

PINHEIRO NETO ADVOGADOS

UNIVERSAL ACCESS: REALITY OR UTOPIA?¹

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1. - When I was invited to take part in this Teleco's initiative, it took me some time to define – or to believe that I had delineated – how to address the challenging proposal to evaluate the Brazilian telecommunication regulatory framework over the last years.

2. - As a matter of fact, this dilemma is common when there is either too much or nothing at all to say. When speaking of telecommunications, particularly in Brazil, there is so much to say that the challenge switches toward choosing the focus to be given when entertaining one same issue surrounded by so many facets.

3. - And it was while doing so that I came across the question serving as title of this paper and whose answer (which could not be otherwise as it is given by a lawyer) is: it depends. But on what?

4. - It naturally depends on whether one wants to see a cup as half full or half empty. If we go back over the years, we will certainly realize that only a short while ago has Brazil actually emerged in the globalized world and seen as a country capable of offering countless investment opportunities in a plethora of activities unimaginable so far.

5. - At that time we were all used to speaking about *bits* and *bytes*, and to discussing whether *software* should be viewed as a product or service, in addition to less down-to-earth issues. After all, we were in the early 1990's and the protective measures for the computer industry (known as *market reserve*) were a thing of the past.

6. - But then speak of *hertz*?! Until then, except for a few of us who had undergone the frustrating experience of the auction of licenses for restricted public services (*serviços públicos-restritos*) still during the Sarney Administration, the issue of telecommunications was essentially confused with that device which is still placed on our tables and rings at the least appropriate times. Speaking of telecommunications one decade ago was invariably tantamount to speaking of "telephone".

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7. - But this scenario was about to change. Take the landmark year of 1994, for instance. Although the prophecies of George Orwell fortunately did not materialize, almost overnight we witnessed a great flood of rules, ordinances and other directives to regulate activities as yet unheard of other than by a selected group of technicians, who over the years had grown and enhanced their expertise jointly with the Telebrás System to ultimately play a fundamental role in the process of privatization and opening up of this System.

8. - The year of 1994 was marked by the issuance of rules on MMDS services,² trunking systems,³ paging services,⁴ among others, which were effectively integrated into Brazilian legal and economic activities, attracting productive interests and, above all, definitively including Brazil in the universalized context of telecommunications.

9. - Within this very scenario, even before enactment of Constitutional Amendment 8/95 (which accommodated the advent of the General Telecommunication Law⁵ and subsequently the privatization of the Telebrás System), domestic and foreign groups began to believe that the Brazilian telecommunication market offers real and effective prospects of success and excellent deals.

10. - Before enactment of Constitutional Amendment 8/95, several investments had already been made in a wide array of services that were out of reach of the constitutional restrictions imposed on public services, effectively marking the first phase of the so-called “universal access” to telecommunications in Brazil.

11. - Up to that time any reference to telecommunications was basically understood as fixed (wireline) telephony. Mobile services such as mobile telephony were extremely expensive or otherwise restricted to very specific niches. Moreover, it was inconceivable that data transmission could be available to ordinary citizens, except to large corporations and government entities.

12. - New communication mechanisms such as pagers and other mobile systems blossomed at an astounding pace before our eyes. A plethora of alternatives and modes of pay-TV emerged as an important option to the limited open-signal TV programming grid and today, a little more than ten years later, it is almost unbelievable to see the rapid evolution when it comes to availability and offer of services within diversified categories nearly throughout the Brazilian territory.

13. - All has become available in Brazil within slightly over a decade, from the most prosaic voice communication to complex mobile transmissions of data and high-definition images, drastically narrowing the technology gap between Brazil and other globalized countries the world over.

14. - Therefore, it is within this context where the “cup is considered as half full” that the phenomenon of universal access to the most advanced communication means has actually reached Brazil as a whole and, today, is a concrete reality that puts Brazil among the world’s major telecommunication markets.

² *Ordinance No. 43 of February 10, 1994, approving Rule 002/94.*

³ *Ordinance No. 478 of July 13, 1994, republishing Ministry of Communications Rule 14 with amendments.*

⁴ *Ordinance No. 579 of August 2, 1994 – instituting the modality of restricted domestic operation in Paging Services.*

⁵ *Law 9472/97 - LGT.*

15. - On the other hand, despite the fact that universal access was considered the pillar of the institutional framework introduced by the General Telecommunication Law, it must be recognized that the process of universal access might not have reached the expected levels domestically.

16. - The fact that this framework has been inappropriate in light of the socioeconomic reality in Brazil is only one of the explanations. Tax cuts, a more flexible approach regarding basic quality and customer service requirements (as a means of reducing costs and tariffs), and immediate investment of the FUST funds, are among the wide range of ideas and proposals to reverse this scenario.

17. - But if the causes and respective remedies are known, why is the problem not resolved once and for all? Maybe because, in actual fact, none of the current alternatives can actually cure the structural deficiencies of a framework that seems to have exhausted all of its possibilities.

18. - By definition, universal access and freedom of enterprise are concepts that belong to diametrically opposing economic conduct rationales, which can co-exist in a balanced manner for a certain period of time but at a given moment exclude each other.

19. - The solution to this deadlock – if it were not utopian to imagine that there is a solution – should comprise an overall redefinition of the role and limits of authority of the Government and the private enterprise alike, not only in relation to performance of the licensed activity, but above all in relation to sharing of the burden resulting from it.

20. - In other words, once and for all we all must face the fact that perhaps the utopia of universal access does not lie in the extension of the universe it seeks to reach but rather in the fact that it is incumbent on the Government to somehow re-assume and shoulder some of the stranded costs incurred with universal access.

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