
THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

SIXTH EDITION

EDITOR
JOHN P JANKA

LAW BUSINESS RESEARCH

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

The Technology, Media and Telecommunications Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Technology, Media and
Telecommunications Review - Edition 6
(published in November 2015 – editor John Janka)

For further information please email
Nick.Barette@lbresearch.com

THE TECHNOLOGY,
MEDIA AND
TELECOMMUNICATIONS
REVIEW

Sixth Edition

Editor
JOHN P JANKA

LAW BUSINESS RESEARCH LTD

PUBLISHER
Gideon Robertson

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, Felicity Bown, Joel Woods

ACCOUNT MANAGER
Jessica Parsons

PUBLISHING MANAGER
Lucy Brewer

MARKETING ASSISTANT
Rebecca Mogridge

EDITORIAL ASSISTANT
Sophie Arkell

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Caroline Herbert

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2015 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients.

Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of October 2015, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-909830-71-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ABOU JAOUDE & ASSOCIATES LAW FIRM

AJUMOGOBIA & OKEKE

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

BAKER & MCKENZIE

CASTRO, BARROS, SOBRAL, GOMES ADVOGADOS

CLEARY GOTTLLIEB STEEN & HAMILTON LLP

CMS

COELHO RIBEIRO & ASSOCIADOS

DESCHAMPS Y ASOCIADOS SC

ELVINGER, HOSS & PRUSSEN

GRATA LAW FIRM

KARATZAS & PARTNERS LAW FIRM

LATHAM & WATKINS LLP

NIEDERER KRAFT & FREY LTD

SETH DUA & ASSOCIATES

SHAY & PARTNERS

ÜNSAL GÜNDÜZ

URÍA MENÉNDEZ

WEBB HENDERSON

YOON & YANG LLC

ZHONG LUN LAW FIRM

CONTENTS

Editor's Preface	vii
<i>John P Janka</i>	
List of Abbreviations	ix
Chapter 1 COMPETITION LAW OVERVIEW.....	1
<i>Abbott B Lipsky, Jr and John D Colahan</i>	
Chapter 2 AUSTRALIA.....	16
<i>Angus Henderson, Raymond Roca and Capucine Hague</i>	
Chapter 3 BRAZIL.....	30
<i>André Gomes de Oliveira, Renato Parreira Stetner and Tiago Franco da Silva Gomes</i>	
Chapter 4 CANADA	41
<i>Theo Ling, Ricard Pochkhanawala, Jonathan Tam and Andrew Chien</i>	
Chapter 5 CHINA.....	58
<i>Jihong Chen</i>	
Chapter 6 EU OVERVIEW	71
<i>Maurits J F M Dolmans, Francesco Maria Salerno and Federico Marini-Balestra</i>	
Chapter 7 FRANCE.....	89
<i>Myria Saarinen and Jean-Luc Juban</i>	
Chapter 8 GERMANY.....	107
<i>Gabriele Wunsch</i>	

Chapter 9	GREECE.....	124
	<i>Anna Manda and Valia Apostolopoulou</i>	
Chapter 10	HONG KONG.....	142
	<i>Simon Powell and Chi Ho Kwan</i>	
Chapter 11	INDIA.....	158
	<i>Atul Dua and Arjun Uppal</i>	
Chapter 12	INDONESIA.....	173
	<i>Agus Ahadi Deradjat and Kevin Omar Sidharta</i>	
Chapter 13	JAPAN.....	187
	<i>Hiroki Kobayashi, Saori Kawakami, Daniel Senger and Shintaro Ojima</i>	
Chapter 14	KAZAKHSTAN	203
	<i>Yerzhan Yessimkhanov and Assel Kalmagambetova</i>	
Chapter 15	KOREA.....	215
	<i>Wonil Kim and Kwang-Wook Lee</i>	
Chapter 16	LEBANON	227
	<i>Souraya Machnouk, Joy Lahoud and Ziad Maatouk</i>	
Chapter 17	LUXEMBOURG	240
	<i>Linda Funck</i>	
Chapter 18	MEXICO	261
	<i>Jaime Deschamps and Andoni Zurita</i>	
Chapter 19	NIGERIA.....	271
	<i>Ebunoluwa Awasika and Olumide K Obayemi</i>	
Chapter 20	POLAND.....	284
	<i>Tomasz Koryzma, Agnieszka Besiekierska and Marcin Lewoszewski</i>	

Chapter 21	PORTUGAL.....	294
	<i>Jaime Medeiros and Mónica Oliveira Costa</i>	
Chapter 22	RUSSIA.....	307
	<i>Maxim Boulba and Elena Andrianova</i>	
Chapter 23	SINGAPORE.....	318
	<i>Ken Chia and Seng Yi Lin</i>	
Chapter 24	SPAIN	341
	<i>Pablo González-Espejo</i>	
Chapter 25	SWITZERLAND	354
	<i>András Gurovits</i>	
Chapter 26	TAIWAN.....	370
	<i>Arthur Shay and David Yeh</i>	
Chapter 27	TURKEY.....	384
	<i>Burçak Ünsal and Okan Gündüz</i>	
Chapter 28	UNITED KINGDOM	399
	<i>Omar Shah and Gail Crawford</i>	
Chapter 29	UNITED STATES	434
	<i>John P Janka and Jarrett S Taubman</i>	
Chapter 30	UZBEKISTAN.....	455
	<i>Nodir Yuldashev</i>	
Appendix 1	ABOUT THE AUTHORS.....	467
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS ...	489

EDITOR'S PREFACE

This fully updated sixth edition of *The Technology, Media and Telecommunications Review* provides an overview of the evolving legal constructs relevant to both existing service providers and start-ups in 29 jurisdictions around the world. It is intended as a business-focused framework for beginning to examine evolving law and policy in the rapidly changing TMT sector.

The burgeoning demand for broadband service, and for radio spectrum-based communications in particular, continues to drive law and policy in the TMT sector. The disruptive effect of these new ways of communicating creates similar challenges around the world:

- a* the need to facilitate the deployment of state-of-the-art communications infrastructure to all citizens;
- b* the reality that access to the global capital market is essential to finance that infrastructure;
- c* the need to use the limited radio spectrum more efficiently than before;
- d* the delicate balance between allowing network operators to obtain a fair return on their assets and ensuring that those networks do not become bottlenecks that stifle innovation or consumer choice; and
- e* the growing influence of the 'new media' conglomerates that result from increasing consolidation and convergence.

A global focus exists on making radio spectrum available for a host of new demands, such as the developing 'Internet of Things,' broadband service to aeroplanes and vessels, and the as yet undefined, next-generation wireless technology referred to as '5G'. This process involves 'refarming' existing bands, so that new services and technologies can access spectrum previously set aside for businesses that either never developed or no longer have the same spectrum needs. In many cases, an important first step will occur at the World Radiocommunication Conference in November 2015, in Geneva, Switzerland, where countries from around the world will participate in a process that sets the stage for these new applications. No doubt, this conference will lead to changes in long-standing radio

spectrum allocations that have not kept up with advances in technology, and it should also address the flexible ways that new technologies allow many different services to co-exist in the same segment of spectrum.

Many telecommunications networks once designed primarily for voice are now antiquated and not suitable for the interactive broadband applications that can extend economic benefits, educational opportunities and medical services throughout a nation. As a result, many governments are investing in or subsidising broadband networks to ensure that their citizens can participate in the global economy, and have universal access to the vital information, entertainment and educational services now delivered over broadband. Governments are also re-evaluating how to regulate broadband providers, whose networks have become essential to almost every citizen. Convergence, vertical integration and consolidation are also leading to increased focus on competition and, in some cases, to changes in the government bodies responsible for monitoring and managing competition in the TMT sector.

Changes in the TMT ecosystem, including the increased reliance by content providers on broadband for video distribution, have also led to a policy focus on 'network neutrality' – the goal of providing some type of stability for the provision of important communications services on which almost everyone relies, while also addressing the opportunities for mischief that can arise when market forces work unchecked. While the stated goals of that policy focus are laudable, the way in which resulting law and regulation are implemented can have profound effects on the balance of power in the sector, and raises important questions about who should bear the burden of expanding broadband networks to accommodate the capacity strains created by content providers.

These continuing developments around the world are described in the following chapters, as well as the developing liberalisation of foreign ownership restrictions, efforts to ensure consumer privacy and data protection, and measures to ensure national security and facilitate law enforcement. Many tensions exist among the policy goals that underlie the resulting changes in the law. Moreover, cultural and political considerations often drive different responses at the national and the regional level, even though the global TMT marketplace creates a common set of issues.

I would like to take the opportunity to thank all of the contributors for their insightful contributions to this publication and I hope you will find this global survey a useful starting point in your review and analysis of these fascinating developments in the TMT sector.

John P Janka

Latham & Watkins LLP

Washington, DC

October 2015

LIST OF ABBREVIATIONS

3G	Third-generation (mobile wireless technology)
4G	Fourth-generation (mobile wireless technology)
5G	Fifth-generation (mobile wireless technology)
ADSL	Asymmetric digital subscriber line
AMPS	Advanced mobile phone system
ARPU	Average revenue per user
BIAP	Broadband internet access provider
BWA	Broadband wireless access
CATV	Cable TV
CDMA	Code division multiple access
CMTS	Cellular mobile telephone system
DAB	Digital audio broadcasting
DECT	Digital enhanced cordless telecommunications
DDoS	Distributed denial-of-service
DoS	Denial-of-service
DSL	Digital subscriber line
DTH	Direct-to-home
DTTV	Digital terrestrial TV
DVB	Digital video broadcast
DVB-H	Digital video broadcast – handheld
DVB-T	Digital video broadcast – terrestrial
ECN	Electronic communications network
ECS	Electronic communications service
EDGE	Enhanced data rates for GSM evolution
FAC	Full allocated historical cost
FBO	Facilities-based operator
FCL	Fixed carrier licence
FTNS	Fixed telecommunications network services

List of Abbreviations

FTTC	Fibre to the curb
FTTH	Fibre to the home
FTTN	Fibre to the node
FTT _x	Fibre to the <i>x</i>
FWA	Fixed wireless access
Gb/s	Gigabits per second
GB/s	Gigabytes per second
GSM	Global system for mobile communications
HDTV	High-definition TV
HITS	Headend in the sky
HSPA	High-speed packet access
IaaS	Infrastructure as a service
IAC	Internet access provider
ICP	Internet content provider
ICT	Information and communications technology
IPTV	Internet protocol TV
IPv6	Internet protocol version 6
ISP	Internet service provider
kb/s	Kilobits per second
kB/s	Kilobytes per second
LAN	Local area network
LRIC	Long-run incremental cost
LTE	Long Term Evolution (4G technology for both GSM and CDMA cellular carriers)
Mb/s	Megabits per second
MB/s	Megabytes per second
MMDS	Multichannel multipoint distribution service
MMS	Multimedia messaging service
MNO	Mobile network operator
MSO	Multi-system operators
MVNO	Mobile virtual network operator
MWA	Mobile wireless access
NFC	Near field communication
NGA	Next-generation access
NIC	Network information centre
NRA	National regulatory authority
OTT	Over-the-top (providers)
PaaS	Platform as a service
PNETS	Public non-exclusive telecommunications service
PSTN	Public switched telephone network
RF	Radio frequency
SaaS	Software as a service
SBO	Services-based operator
SMS	Short message service
STD-PCOs	Subscriber trunk dialling—public call offices
UAS	Unified access services

List of Abbreviations

UASL	Unified access services licence
UCL	Unified carrier licence
UHF	Ultra-high frequency
UMTS	Universal mobile telecommunications service
USO	Universal service obligation
UWB	Ultra-wideband
VDSL	Very high speed digital subscriber line
VHF	Very high frequency
VOD	Video on demand
VoB	Voice over broadband
VoIP	Voice over internet protocol
W-CDMA	Wideband code division multiple access
WiMAX	Worldwide interoperability for microwave access

Chapter 3

BRAZIL

André Gomes de Oliveira, Renato Parreira Stetner and Tiago Franco da Silva Gomes¹

I OVERVIEW

Federal Law 9,472/1997 (LGT) – the main statutory basis for the telecoms sector – celebrates its 18th year in 2015. Since the privatisation of the companies that comprised the Telebrás System up to the present day, development has been extraordinary in terms of quality, universalisation of services and competition within the sector, and especially in mobile services. Regulation of the sector is stable and consolidated, and the management of spectrum for broadcasting frequencies and certification, as well as the accreditation of telecoms equipment, have become more efficient.

Despite these achievements, new issues continue to appear as the sector evolves. Technological convergence, with the biggest players joining efforts for the offering of double, triple and quadruple-play service, has led to concentration and made the review of many of the regulations urgent.

In this sense, the renewal of the General Concessions Plan in 2008 broadened the scope of activities and companies regulated by the National Telecommunications Agency (ANATEL), and relaxed the requirements for the approval of mergers of PSTN carriers. The new General Regulation Plan, enacted in 2008, reiterated the regulatory principles of the LGT, but with greater focus on the rollout of broadband access and increasing the offer of convergent services. Finally, since 2011, the new General Objective Plan towards the universalisation of services has focused on the use of backhaul as the network infrastructure for the support of the PSTN for the connection of broadband internet, defining the general objectives for the minimum capability of the backhaul and setting the parameters for the analysis of the quality of the PSTN.

¹ André Gomes de Oliveira, Renato Parreira Stetner and Tiago Franco da Silva Gomes are partners at Castro, Barros, Sobral, Gomes Advogados.

II REGULATION

i The regulators

The Brazilian Constitution of 1988 established the general guidelines for the TMT sector. Article 22(IV) establishes the exclusive competence of the Federal Union to legislate on telecommunications and broadcasting. Article 21(XI and XII) establishes the competence of the Federal Union to permit the operation of telecoms and broadcasting services, either directly or indirectly, by means of authorisation, concession or permission.

The LGT created ANATEL and divided the competence for regulating TMT in Brazil between the Ministry of Communications (MiniCom) and ANATEL.

MiniCom is responsible for defining public policy in the TMT sector, and is responsible, *inter alia*, for approving the general universalisation plan. MiniCom is also responsible for granting authorisations, permissions or concessions for the private operation of broadcasting services.²

ANATEL is responsible for regulating and overseeing the operation of telecoms and broadcasting services by private entities in Brazil,³ as well as for granting the permissions for private entities to operate telecoms services in the country, including cable TV.⁴ While linked with MiniCom, ANATEL is administratively and financially independent. ANATEL's directors are appointed by the President, after approval by the Senate, and their terms of office are fixed. As per Article 19 of the LGT, ANATEL is responsible for the development of the TMT sector, acting with independence, impartiality and in accordance with the law.

Among its responsibilities are:

- a* implementation of the national telecommunications policy set out by MiniCom;
- b* management of the spectrum of radio frequencies and the use of orbits, and issuance of the corresponding rules;
- c* issuance of certification of telecommunications products;
- d* resolution of conflicts of interest that may arise among the companies providing telecoms services; and
- e* punishment of infractions of users' rights.

The Administrative Council of Economic Defence is responsible for the analysis of mergers in the sector (the notification of the merger is made by ANATEL, which may either suggest the approval or the rejection of such merger) and also for investigating anti-competitive conduct in the sector alongside ANATEL.⁵

Finally, the Ministry of Justice is responsible for the classification of programmes, and imposing restrictions on content during certain hours of the day depending on the age-group classification.

2 Article 1 of Law 11,652/2008.

3 Article 211 of the LGT.

4 Article 212 of the LGT.

5 Articles 7(2) and 19 of the LGT.

ii Regulated activities

The Telecommunications Services Ruling⁶ establishes that telecoms services in Brazil are regulated by the LGT, the Telecommunications Services Ruling itself, and the regulations, plans and rules applicable to each service.⁷ Thus, the Brazilian TMT sector is subject to a vast number of rulings and concession instruments. Currently, there are more than 30 different types of licence, concession and authorisation for the rendering of telecoms services.

Although the convergence of technology has been pushing the regulators and the legislators toward the adoption of one universal licence – similar to the European system – restrictions imposed by the Constitution and the existence of public and private regimes for the rendering of telecoms services (with a whole different set of obligations and rights for companies acting in each sector) are serious impediments to the implementation of a universal licence.

Pursuant to Article 63 of the LGT, public telecoms services may be provided under concession or permission from ANATEL, as opposed to private telecoms services, which are provided under authorisation. According to Decree 6,654/2008 (which approves the General Concessions Plan), the only service currently classified as public is the Federal Telecommunications System. The remaining services are all private, including multimedia communication services,⁸ cable TV and other technologies dealing with subscription TV.⁹

Concessions are granted following public tender procedures, and concessionaires must grant guarantees to ANATEL, and demonstrate their legal and taxation compliance as well as their technical and financial qualifications. Alternatively, authorisations are granted based on the availability of the band required for the services and the presentation by the authorised company of a technically viable plan.¹⁰

Value-added services (VAS) are not regulated and require no permits or licences from ANATEL or the Ministry of Communication.

iii Ownership and market access restrictions

Telecommunications companies

Companies providing Federal Telecommunications System services must be incorporated under the laws of Brazil and headquartered in the Brazilian territory. The majority of voting shares in such a company must be held by Brazilian natives resident in the country or by Brazilian-incorporated companies with their headquarters in the country.¹¹ For companies rendering any other telecoms service, the only restriction applicable is that they must be incorporated under the laws of Brazil or have their legal seat in Brazil.

6 Approved by ANATEL Resolution 73/1998.

7 Article 1 of the Telecommunications Services Ruling.

8 ANATEL Ruling 272/2001.

9 Article 29 of Law 12,485/2011.

10 Article 132 of the LGT.

11 Article 18(II) of the LGT and Article 1 of Decree 2,617/1998.

Broadcasting companies

Article 222 of the Constitution states that the property of newspaper companies, audio broadcasting companies, and sound and image broadcasting companies, must be exclusive to native Brazilians or those naturalised for more than 10 years; or by legal entities incorporated under Brazilian laws and headquartered in Brazil that have at least 70 per cent of the total capital stock and of the voting capital held, directly or indirectly, by native Brazilians or those naturalised for more than 10 years. The management of these companies and the definition of content or programming are also reserved to native Brazilians or those naturalised for more than 10 years. Article 2 of Law 10,610/2002 states that foreigners and those naturalised for less than 10 years will only be able to hold a stake in those companies indirectly by means of a Brazilian holding company.

Restrictions arising from Law 12,485/2011

Law 12,485/2011 establishes a further limitation. Broadcasting companies, and also content producers and programmer companies of conditioned-access services,¹² cannot hold more than 50 per cent of the total and voting shares of companies rendering telecoms public interest services (which differ from telecommunication services in the public system classification and include, *inter alia*, the Federal Telecommunications System, cable TV, MMDS, CMTS, GSM and mobile in general); neither can broadcasting companies, content producers and programmer companies for conditioned-access broadcasting provide public telecoms services.¹³

Conversely, those providing public-interest telecoms services cannot hold, directly or indirectly, more than 30 per cent of the total and voting shares of broadcasting companies, content producers and programmer companies of conditioned access; neither can they directly or indirectly provide broadcasting services, nor produce content and programmes for conditioned-access broadcasting.

iv Transfers of control and assignments

Telecommunication companies

The spin-off, merger, transformation, incorporation, reduction of capital stock or transfer of control of companies rendering telecoms services, as well as the assignment of a concession, permission or authorisation, will depend on prior authorisation from ANATEL.¹⁴

12 See Section VI, paragraph 2, *infra*. According to Law 12,485/2011 (Article 2(XXII)), conditioned-access services are privately provided subscription telecommunications services of public interest intended for the broadcast of audiovisual content formatted in packages; channels in programmed spare mode; programmed content-spare mode; and channels of mandatory broadcasting, by means of technology, procedures, electronic means and any communication protocols.

13 Article 5.

14 Article 97 of the LGT.

The transaction will be approved or the permission transferred provided the transaction is neither harmful to free competition in the sector nor capable of jeopardising the fulfilment of the company's regulatory obligations.

Furthermore, ANATEL's approval will be granted as long as the services have been satisfactorily rendered for at least three years, and the assignee fulfils all the requirements for the concession, permission or authorisation, including those related to guarantees, legal and tax regularity, and technical and financial qualifications.

Broadcasting companies

According to Article 28(10) of Decree No. 52,795/63, broadcasters must request prior authorisation from MiniCom to amend their by-laws, transfer their concessions or permissions, or assign shares.

Decree 52,795/63 establishes two ways of implementing the transfer of a concession: directly (when one legal entity transfers a concession to another) or indirectly (when the majority of the shares of a legal entity are transferred to a group of shareholders that will thereafter exercise control).

The request must be addressed to MiniCom. Whatever the transfer implemented (direct or indirect), the authorisation may only be granted five years after the date of issuance of the licence to operate.¹⁵

Finally, according to Article 3 of Law 10,610/02, MiniCom must inform Congress of any change in share control of a broadcaster.

Conditioned-access services companies

Law 12,485/2011 states that licences for the rendering of cable TV, MMDS, DTH and subscription TV in general will remain valid. Upon the approval of the regulation on conditioned-access services, companies currently rendering those services may – provided that they fulfil the objective and subjective conditions set out in the regulation to be approved, and under the commitment that the services will continue to be rendered for similar prices – request the adaptation of their licences for the rendering of conditioned access services. Until the approval of the regulation, ANATEL will only approve the renewal of licences for broadcasting, licence assignments, transfers of control, and any changes in ownership of companies rendering cable TV, MMDS, DTH and subscription TV in general if the companies commit to adapt their services to conditioned-access services. As from the date of enactment of Law 12,485/2011, no new licences for cable TV, MMDS, DTH and subscription TV will be granted, and licences for the provision of conditioned-access services will be dependent on the absence of other licences granted to any company of the same group for cable TV, MMDS, DTH or subscription TV.

15 Ibid., Article 91.

III TELECOMMUNICATIONS AND INTERNET ACCESS

i Internet and internet protocol regulation

Internet services are considered VAS and therefore not subject to ANATEL regulation. Since 2005, there has been intense discussion as to the legal nature of internet services and whether they should be considered telecoms services or VAS. ANATEL's current position is that internet protocols are a set of technologies that make use of internet or IP private networks, and as such should be considered VAS.

On 23 April 2014, Law 12,965 (the Brazilian Legal Framework for the Internet (Internet Framework)) was enacted, setting forth the principles, guarantees, rights and obligations relating to the use of the internet in Brazil. According to Article 2 of the Internet Framework, the regulation of the internet in Brazil is based upon:

- a* the acknowledgement of its global scale;
- b* human rights and the exercise of citizenship by digital means;
- c* plurality and diversity;
- d* openness and cooperation;
- e* free enterprise, free competition and consumer protection; and
- f* the social purpose of the internet.

It also follows the principles of:¹⁶

- a* free expression, communication and manifestation of thought in accordance with the Constitution;
- b* protection of privacy;
- c* protection of personal data;
- d* preservation and guarantee of internet neutrality;
- e* preservation of the stability, security and functionality of the internet by means of the adoption of techniques compatible with international standards and encouraging the use of good practices;
- f* accountability of internet agents in accordance with their activities;
- g* preservation of the cooperative nature of the internet; and
- h* freedom of business models promoted on the internet, provided they do not conflict with other principles.

Finally, the Internet Framework aims to promote:¹⁷

- a* the right of access to the internet of all Brazilian citizens;
- b* access to information, knowledge and participation in cultural life and public issues;
- c* innovation and diffusion of new technologies and models of use and access to the internet; and
- d* adhesion to open technological standards that allow the communication, accessibility and interoperability between applications and database.

16 Article 3.

17 Article 4.

ii Universal service

Federal Decree 7,175/2010 created the National Broadband Programme (PNBL) with the purpose of increasing access to broadband and promoting digital inclusion. To help achieve these objectives, the PNBL changed the purpose of the federal corporation Telebrás to foster development of broadband services.

Telebrás must, among other duties imposed by the Decree 7,175/2010:

- a* implement a dedicated network for the federal public administration;
- b* provide the network infrastructure and support to services rendered by private companies; and
- c* provide broadband connection services to end-users in those locations where there is inadequate provision of those services by the private sector.

According to MiniCom, in 2011 36.5 per cent of Brazilian households had access to the internet. Between October 2011, when PNBL services started being provided in 621 cities, and March 2013, by which time PNBL services were being provided in 2,930 cities, the number of households with access to the internet increased by 54 per cent, and the PNBL is responsible for almost 13 per cent of the total households with access to the internet. In May 2014, when PNBL services were being provided in 4,633 cities, there were 23.1 million Brazilians with access to the internet, an increase of 76 per cent since PNBL services were first offered.

iii Restrictions on the provision of service

There are no restrictions on the provision of internet services in Brazil. Network owners are obliged to provide services to anyone, as a general rule arising from the Brazilian Competition Law forbids unjustified refusals of service.

In addition, Article 9 of Law 12,965/2014 provides that the network owner shall treat equally any data package, with no distinction between content, source and destination, service, terminal or application, except for traffic arising from the technical requirements of the service or the prioritisation of emergency services. Furthermore, internet service providers may not monitor, filter, analyse or oversee the content of data packages.

iv Security

Internet security issues are currently treated by the judiciary on a case-by-case basis, based upon general legislation applicable to crimes, civil liability of service providers, and torts, as well as the constitutional provisions on freedom of speech. The Superior Court of Justice has recently decided that search engines and web hosting services cannot be held strictly liable for prejudicial content posted by third parties,¹⁸ although the latter may be held jointly and severally liable with the author of the content to indemnify the offended parties should they fail to take immediate action to remove the prejudicial content upon notification by the offended party.

18 REsp 1316921/RJ and REsp 1192208/MG.

Articles 10 to 17 of Law 12,965/2014 specify the responsibility of internet providers to maintain data under secrecy. It exempts the service provider from any liability for damages caused to third parties arising from contents posted by its customers, except in cases of non-compliance with a judicial order for the exclusion of the content. Basically, the interested parties will be able to request that the Brazilian courts order a specific injunction either for obtaining records of connections made or for the removal of prejudicial content.

IV SPECTRUM POLICY

i Development

Technological convergence is forcing the Brazilian authorities to constantly review their management of the spectrum. The most evident concerns of ANATEL are the search for flexibility (so that the various bands may be used for different kinds of services) and technological neutrality (to define the conditions of use of radio frequencies without benefiting any certain technology or provider).

Besides the growing concern about the demand for spectrum by broadband and next-generation mobile services, ANATEL's challenge is to balance such demand with the needs of other technologies such as DTTV, aeronautical mobile services, MMS and auxiliary broadcasting and related services, so as to make sure that the use of the spectrum is efficient, rational and adequate. In October 2010, ANATEL issued Resolution 548/2010, which regulates the evaluation of the efficiency of use of the spectrum.

ii Flexible spectrum use

As mentioned in Section IV.i, *supra*, the major focus of ANATEL's activity regarding the regulation of spectrum use in Brazil is related to ensuring flexibility. The use of technologies such as cognitive radio systems and software-defined radio has been discussed as a means to ensure such flexibility.

iii Broadband and next-generation mobile spectrum use

The growing need for spectrum for broadband and next-generation mobile services is of concern to the Brazilian regulators. According to ANATEL's 2014 annual report, by 31 December 2015, Brazil had 280.7 million mobile phones, of which more than 56 per cent had access to high-speed internet (3G and 4G). From 2013 to 2014, the amount of mobile devices allowing data traffic grew from 103.1 million to 157.9 million – an increase of 53.1 per cent. The expectation is that the number will keep growing in future years. Prior to 2010, the 754MHz band was designated for mobile services, and in 2011 and 2012, ANATEL auctioned the 450MHz, 1.8GHz and 2.5GHz bands to meet the growing demand for broadband and mobile services. However, the available infrastructure proved insufficient before the growing demand, forcing ANATEL to auction the 700MHz band for broadband and mobile services in September 2014. This entailed the remodelling of the system, since this band had previously been used for broadcasting.

iv Spectrum auctions and fees

Spectrum is a limited resource and a public property,¹⁹ and authorisation for its use depends upon public auctions,²⁰ except for those bands dedicated to military use and of restricted frequencies. The minimum fee is set by ANATEL before the bidding process. In 2012, the 450MHz and 2.5GHz bands were auctioned, and the successful bidders paid 2.72 billion reais. The average premium paid was 34.37 per cent higher than the minimum values established by ANATEL. In 2014, the 750MHz band was auctioned, and the successful bidders paid 5.2 billion reais.

V MEDIA

i Restrictions on the provision of service

Besides the age-classification restrictions imposed by Law 8,069/1990, the only current content restrictions are those arising from Law 12,485/2011, which imposes obligations of national content in conditioned-access services. In addition, not only are broadcasters and content providers (the producers and the programmers) regulated separately (with the restrictions on cross-ownership mentioned in Section II.iii, *supra*), so are ‘packers’, which are companies responsible for selling several content channels in different packages to end-users.

Telecoms carriers have sought to increase their revenues by offering VAS, making entertainment and interactivity available through mobile phones and other devices. VAS are not regulated in Brazil, but ANATEL has been regulating those integrator companies that are responsible for integrating the VAS content generated by content providers to the PSTN carriers’ networks.

ii Digital switchover

The digital switchover is still ongoing in Brazil. Federal Decree 5,820/2006, as amended by the Federal Decree 8,061/2013, set forth that MiniCom would be responsible for establishing a schedule for the transition from analogue to digital transmission, beginning on November 2015 and ending by November 2018. In 2019, MiniCom will revoke the remaining analogue broadcasting concessions.

The implementation of the Brazilian DTTV standard is stimulating the development of programming providers. Ginga, which is an intermediary layer of open-source software developed by two Brazilian universities that supports interactivity in DTTV and mobile devices, is also an important contribution to the development of digital content for both DTTV and mobile devices. Finally, the federal government is working towards the implementation of tax incentives for the expansion of production of digital content for the Brazilian DTTV.

19 Article 157 of the LGT.

20 Article 164(I) of the LGT.

iii Internet-delivered video content

Social digital inclusion is a permanent concern in Brazil – as demonstrated by the enactment of the PNBL and several regulations from ANATEL to enhance the attractiveness of providing broadband services to low-income regions of the country – which leads to the conclusion that the move from broadcast video distribution to internet video distribution may not reach low-income customers. The impact on low-income users cannot yet be measured, as many of them do not have access to content other than broadcast TV, which is still the pre-eminent format in Brazil.

Currently, ISPs cannot control and be compensated for the content being transmitted over their networks. Indeed, one of the major debates among ISPs continues to be network neutrality. ISPs complain that at least part of the investment in network infrastructure should be shared by content providers, as they claim that a huge portion of the traffic is due to the services provided by video distribution companies.

iv Mobile services

Originally, the LGT had envisaged a separation between FTNS and PSTN, and set out rules for the separation of activities from companies providing each service. With the achievement of the universalisation targets and the convergence of both technologies, the restrictions disappeared and land carriers were authorised to provide mobile services, leading to market consolidation through mergers.

As mentioned in Section IV.iii, *supra*, the growing demand for mobile media services has resulted in more spectrum becoming available.

VI THE YEAR IN REVIEW

The telecoms sector has undergone important advances during the past 12 months.

ANATEL has approved its new internal ruling aiming to set out more rational procedures that will allow it to focus more on areas such as competition, monitoring obligations and defence of consumer rights. It has also set the rules of the General Plan of Competition Goals, which is based upon free and open competition among companies acting in the sector, and the System for the Negotiation of Wholesale Offers, which establishes, on an isonomic and non-discriminatory basis, the process for the negotiation of the contracting of products in the wholesale market offered by those telecommunication companies with significant market power. It has also auctioned the 700MHz spectrum for digital TV, thus allowing the use of the 2.5GHz spectrum by 4G carriers.

According to ANBIMA, the Brazilian association of companies acting in the financial and capital markets, in 2014 mergers and acquisitions in the TMT sector in Brazil represented 29.9 per cent of the total amount of mergers and acquisitions in Brazil, mainly due to the acquisition by Altice of Portugal Telecom (for 23.8 billion reais) and of GVT by Telefónica (for 23.5 billion reais). In the first semester of 2015, the sector represented 2.9 per cent of the total number of mergers and acquisitions in Brazil.

VII CONCLUSIONS AND OUTLOOK

Brazil's TMT sector has seen extraordinary progress in the past 18 years, and Brazilians now have easy access to PSTN and FTNS, broadband and cable TV. Nevertheless, social inclusion, quality issues and customer service remain challenges in the TMT sector in Brazil.

Looking ahead, light should be shed on the enactment of new rules for the internet (Law 12,965/2014), which, in summary, regulates:

- a* the rights and guarantees of internet users;
- b* the traffic of data over the internet and the conditions for the rendering of said services;
- c* the conditions for record keeping and how such records would be available to the authorities;
- d* the liabilities of service providers for third parties' acts; and
- e* the role of public authorities in regulating the network environment with regard to constitutional guarantees such as freedom of speech and the right to privacy.

Nevertheless, Law 12,965/2014 only came into force in June 2014, and thus it is still too early to be able to draw any conclusions on these matters.

Finally, network neutrality is soon likely to become a key issue, even though it is currently the rule. The most conservative prognosis is that by 2016, internet traffic demand in Brazil will increase eight-fold. As much of the TMT sector's profitability seems to have moved to the content production and distribution layers, there will be an interesting debate about who bears the burden of infrastructure expansion to meet the constant increase in traffic, with internet network providers pushing for content providers to split the bill.

Appendix 1

ABOUT THE AUTHORS

ANDRÉ GOMES DE OLIVEIRA

Castro, Barros, Sobral, Gomes Advogados

André Gomes de Oliveira is a partner at Castro, Barros, Sobral, Gomes, and head of its tax department, based in Rio de Janeiro. Mr Oliveira's practice includes taxation in general, with an emphasis on taxation in the telecoms sector. Mr Oliveira is a graduate of the Rio de Janeiro State University Law School. He is a member of the International Fiscal Association and a former chair of the British Chamber of Commerce – Rio.

RENATO PARREIRA STETNER

Castro, Barros, Sobral, Gomes Advogados

Renato Parreira Stetner is a partner at Castro, Barros, Sobral, Gomes, based in São Paulo. His practice includes corporate and commercial transactions, regulatory advice and representation before the regulatory agencies. Mr Stetner is a graduate of the University of São Paulo Law School, with a master's degree (LLM) from the University of Pennsylvania.

TIAGO FRANCO DA SILVA GOMES

Castro, Barros, Sobral, Gomes Advogados

Tiago Franco da Silva Gomes is a partner at Castro, Barros, Sobral, Gomes, based in São Paulo. His practice includes mergers and acquisitions, and regulatory matters. Mr Gomes has advised local and international companies in proceedings before the regulator. He holds a master's degree from the University of São Paulo Law School.

CASTRO, BARROS, SOBRAL, GOMES ADVOGADOS

Rua do Rocio, 291, 11th Floor

04552-000 São Paulo

Brazil

Tel: +55 11 3040 0908

Fax: +55 11 3040 0938

Av Rio Branco 110, 14th Floor

20040-001 Rio de Janeiro

Brazil

Tel: +55 21 2132 1855

Fax: +55 21 2132 1856

andre.oliveira@cbsg.com.br

renato.stetner@cbsg.com.br

tiago.gomes@cbsg.com.br

www.cbsg.com.br