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## ABOUT THIS NEWSLETTER

**TMT Bulletin** is a newsletter on technology, media, telecommunications and internet. Our Technology, Media and Communications 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.

Please note that this mailing is meant for general informational purposes only and should not be relied upon as legal advice on any specific deal or matter. If you need more information, please contact our [lawyers](#) or visit our website at [www.pinheironeto.com.br](http://www.pinheironeto.com.br).

We hope you find this publication informative.

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## Quick access

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*Review of the telecom  
regulatory framework  
moves forward*

The Ministry of Communications issued on April 8 its first set of guidelines for the review of the Brazilian telecommunications regulatory framework, by means of Ordinance No. 1,455/2016. This is an important step in the review that is already being carried out by the National Telecommunications Agency - ANATEL and which was prompted by the 2015 review of the fixed telephony concession agreements. Under the current law, the concession agreements must be reviewed every five years to ensure that coverage and quality goals remain up to date, but ANATEL has already extended the deadline for execution of the revised agreements twice (the original deadline was December 31, 2015 and ANATEL now wishes to extend it to December 31, 2016). Much of ANATEL's difficulty in finalizing this review is caused by the challenges that the concession model itself is facing. There is a consensus inside ANATEL and among all players in the market that the current model is not likely to survive another five years - and much less until the agreements in place today expire in December 2015.

The guidelines proposed by the Ministry of Communications are clearly centered on two goals: (i) to significantly expand the availability of broadband services, and (ii) to create a less bureaucratic regime for the offer of telecommunications services in general. In this sense, the Ministry's Ordinance has directed ANATEL to draft and submit to the Ministry a proposal for migration of the current concession agreements to a less-regulated regime that is no longer subject to the 2025 deadline and is expected to be more similar to the authorization regime currently existing for all services but the fixed telephony rendered by means of the concessions. The proposal must enable more investments by the carriers in broadband networks and services, particularly in the expansion of high-capacity fiber optic networks to more cities within the national territory. The Ministry acknowledges that there may be areas within the country where the mandatory offer of voice services must be kept in place and ANATEL's proposal must take that into consideration. At the same time, ANATEL is being encouraged to propose

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incentives for the migration to the new regime, including by reviewing universalization targets and limitations on pricing and eliminating all restrictions involving the so-called reversible assets (which are supposed to revert to the Federal government's ownership upon termination of the concession agreements).

But the Ordinance is not limited to the concession agreements. It also expressly directs ANATEL to seek to establish a simpler, more effective and more convergent format for granting licenses for provision of telecommunications services.

A few ideas have already been proposed by members of ANATEL's Board of Directors: they include reducing the scope of the concessions to the limited areas where the offer of landline voice services still needs to be ensured by the Government and migrating services in all other areas to the private regime, as well as creating a new convergent service that would supersede all existing telecommunications services. The discussions still continue at the Board level and ANATEL is expected to give preference to a solution that can be more easily implemented, without the need of approval of significant law changes by the National Congress, especially as ANATEL acknowledges that it is imperative to give a solution to these issues as soon as possible this year.

***Why is this important?***

The review of regulatory framework would benefit not only the carriers that have to deal with the significant decline in demand for landline services while still being required by ANATEL to invest in the services, but the whole ecosystem of companies that are somehow involved in the telecom market. That includes financial investors and providers of all types of services to the telcos, including those in the tower and other infrastructure businesses. The current concession model is viewed by the market as the main obstacle for more investments by carriers in their networks and for

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corporate reorganizations and consolidations in the sector. Eliminating the 2025 expiration date and the restrictions on the use and sale of assets are often remarked as fundamental regulatory changes to foster investments and allow the development of the market.

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*Controversy on fixed  
broadband data caps*

Data caps on fixed broadband services have just become the new hot topic on the Brazilian telecom market. It all started when operator Telefonica/Vivo announced that it would start imposing limitations on the usage of data on its new fixed broadband agreements. This is not exactly news: data caps are already contemplated in agreements for services offered by some ISPs, but, in practical terms, these caps are rarely enforced and the common practice is to charge only for connection speed. For this reason, the issue had never attracted much attention from the general public or other authorities. Also, because fixed broadband services are offered in the private regime, which is much less regulated than telecom services offered in the public regime, ANATEL has always been inclined to interfere as little as possible in the business models adopted by ISPs.

But Vivo's announcement caused immediate negative reactions by users and consumer protection and other governmental authorities, which led ANATEL to issue on April 18 a temporary order prohibiting ISPs from discontinuing users' connections if the data cap existing under any agreement is reached, or from reducing the connection speed for data used in excess of the cap or charging overages. These restrictions should remain in place until the ISPs adopt certain measures to effectively and clearly inform users about the data limits and make available tools that permit the measurement of the data used by them each month. Implementation of these measures should be verified by ANATEL as regards each ISP and the companies would only be allowed to start enforcing any caps 90 days after confirmation by ANATEL that all measures had been fully implemented.

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Contrary to the Agency's expectations, however, this order was not well received and was perceived by the market, consumer protection authorities and other entities as an authorization by ANATEL for the implementation by ISPs of practices that are not in the best interest of consumers. In view of that, ANATEL's Board of Directors decided on April 22 that it must look further into the issue and determined that ISPs be prevented from imposing data caps for indefinite term, until this review is concluded. As the restraining order issued on April 18 was not revoked, failure to comply with ANATEL's restrictions may subject ISPs to daily fines of R\$150,000, limited to R\$ 10 million.

***Why is this important?***

The ability to impose data caps significantly impacts not only the consumers and the ISPs' business models, but also all OTTs whose services depend on the availability of fixed broadband services. Restrictions on data usage or increase in prices may adversely affect the attractiveness of OTT services in the Brazilian market and cause changes in their business models too.

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*Appeal in civil class action related to breach of privacy rights by ads in the facebook platform is quashed*

The Court of Appeals of Distrito Federal (Brasília) quashed an appeal by the Brazilian Institute of Computer Politics and Law (IBDI) and confirmed a lower level ruling dismissing the class action filed against Facebook where IBDI sought to ban the company's "Sponsored Stories" advertisement.

This civil class action is very similar to other class actions filed in the United States and Canada. IBDI claimed that "Sponsored Stories" advertisements displayed by Facebook violate users' privacy rights (image and name), particularly minors' rights, because users do not provide prior and informed consent to the

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use of their names and images in connection to those advertisements. IBDI aimed to obtain a ruling ordering Facebook to refrain from publishing “Sponsored Stories” without proper consent from users and also requested indemnification for collective moral damages to all Brazilian users. The case was deemed groundless on the merits based on the following arguments: (i) it is clear that all users, upon signing up for the service, have prior knowledge regarding the use of their name, information and images for purposes of advertising; (ii) Facebook is a social network in which public exposure is essential and part of the nature of the service, as well as intentionally desired by the users. The extent of the public exposure is also defined by the user; (iii) vigilance over the activities of children should be done by their parents. It is presumed that access to the internet by children and adolescents is done under their supervision and the difficulty of controlling this, in modern times, is inherent to the use of the internet and not just to one of the available services.

***Why is this important?***

This is an important precedent that acknowledges and highlights the relevance of the Terms of Service as a means to show user consent and the role of parents in the supervision of their children’s digital life.

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*The illegal charge of ISS on the dissemination of advertisement*

With the constant increase of the internet usage in our everyday life, the dissemination of advertising material on the internet has verified a huge financial growth. With such huge financial growth, comes the interest of the tax authorities to subject such revenues to tax collection.

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However, tax collection in Brazil is strictly limited to the rules defined in the Brazilian Federal Constitution, which precisely defines the sphere of competence correspondent to each entity authorized to levy taxes (Federal Government, States, the Federal District, and Municipalities) and exhaustively defines all entities authorized to create taxes, as well as the tax triggering events.

In this sense, the Federal Constitution's article 156, item III, establishes that the Municipalities must institute the tax on "services of all nature, not comprehended on article 155, item II, defined in a complementary law". Complementary Law No. 116, from July 31st, ("LC 116/03"), therefore defined the ISS triggering event as the "rendering of services which are foreseen in the attached list".

In the approval of LC 116/06's service list, the president vetoed the dissemination of advertising materials through any means as an ISS taxable activity, being it clear that no ISS could be currently assessed on such activity.

Notwithstanding, on March 9, 2016, the Municipality of São Paulo in a desperate attempt to collect ISS, issued Normative Ruling 1/16, through which it concluded that the dissemination of advertisement – in Tv, internet, outdoor – is actually included in item 17.06 of the ISS service list. Note that item 17.06 of the ISS service list regards the advertising service provided by advertising agencies ("Commercial Propaganda and advertising, including sales promotion, planning of campaigns or advertising systems, preparation of drawings, texts and other advertising materials"), a completely different activity from the dissemination of advertisement service in which no creative effort is applied.

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Moreover, Normative Ruling 1/16 describes itself as being interpretative, and therefore with retroactive effects, which probably means that the Municipality of São Paulo will start charging ISS on the dissemination of advertisement for the past 5 years.

In our view, the current charge of ISS on the dissemination of advertisement, retroactive or not, is illegal and questionable. The ISS levy on the dissemination of advertisement would only be possible in case there is a change in the ISS service list.

***Why is this important?***

The attempt of the Municipality of São Paulo to charge the ISS on the dissemination of advertisement would illegally increase the tax burden on the ad sales industry, which currently should not be subject to ISS.

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