm/No. 14/IN01/DSIC/GSIPR, established in 2012 and edited in 2018, has the objective of setting guidelines regarding the use of technologies in government agencies. More specifically, it addresses cloud computing and the aspects related to security and data protection. The Norm requires that

information classified as secret or top secret cannot be processed on the cloud, for any reason. Also, data and metadata produced by and (or) under the responsibility of the agency must be stored in data centres within the national territory.

Key trends and expected changes

Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

Major investments are presently ongoing as a consequence of commitments undertaken by the winning bidders of the largest auction in Brazil's history, held in 2021, which resulted in authorisations being granted by Anatel for the use of radio frequencies in the 700MHz, 2.3GHz, 3.5GHz and 26GHz bands. This not only resulted in the implementation of 5G technology in 2022, but is also expanding access to communications and services in the country, including with 4G technology.

Other radio frequencies might come to be used for 5G applications following public consultations and further analysis and approval by Anatel, but it is not possible to predict whether or when the applicable reallocation might become effective.

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