

Azevedo Sette
ADVOGADOS

TELECOMS SERIES

BRASIL

São Paulo | Belo Horizonte | Brasília | Rio de Janeiro | Goiânia | Recife
www.azedosette.com.br

CONDUCT ADJUSTMENT AGREEMENTS (TACS) IN THE TELECOMMUNICATIONS SECTOR

By Ricardo Barretto Ferreira and Isabella De Castro Satiro Aragão

In response to the occurrence of inappropriate conduct by telecommunications service providers, in violation of the applicable legal, regulatory or contractual provisions - related to quality of service, availability of service to the public, interconnection and remuneration of networks, offer of products in disagreement with technical standards, among other aspects -, fines and sanctions can be applied to correct these deviations. However, in addition to the punitive corrective mechanism, ANATEL – the Brazilian National Telecommunications Agency - also has instruments at its disposal to regulate or encourage the regularization of telecom providers' conduct, in order to ensure a better service of the public interest.

The Conduct Adjustment Agreement (TAC) is an instrument for negotiated conflict resolution involving transindividual rights. It is an extrajudicially enforceable instrument that aims to make the signatory of the agreement commits to adjust some conduct considered illegal and adapt its behavior to the legal

requirements, having a pre-procedural nature of “penalty-substitution agreement” - although it should provide for a fine penalty in the event of total or partial non-compliance with the obligation provided for in the agreement.

The proposal for an agreement to solve problems, within the scope of the Brazilian legal system, assists the Judiciary and administrative regulatory bodies, which are usually overburdened with demands, as the negotiation of an agreement, instead of applying sanctions and penalties, valuing the economy, efficiency and speed, allows the enforcement of rights and the resolution of conflicts on a voluntary basis, relieving the legal system.

TAC was introduced in Brazil, for the first time, 20 years ago, through the Child and Adolescent Statute - ECA (Law No. 8,069/90) which provides, in its article 211, that “the legitimate public bodies may take from the interested parties an agreement to adjust their conduct to legal requirements, which will be effective as an extrajudicially enforceable instrument”.

LEGAL – REGULATORY

However, this provision had action limited to the resolution of conflicts involving issues related to childhood and youth.

In order to expand the adoption of TAC, article 113 of the Brazilian Consumer Protection Code (Law No. 8,078/90) intended to extend its application to all transindividual rights (diffuse and collective), changing the Law No. 7,347/85 (Public Civil Action Law - "LACP") to include Paragraph 6 of Article 5 of the LACP, which provides that "legitimate public bodies may take from the interested parties an agreement to adjust their conduct to the legal requirements, under penalties, which will be effective as an extrajudicial enforcement instrument".

It should be mentioned that, although the notion of Alternative Dispute Resolution method - ADR is imported from foreign law, bringing some inspiration to the development of such agreements, the implementation of TAC in the Brazilian legal system is understood as an eminently national and original solution, which does not fully identify with direct alien influences, especially in relation to its extension and effectiveness.

In Brazil, transindividual rights that are object of TACs have a main legal basis in the Brazilian Federal Constitution and can be mentioned as an example: science and technology, consumer, child and adolescent, economy, education, the social function of property, environment,

administrative morality, basic sanitation, health, urbanism, etc. In addition, among the various legitimate public bodies that may take the TAC from interested parties, provided for in items I to V of article 5 of the LACP, we have the Federal Public Prosecutor's Office, the Public Defender's Office, the independent governmental agencies (such as ANATEL), public companies, foundations or government-controlled corporations, among others.

In the telecommunications sector, TACs are defined, at a regulatory level, by ANATEL's Resolution No. 589/2012, that approves the Regulation for the Application of Administrative Sanctions, which establishes in its Article 5 that the Agency "may, at its discretion and within the scope of its legal competence, in order to ensure a better service of the public interest, execute, with the offenders, a conduct adjustment agreement to the legal requirements".

In addition to the aforementioned provision, ANATEL's Resolution No. 629/2013 approved the regulation for the execution and monitoring of the Conduct Adjustment Agreement (TAC) between ANATEL and concessionaires, permissionaires or authorized entities of telecommunications services, including broadcasters, as well as other administered entities subject to the regulation of the Agency (Committed Party). The normative instrument brings the procedure for the execution of the

LEGAL – REGULATORY

TAC; the requirements, commitments and conditions that must be present in the clauses of the agreement; and rules on monitoring the execution of the TAC, verification of its compliance and sanctions for its non-compliance.

However, it cannot be forgotten that the beginning of the execution of TACs by ANATEL faced several challenges, not always being successful. In this regard, it is possible to mention:

- I) The case of the operator Oi, which was negotiating two agreements with ANATEL, but both were rejected due to uncertainties about the company's economic conditions to honor the associated commitments, due to the company's entry into a judicial reorganization process;
- II) The case of the operator Sercomtel, which had its TAC rejected by ANATEL, under confidential treatment;
- III) The case of the operator Nextel, which had its request rejected because the company was classified as a small operator (PPP), no longer having obligations of quality goals that could be replaced by investment commitments; and
- IV) The case of the operator Telefônica (Vivo), which was in progress in ANATEL since 2014. After the issuance of a report by the Federal General Accounting Office ("TCU") that blamed ANATEL for damage to the treasury for the way of conducting said

TAC, the body approved the execution of the agreement, highlighting the competence of ANATEL to execute TACs, but conditioning its validation to compliance with corrective and preventive determinations and specific recommendations. Although the operator has tried to renegotiate the clauses and commitments in 2018, the process ended up being closed by ANATEL's Board of Directors.

However, in recent times, the Agency has been making progress and obtaining success in these agreements, guaranteeing the correction of conducts and significant gains in the adequate provision of services to the citizen. In this regard, it should be highlighted the TAC signed with the Tim Group, which establishes actions to improve the customer experience, quality and infrastructure, besides additional commitments to bring 4G technology mobile broadband to municipalities without this technology in Brazil. Such agreement was accepted by ANATEL's Board of Directors in August 2019 and, after approval by TCU in March 2020, said TAC was approved by ANATEL's Board of Directors, which executes the first ANATEL's TAC since the approval of the regulation of the agreement (Resolution No. 629/2013).

Furthermore, the case of ANATEL's TAC with Algar Telecom, which involves several commitments - as a guarantee of minimum availability for the FSTS,

LEGAL – REGULATORY

reimbursement of users affected by interruption or undue charges, implementation of service and customer management features, implementation of the 4G offer in certain municipalities, among other responsibilities - also represents an agreement with great potential for success: approved by the ANATEL's Board in August 2019, the TAC was approved by the TCU and, recently, by the Algar Telecom's Board, in the amount of BRL 45.420 million. Currently, the agreement is waiting to be voted by the ANATEL's Board of Directors.

The aforementioned agreements indicate to the market that TACs can be redeemed as an instrument of regulatory action and public policies within the scope of ANATEL, generating high expectations for the future of telecommunications operators. It should be emphasized that the execution of the agreements is important not only for the correction of irregular practices and for the prevention of new infractions, but also for the benefit of end users, through the fulfillment of the commitments made in these agreements, such as the expansion of the mobile telephony network to areas without technology and better customer service.

To receive the main legislative news and positionings on this and other topics related to telecommunications, follow the Technology, Media and Telecommunication (TMT) team of Azevedo Sette Advogados.



Ricardo Barretto Ferreira da Silva - Senior Partner
barretto@azevedosette.com.br



Isabella de Castro Satiro Aragão - Associate
iaragao@azevedosette.com.br