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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.

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JUAREZ QUADROS, APPOINTED BY THE PRESIDENT MICHEL TEMER TO BE THE PRESIDENT OF THE NATIONAL TELECOMMUNICATIONS AGENCY (ANATEL). PHOTO: JEFFERSON RUDY/AGÊNCIA SENADO

ANATEL's president resignation

The former president of the National Telecommunications Agency ("ANATEL"), Mr. João Batista de Rezende, presented his resignation letter on August 10, due to personal reasons. Mr. Rezende's resignation followed a series of replacements in the government's offices, that accompained the suspension and subsequent impeachment of the former President Ms. Dilma Rousseff.

Rezende was appointed ANATEL's president in 2011 and his mandate would extend until December, 2016. He was also suposed to be ANATEL's board member, until December 2018.

Mr. Juarez Quadros (who was the Minister of Communications in 2002) was appointed by the President Michel Temer to occupy the position left by Mr. Rezende and his appointment was confirmed by the Senate.

Why is this important?
The replacement of ANATEL's president, along with the country's recent political shift, leaves an atmosphere of uncertainty in relation to how the needed changes in the telecom regulatory landscape will be steered.

ANCINE attempts to tax internet ad market

Ancine expressed its intent to tax the increasingly attractive internet advertisement market. Ancine discretely included "audiovisual advertisement in the internet" as a market segment subject to Fixed Condecine in a public consultation of the terms of a new Normative Ruling.

The Fixed Condecine is due once every twelve months on audiovisual advertisement works per title and per market segment in which such title is economically explored. The taxpayer of the Fixed Condecine on advertisement works is the (i) production company, for Brazilian works;

(ii) holder of the licensing rights in Brazil, in case of foreign advertisement works; or (iii) legal representative of foreign programmer, in case of audiovisual work included in international programming, in cases where there is direct participation of Brazilian ad agency. It is important to note that the exhibitor, transmitter, disseminator or vehicle of the advertisement work that has not been subject to Fixed Condecine collection is jointly liable for its collection.

Condecine is a contribution for intervention in the economic domain – and, therefore, a tax under the definition of the Federal Supreme Court. It is subject to the taxation power limitations contained in the Federal Constitution of 1988. Specifically in relation to the tax issue, the constitutional legality principle contains rigorous characteristics. The tax can only be considered valid if a case specifically set forth by law is verified, given that "the Federal Government, the States and Federal District and the Municipalities are forbidden from demanding or increasing the tax without legal basis."

In our opinion, due to the lack of legislative modification (to include the internet as a market segment) and a clear definition by the legislator regarding such "other markets," the tax authorities find themselves prevented from collecting Fixed Condecine as proposed in this new Normative Ruling draft, under penalty of violating the Federal Constitution.

Why is this important?
Ancine attempts to tax internet advertisement.

PHOTO: ADOBE STOCK

Taxes on capital increase with rights

The IRS has recently issued Interpretative Act nº 7 that determines that the capital increase of a Brazilian legal entity with the granting of rights by a foreign resident is subject to (i) withholding income tax ("WHT") at a 15% rate; and (ii) if the mentioned rights regard the transfer of technology, the capital increase shall also be subject to the Contribution on Economic Domain ("CIDE"), at a 10% rate, both levied on the value of the right. With this, the IRS demonstrates that the mere delivery of shares should be treated as "consideration" of the foreign investor for the the rights transfer, entailing the tax charges mentioned above. More alarmingly, because it is an interpretative act, its effects retroact.

We understand there are arguments to dispute such understanding of the tax authorities since (i) capital increase entails no consideration to the foreign investor and (ii) the triggering event of the WHT and CIDE shall not apply to capital increases.

Why is this important?
Higher tax levies on transactions regarding capital increase with rights.

New rules on tax havens and gray listed jurisdictions

Normative Ruling nº 1.658 was published on 9.13.2016, altering Normative Ruling 1.037/2010, which defines the tax havens and gray list jurisdictions.

Curaçao, St Martin and Ireland are now foreseen as a tax haven. Austrian holding companies are now gray listed. St Kitts and Novis and Netherland Antilles were removed from the tax havens list.

Normative Ruling nº 1.658 also clarified when Danish and Dutch holding companies are considered to not have substantial economic activity and, consequently, be gray listed. It is now understood "as having substantial economic activity in case it has, in its country of domicile, operational capacity for its purposes, evidenced, among other factors, by the existence of own employees qualified and in sufficient number, and of physical installations that are adequate for the management and decision making of:

I – developing the activities with purposes of obtaining income derived form the assets it has; or

II – management of corporate participations with purposes of obtaining income derived from the distribution of profit and capital gain".

Classification of a foreign party in the list of tax haven jurisdictions or in the list of jurisdictions with privileged tax regime results in important differences, particularly as to tax implications.

The main differences lie in the fact that transactions carried out with a beneficiary resident or domiciled in a tax haven jurisdiction are subject to a higher withholding tax rate in Brazil, as well as to exclusion of the tax benefits granted to foreign investments carried out on the Brazilian financial and capital markets.

Please note, however, that the increase in the withholding rate (from 15% to 25% in respect to income and capital gains) and shall not apply to transactions carried out with a party located in a jurisdiction with privileged tax regime.

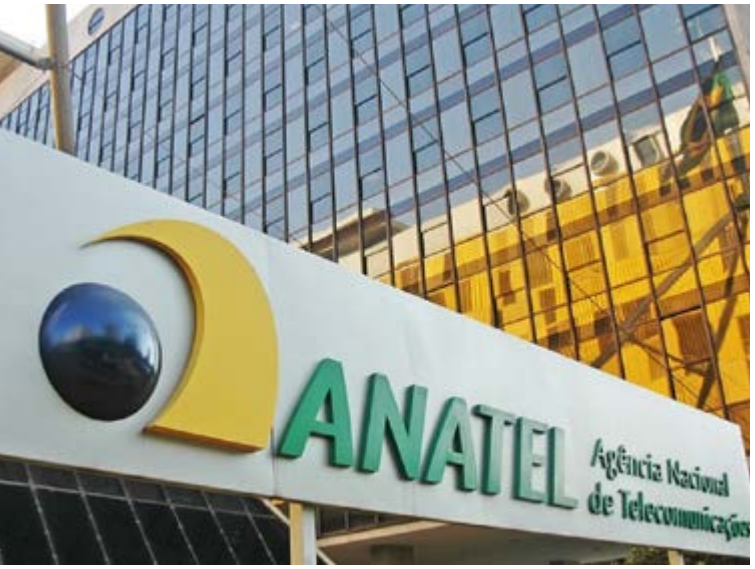
Nevertheless, both beneficiaries residing in tax haven jurisdictions and in jurisdictions with privileged tax regime, as defined in the list of privileged tax regimes, are subject to:

(i) application of transfer pricing rules – the transfer pricing rules must be observed, regardless of the relation between the parties, and the 5% profit margin safe harbor rule may not be applicable to export transactions;

(ii) limited deductibility of interest paid by Brazilian legal entities (thin-capitalization rules) – in the event of payment of interest to beneficiaries resident in tax haven jurisdictions or to legal entities subject to privileged tax regime, the Brazilian legal entity will be subject to stricter limits (e.g, the debt cannot exceed 30% of the debtor's net equity) for interest deductibility purposes; and

(iii) limited deductibility of payments made by Brazilian legal entities – as a general rule, payments to beneficiaries residing in tax haven jurisdictions or to legal entities subject to privileged tax regime, are treated as nondeductible expenses for the paying source in Brazil, unless the following are present (substance test): (a) identification of the actual beneficiary of the entity abroad that will receive these amounts; (b) evidence of the operating capacity of the individual or legal entity abroad to carry out the transaction; and (c) documentary evidence of payment of the respective price and receipt of the goods or rights or the use of services.

Why is this important?
Higher tax burden in transactions with Ireland.



ANATEL'S HEADQUARTERS FACADE IN BRASÍLIA. PHOTO: ANATEL, 2014

Draft Amendment to the PGMC to be Voted by ANATEL's Board

The National Telecommunications Agency ("ANATEL")'s board is abbout to vote a draft amendment to the General Competition Targets Plan ("PGMC"), which is much expected by telecom operators.

The PGMC was enacted by ANATEL in November 2012 with the purpose of leveraging the competition, and consequently conducting prices' and services' levels in the telecom industry, and it is supposed to be revised every four years.

It establishes mechanics for identifying geografic areas where the level of competition is low, and measures to be imposed on players in that area that have a significant market power, such as obligations to make isonomic commercial offers, price limitations, and obligation to share infra-structure.

Within the context of the first PGMC review, ANATEL carried out a study mapping and classifying the telecom competition in the Brazilian territory. The same study is also being used as base for the review of the telecom regulatory framework by the Ministry of Telecommunications.

The draft amendment to the PGMC, once approved by ANATEL's Board, will be submitted to public consultation.

Why is this important?

The PGMC's amendment may be an important step for the general review of the Brazilian telecom regulatory framework and will evidence the government's willingness to reduce regulation in the telecom industry.

Changes to the General Telecommunications Law

The Bill of law No. 3,453, that introduces changes to the General Telecommunications Law ("LGT"), is slowly moving ahead and was recently submitted to the appreciation of the Commission of Constitution and Justice ("CCJ"). It now stands by the appreciation of the rapporteur to soon be voted by the legislative members.

One of the most debated changes to the LGT is the possibility of landline concessionaires to shift to authorizations regimes, and the pressing question is whether incumbents will be allowed to free up their fixed assets (so-called "reversible assets" which are supposed to revert to the Federal Government's ownership upon termination of the concessions).

As currently drafted, incumbents would be allowed to request the regime's conversion, and the Federal Government would waive rights over reversible assets, as long as certain requirements are fulfilled, including an investment committment by carriers, mainly in broadband. The calculation of the investment amount would consider, inter alia, the value of the assets freed.

Another debated issue is how to address valuation of assets that are also used for the provision of other services, such as mobile telephony. The draft bill currently provides these assets would be valued proportionally to their utility for the provision of fixed telephony, but does not give color on how to determine this utility.

Why is this important?

This bill of law deals, at the same time, with important problems faced by incumbents related to their legacy landline concessions, and with the much needed expansion of broadband infrastructure in Brazil.