

A newsletter on technology, media, telecommunications and internet. Our practice group gathers knowledge from different areas to provide a holistic approach to the most complex legal issues brought by our clients. From telecommunications and audiovisual regulatory matters to tax, labor and intellectual property, Brazil is not a country of simple answers; an approach taken by a global company in another jurisdiction may need to be considered from surprising new angles.

PUBLICATION FREQUENCY

Monthly

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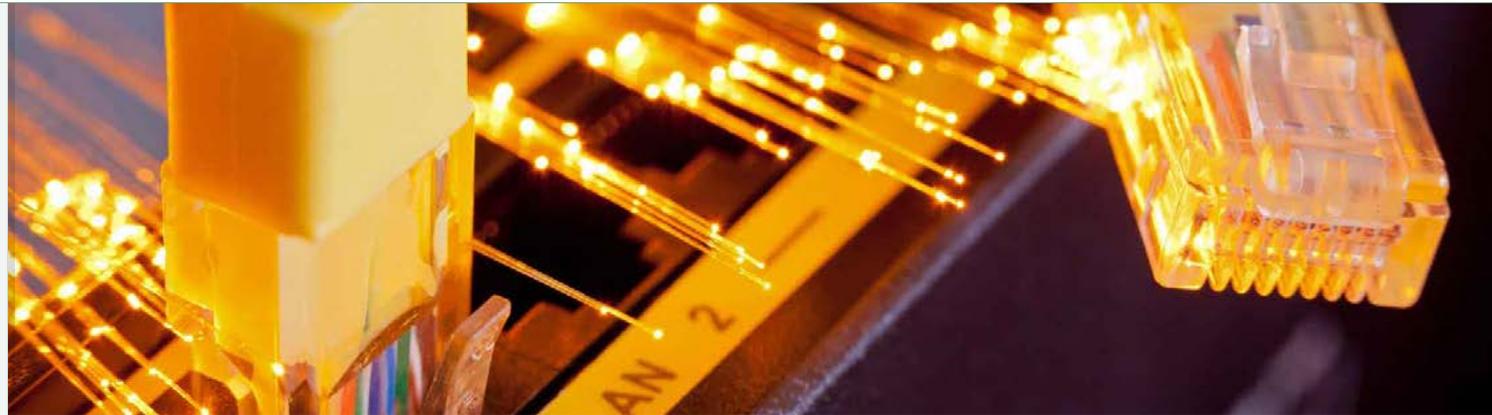


PHOTO: ADOBE STOCK

REGULATORY

Fixed broadband data caps: ANATEL releases Q&A for the public

As we previously reported in this bulletin, the National Telecommunications Agency (“ANATEL”) is working on a Regulatory Impact Report (Análise de Impacto Regulatório – AIR) addressing the effects of data caps adopted by telecom carriers. The report must be issued until the end of the first semester of 2017 and will assist ANATEL to adopt a final decision on whether data caps will be permitted or not (and, if permitted, under what limits and requirements).

For purposes of preparing the AIR, ANATEL has issued a list of questions addressing technical, economic, competition and legal aspects related to data caps. ANATEL also released a list of required respondents including representatives of universities, consumers, government and the private sector, in order to make sure

it will receive contributions from different perspectives. The questions will also be available at ANATEL’s website so that other interested parties may provide their contributions.

In the meantime, ANATEL’s provisional measure issued on April 22, 2016 that prohibited carriers to impose data caps until an ultimate regulation to the matter is enacted remains in force.

Why is this important?

Data caps on fixed broadband may have significant impact not only on the consumers and carriers business models, but also on all OTTs whose services depend on the availability of fixed broadband services. s.

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Will OTT services be regulated?

ANATEL informed its intention to broaden its regulatory authority in order to also encompass certain internet-related matters.

ANATEL has historically kept some distance from OTTs, as they are considered value added services (not subject to telecom regulation). Igor de Freitas, a member of ANATEL's board of directors stated in an industry event that he now feels that ANATEL lacks data and information on internet related matters to adequately support its decision-making.

A proposal to revise ANATEL's authority may be submitted for appreciation of ANATEL's board by the end of the year, but an effective change may still depend on a Congress' initiative.

Why is this important?

ANATEL has been a heavy handed regulator over telecom incumbents throughout the years. OTTs fear the expansion of ANATEL's authority will increase bureaucracy and the cost of their services.

Government working group to discuss Oi's bankruptcy

The Federal Government created a working group coordinated by ANATEL to exchange information and discuss the positions to be adopted during the Oi judicial restructuring process. Public banks, the National Bank for Public and Economic

Development (BNDES) and the Federal Attorney's General Office (AGU) are also part of this group.

Oi is a telecom incumbent with over 70 million subscribers that sought Court protection in June of this year. All participants of the working group are Oi's creditors (either for financial services rendered or for fines applied) and BNDES is also a shareholder. may still depend on a Congress' initiative.

Why is this important?

Oi's is Brazil's largest bankruptcy case and the first of a telecom incumbent. The particularities of the case, including the large public debt involved, bring several unprecedented issues in the bankruptcy legal framework.

Ministry of Telecommunications' new governance structure

The Federal Government issued on October 18 Decree 8,877 restructuring the Ministry of Science, Technology, Innovations and Communications ("MCTIC" – a result of the merger between the Ministry of Communications and the Ministry of Science, Technology and Innovations, previously reported in this bulletin).

The MCTIC is now composed of five secretaries: Executive Secretary, Secretary of Research and Development Policies and Programs, Secretary of Technology and Innovations Development,

Broadcasting Secretary, Telecommunications Secretary and Informatics Secretary.

Under the Telecommunications Secretary are the Digital Inclusion, Broadband and Telecom Services departments and under the Broadcasting Secretary are the Commercial, Educative, Community and Surveillance departments.

Why is this important?

The year of 2016 was marked by a political turmoil that contributed to a lack of political leadership. There is an expectation from the society, in general, that 2017 will resume the political and legislative agendas. The Ministry's new governance may be an indicator that it will be ready to take the lead in important issues that have been outstanding due to the impeachment process. issues in the bankruptcy legal framework.

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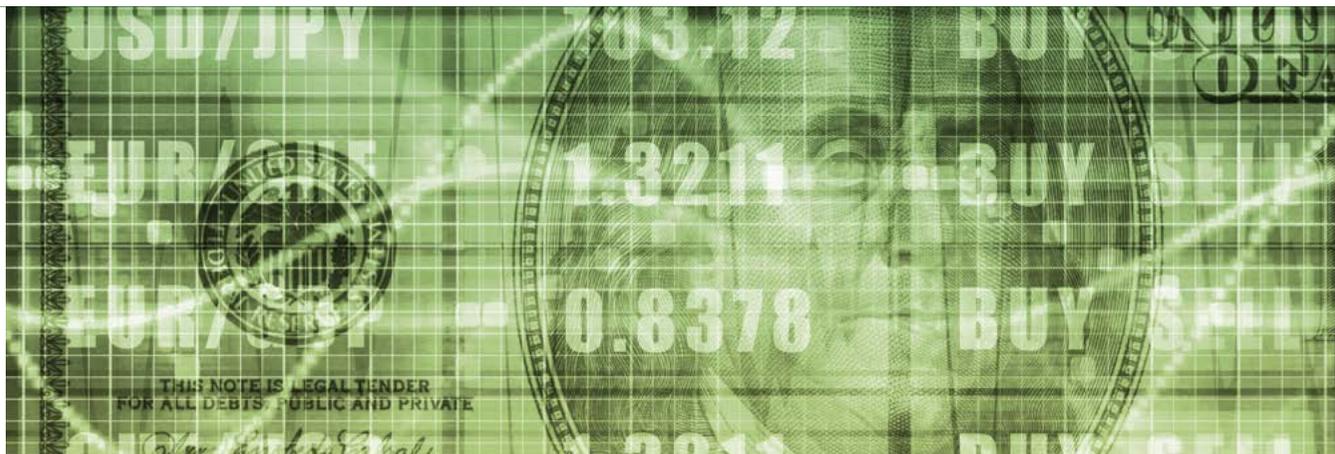


IMAGE: ADOBE STOCK

EMPLOYMENT

Federal Regional Court decides stock option plans are not wage payment

The Fifth Panel of the Federal Regional Court of the 3rd Region has stated that stock option plans should not be considered as wage, provided that the program is optional and the employee voluntarily assumes the financial risk.

The stock option plan under review was offered by the parent company in Sweden to employees of its Brazilian subsidiary. Payment was made monthly through discounts on the wages. The employee could also choose to receive Matching Shares and Performance Shares at no charge, after the vesting period, provided that certain requirements were fulfilled. No subsidies were offered by the company for the stock purchase.

According to the legislation, the social security contribution basis consists in all sums paid during the month in consideration of work performed in any way. Thus, by stating that the stock option plan (in the conditions above mentioned) should not be considered as wage, the Court defines that no social security should be levied on such stock option plan.

Why is this important?

There are few court precedents on the matter and the social security authorities adopt a more restrictive interpretation to characterize stock options as part of the wage payment (and consequently, subject to social security contribution).

LITIGATION

Superior Court of Justice allows access to private content stored in a seized mobile phone

The Superior Court of Justice recently acknowledged that the access to private and static content stored in a seized mobile phone should be considered a legal procedure when there is a court order expressly authorizing this access. But the Superior Court also ruled that the content already stored on the device (“static content”) should be treated differently from content transmitted in real time (“dynamic content”). As a result, although the access to dynamic content is subject to the fulfillment of more stringent legal requirements (as provided on the Brazilian Wiretap Law), the same is not applicable for access to static content.

Why is this important?

This ruling reinforces the difference between “static content” and “dynamic content” as it expressly acknowledged that they should be treated differently.

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FOTO: ADOBE STOCK

TAX

ICMS not due on transactions with software, apps and other electronic files, say State Courts

The discussion on whether ICMS, a State VAT tax, is due on transactions with software, apps and other electronic files was recently submitted to judicial review. There are few precedents, but so far the courts have ruled in favor of the taxpayers.

The Computer Companies Union of the State of Rio Grande do Sul (“SEPRORGS”) sued the State Authorities against the assessment of the ICMS on the referred transactions. The preliminary injunction was granted to recognize that the State legislation stands in contradiction with constitutional principles and that entails double-taxation, since the ISS (municipal tax) is already levied on the same taxable event. Consequently, in Rio Grande Sul, the provisions of the State Decrees No. 52.904/2016 and 53.121/2016 are not applicable to the members of the union until a final decision is rendered. it

In São Paulo, another Union of the computer industry (“SEPROSP”) has filed a lawsuit with the same purpose. The preliminary injunction was also granted in similar terms of the one rendered in Rio Grande do Sul, determining that the provisions of the State Decrees No. 61.522/2015 and 61.791/2016 are not applicable. In this case the Court of Appeals of the State of São Paulo upheld the decision.

Why is this important?

These decisions give a glance on how the Judiciary Branch will look at the recently issued legislation on the taxation of software, apps and electronic files. The matter is controversial and will likely be reviewed by courts.