

In brief: telecoms regulation in Brazil

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Communications policy

Regulatory and institutional structure

Summarise the regulatory framework for the communications sector. Do any foreign ownership restrictions apply to communications services?

The Brazilian telecommunications sector has as its basis Law No. 9,472/1997, the General Telecommunications Law, which sets forth that the national government is competent to organise the exploitation of telecommunications services, as per the terms of policies established by the executive and legislative branches. The organisation of telecommunications services includes the regulation and inspection of the services' execution, trade and use, deployment and operation of telecommunications networks, in addition to the use of orbit resources and radio frequencies spectrum. Moreover, telecommunications services' organisation is based on free, broad and fair competition among providers thereof.

The National Telecommunications Agency (Anatel) is the sector's regulatory body, having the competence to implement the national telecommunications policy, issue rules concerning the grant, provision and enjoyment of telecommunications services in the public and private regimes, administer the radio frequencies spectrum and the use of orbits, conduct inspections and apply sanctions, in addition to other roles.

Broadcasting services in Brazil, in turn, are regulated by Law No. 4,177/1962 and Decree No. 52,795/1963, according to policies instituted by and subject to the control of the Ministry of Communications. The Federal Constitution, moreover, sets forth that radio and television broadcasters' productions and programmes shall:

- give preference to educational, artistic, cultural and informative purposes;
- promote national and regional culture and stimulate independent production aimed at dissemination thereof;
- regionalise cultural, artistic and journalistic production; and
- respect ethical and social values.

However, as opposed to free-to-air television broadcasting, pay television services are called conditioned access services, which are deemed telecommunications services, being subject to the provisions of Law No. 12,485/2011.

Anatel does not regulate broadcasting services, except for certain technical aspects concerning radio frequency use and compliance of equipment. The National Cinema Agency regulates audio-visual content regarding the registration of works and implementation of governmental policies intended to develop the national

cinematographic sector.

In general, there are no restrictions concerning foreign ownership, but telecommunications service providers shall be companies organised by Brazilian laws, having their headquarters and administration in Brazil. Broadcasting companies, however, shall be owned by native Brazilians or individuals naturalised as Brazilian citizens for over 10 years, or by legal entities organised under Brazilian laws, headquartered in Brazil. Additionally, at least 70 per cent of the total capital and voting capital of broadcasting companies shall be directly or indirectly held by native Brazilians or individuals naturalised as Brazilian citizens for over 10 years, who will mandatorily manage their activities and establish the programming content, thus limiting foreign ownership.

Authorisation/licensing regime

Describe the authorisation or licensing regime.

Telecommunications services in Brazil might be provided under the public or private regime. In the public regime, a concession or permit (in specific circumstances and temporarily) granted by Anatel is required for the service provision. In the private regime, an authorisation shall be granted for the services to be provided. Notwithstanding, according to the terms of Law No. 13,879/2019, if the applicable requirements are met, concessionaires might request the adjustment of a concession into an authorisation.

Only companies organised according to Brazilian law, with headquarters and administration in Brazil, having as their corporate object the provision of telecommunications services, might be granted the relevant licences. Capacity to bid and enter into agreements with the public authority, and a technical qualification to provide the services, in addition to other requirements, also apply. Moreover, a company might not hold more than one licence to provide the same kind of service in the same area. The transfer of both concessions and authorisations depends on approval by Anatel.

Fixed-switched telephone services (FSTS) are the only telecommunications services provided under the public regime, although they might also be provided under the private regime. Concessions are granted using a bidding procedure for a period of up to 20 years, renewable for equal terms, provided the applicable conditions for this purpose have been fulfilled.

Mobile services and multimedia communications services are provided under the private regime, with authorisations being granted for up to 20 years, renewable for equal terms. Spectrum for the deployment of 3G, 4G, and 5G technologies (the latter available since 2022) has been granted in bidding procedures.

The cost for issuing an authorisation is 400 reais (approximately US\$80), but regarding the bid for spectrum, the highest offer is to be paid by the winning party. Other fees might also be due, such as the installation inspection fee and the operating inspection fee.

According to Brazilian regulations, the provision of satellite capacity does not constitute a telecommunications service. However, when there is communication with earth stations in Brazil, satellite exploitation over the country's territory is dependent on the grant of the right to exploit satellites (which authorises the use of orbit resources and radio frequencies for satellite control and monitoring, satellite communications, and provision of satellite capacity over the country's territory, whether by a Brazilian or a foreign satellite), in addition to other requirements, depending on the specific case. The party interested in being granted such rights shall be a private or public legal entity, organised under Brazilian laws, with headquarters and administration in Brazil, have the legal and technical qualifications to exploit satellites, in addition to other requirements, and submit an application in this regard to Anatel. Once the right to exploit satellites is granted, the respective operator might provide the satellite capacity to companies holding a concession, permission or authorisation to provide telecommunications and broadcasting services, or even to the armed forces. Satellite operators are not forbidden

to be telecommunications services providers as well. The exploitation right might be granted for up to 15 years, extendable for further 15-year periods for the remainder of the authorised satellite's useful life. The need to conduct bidding procedures for an orbital position was eliminated. Compliance with the Radiocommunication Regulations of the International Telecommunication Union and guidelines of the United Nations Office for Outer Space Affairs might be applicable.

Public wi-fi services were instituted by Decree No. 7,175/2010 (the National Broadband Plan), later revoked by Decree No. 9,612/2018, which provides on telecommunications public policies. Presently, the Wi-Fi Brasil programme makes available high-speed connectivity in more than 20,000 points throughout the country, especially to socially vulnerable communities, benefitting schools, healthcare units, indigenous villages and others.

Flexibility in spectrum use

Do spectrum licences generally specify the permitted use or is permitted use (fully or partly) unrestricted? Is licensed spectrum tradable or assignable?

According to the General Telecommunications Law, the spectrum of radio frequencies is a limited resource and public asset, which might only be used as authorised by Anatel according to a prior licence. In this regard, it should be noted that in the destination of radio frequency bands, Anatel takes into consideration the rational and economic use of spectrum, as well as the existing attributions, distributions and consignations, to avoid damaging interference.

The possibility of transferring authorisations among telecommunications services providers is foreseen by the General Telecommunications Law but depends on Anatel's approval, and for this purpose, the regulatory agency might set forth certain conditions, including limitations to the number of radio frequencies being transferred. In addition, the analysis of the Administrative Council for Economic Defence (CADE), the Brazilian antitrust authority, might also be required.

Ex-ante regulatory obligations

Which communications markets and segments are subject to ex-ante regulation? What remedies may be imposed?

In general, telecommunications services in Brazil shall comply with ex-ante regulations, and the General Telecommunications Law sets forth that such services are to be organised based on free, broad and fair competition.

Anatel's Resolution No. 600/2012, which approved the General Competition Plan, also sets forth guidelines regarding:

- competition aspects;
- measures concerning transparency, isonomic and non-discriminatory treatment;
- price control;
- the obligation of access and provision of specific network resources;
- the offer of wholesale products according to conditions set by such agency;
- obligations aimed to remedy specific market failures or to comply with the legal and regulatory rules in force; and
- accounting, functional or structural separation.

CADE's analysis and approval might also be required in the case of risk of impact on market competition, according to Law No. 12,529/2011.

Structural or functional separation

Is there a legal basis for requiring structural or functional separation between an operator's network and service activities? Has structural or functional separation been introduced or is it being contemplated?

There is no legal basis concerning the structural or functional separation between an operator's network and service activities, but Anatel might impose accounting, functional or structural measures to achieve the General Competition Plan's objectives, as per Resolution No. 600/2012.

Universal service obligations and financing

Outline any universal service obligations. How is provision of these services financed?

Universal service obligations are applicable to services provided under the public regime. In Brazil, only FSTS are provided by concessionaires under the public regime, which, in addition thereto, shall also comply with continuity obligations. Failure to comply therewith might lead to a fine, forfeiture or an intervention decree.

Decree No. 10,610/2021 approved the current General Universalisation Goals Plan for 2021–2025, setting forth obligations and universalisation goals for FSTS, among which the obligation to deploy fibre optic backhaul in 100 per cent of municipalities, villages, isolated urban areas and rural communities by the end of 2024, and install individual access to FSTS in locations with over 300 inhabitants.

Concessionaires shall bear the costs of their obligations, but such costs might be financed in part with resources from the Universalisation Fund for Telecommunications Services, created by Law No. 9,998/2000.

Number allocation and portability

Describe the number allocation scheme and number portability regime in your jurisdiction.

Number allocation is presently ruled by Anatel's Resolution No. 749/2022, which approved the Regulation of Telecommunications Services Numbering.

According to Anatel's Resolution No. 73/1998, as amended by Anatel's Resolution No. 750/2022, number portability in Brazil is allowed between providers of the same class of telecommunications services, being applicable to FSTS, personal mobile services (PMS), and multimedia communications services, if the relevant user remains in the same area. It is not possible to apply for portability between different kinds of services, such as FSTS to PMS.

Customer terms and conditions

Are customer terms and conditions in the communications sector subject to specific rules?

Terms and conditions applicable to the provision of telecommunications services must be included in end-user agreements, which shall also comply with rules set forth by the Brazilian Civil Code, Consumer Defence Code and General Data Protection Act, in addition to being in line with rules applicable to the relevant class of service. Mandatory clauses relate to the service's object, plan, conditions for changing the user's access codes, installation address, termination, customer services and others. Moreover, a template of terms and conditions shall be submitted to Anatel for approval. Anatel's Resolution No. 632/2014, which approved the General Regulation on Rights of Consumers of Telecommunications Services, regulates the rights of users of fixed and mobile telephone, multimedia communications and paid television services, and also applies.

Net neutrality

Are there limits on an internet service provider's freedom to control or prioritise the type or source of data that it delivers? Are there any other specific regulations or guidelines on net neutrality?

Net neutrality is set forth by Law No. 12,965/2014 (the Internet Law). According thereto, preserving and ensuring net neutrality is one of the principles applicable to Internet use in Brazil, and the party in charge of the transmission, switching or routing has the duty to process any data packages in an isonomic manner, with no

distinction related to content, origin and destination, service, terminal or application. Therefore, ‘throttling’ in general is not allowed.

However, traffic discrimination or degradation might be possible, if resulting from technical requirements essential for the proper provision of services and applications, and for the prioritisation of emergency services, in which cases the provider shall:

- not cause damage to users;
- act with proportionality, transparency and isonomy;
- inform users in advance, in a transparent, clear, and sufficiently descriptive manner, with regard to traffic management and mitigation practices adopted, including those related to network security; and
- offer services in non-discriminatory commercial conditions, refraining from practising anticompetitive conduct.

It is also forbidden to block, monitor, filter or analyse data packages’ content.

Decree No. 8,771/2016 regulated the Internet Law and specifies that traffic discrimination and degradation are exceptional measures, aimed at maintaining the stability, security, integrity and functionality of networks, of which users should be aware. For these purposes, technical measures consistent with international standards, developed for Internet good operation and in accordance with Anatel’s regulatory parameters and guidelines established by the Internet Management Committee in Brazil are required.

Platform regulation

Is there specific legislation or regulation in place, and have there been any enforcement initiatives relating to digital platforms?

In Brazil, digital platforms are not subject to specific legislation exclusively addressing the matter. However, there are laws in place that provide some level of guidance on the use of the internet and that establish rules on data processing in different media types. Some examples are the Internet Law (Law No. 12,965/2014), regulated by Decree No. 8,771/2016; and the General Data Protection Act (Law No. 13,709/2018) (LGPD).

Additionally, there are various legal initiatives under analysis in both houses of the Brazilian Congress for the regulation of digital platforms. The main bills are:

- Bill No. 2,630/2020, establishing the Brazilian Law on Freedom, Responsibility, and Transparency on the Internet;
- Bill No. 2,338/2023, the legal benchmark for artificial intelligence; and
- Bill No. 2,768/2022.

Bill No. 2,630/2020 focuses strongly on transparency, fighting misinformation, transparency in relation to sponsored content connected with the use of personal data, risks to the freedom of speech, content management and control, liability of the platforms, and sanctions for lack of compliance with the law. This Bill originated in the Senate and is currently awaiting its plenary vote in the House of Representatives.

Bill No. 2,338/2023 aims at setting forth the bases for artificial intelligence in Brazil. This Bill results from a joint effort of a jurists’ commission to unite three bills on AI: Bills No. 5,051/2019 and No. 872/2021 from the Senate and Bill No. 21/2020, from the House of Representatives. The voting of Bill No. 2,338/2023 has been announced as a priority for the Senate voting schedule in 2024.

Bill No. 2,768/2022 focuses on the organisation and operation of digital platforms offering services in Brazil.

Next-Generation-Access (NGA) networks

Are there specific regulatory obligations applicable to NGA networks? Is there a government financial scheme to promote basic broadband or NGA broadband penetration?

No specific regulatory obligations are presently applicable to NGA networks in Brazil. However, the Brazilian government has been continuously promoting access to broadband since 2010, when Decree No. 7,175/2010 launched the National Broadband Plan. In the following years, several bids granting rights to use spectrum bands allocated for 3G, 4G and 5G technologies were held. The largest auction in Anatel's history granted authorisations aimed to expand telecommunications services in Brazil, which also resulted in the deployment of 5G technology in 2022, an expansion that is positively impacting the internet of things and machine-to-machine communications markets.

Data protection

Is there a specific data protection regime applicable to the communications sector?

The communications sector does not have a separate set of rules for data protection. The LGPD covers all sectors in Brazil, including communications.

The LGPD applies to all processing operations carried out by an individual or by a legal entity, whether governed by private or public law, regardless of the format, the headquarter's country or the country where data are located, as long as the processing operation observes the following:

- processing carried out in the Brazilian territory;
- processing activity aimed at offering or providing goods or services, or processing of individuals' data located in the Brazilian territory; or
- collection of personal data subject to processing in the Brazilian territory.

The LGPD also sets out principles that must be complied with when handling personal data, such as purpose, adequacy, necessity, transparency, security and accountability, among others.

The communications sector can use personal data for different legal reasons, such as consent, legal or regulatory duties, the execution of a contract, the safeguarding of someone's life, and the controller's legitimate interest (as long as the individual's reasonable expectations are met). It is worth noting that some legal reasons are specific to the processing of personal data that is sensitive, such as:

- data related to racial or ethnic origin;
- religious conviction;
- political opinion;
- affiliation to a union or organisation of a religious, philosophical or political nature; or
- data related to health or sex life, genetic or biometric data, when linked to an individual.

Regarding controllers, they are subject to the following legal duties:

- designate a data protection officer;
- perform a data protection impact assessment, pointing out measures, safeguards and mechanisms for risk mitigation, as well as describing the processes that may create risks to civil freedoms and fundamental rights; and

- notify the Data Protection Authority (ANPD) and data subjects when a security incident occurs, which may cause relevant damage or risk to data subjects.

They must also answer to requests made by data subjects, which may include requests such as the examples below:

- access to data;
- correction of incomplete, inaccurate or outdated data;
- anonymisation, blocking, or deletion of unnecessary or excessive data or data processed not in compliance with LGPD requirements;
- deletion of personal data processed with the data subjects' consent;
- portability of data to a different provider of service;
- evidence on public and private entities the controller has shared data with; or
- review of decisions made by the controller based solely on automated processing of personal data affecting the interests of data subjects. This includes decisions aimed at defining his or her credit and (or) consumer profile, among others.

All processing agents must keep records of their personal data processing activities, especially when they rely on legitimate interest, and also implement security, technical and organisational measures.

It is also important to note that violating the LGPD's rules may result in an administrative proceeding by the ANPD, which may apply penalties such as warning, data blocking, data deletion, processing activity prohibition, and even fines that can go up to 50 million reais per violation. The administrative proceeding by the ANPD does not preclude lawsuits by data subjects or the intervention of specific regulatory agencies such as Anatel.

Anatel also has an online page available on how the Agency handles personal data, with privacy notices and the data protection officer's contact details, observing the LGPD.

Cybersecurity

Is there specific legislation or regulation in place concerning cybersecurity or network security in your jurisdiction?

Anatel's Resolution No. 740/2020 approved the Regulation of Cybersecurity Applied to the Telecommunications Sector (some provisions of which are not applicable to all telecommunications service providers), setting that conducts and procedures intended to promote cybersecurity in telecommunications networks and services shall ensure the principles of authenticity, confidentiality, availability, diversity, integrity, interoperability, priority, responsibility and transparency. Accordingly, individuals and legal entities directly or indirectly involved in the management or development of telecommunications networks and systems shall:

- adopt national or international rules and standards and good cybersecurity practices;
- seek the safe and sustainable use of such networks and services;
- identify, protect, diagnose, reply to, and recover cybersecurity incidents; and
- stimulate the adoption of security by design and privacy by design concepts in the development and acquisition of products and services in the telecommunications sector, in addition to other guidelines.

Other regulations may apply to specific subjects, such as Anatel's Act No. 2,436/2023, which established the mandatory minimum cybersecurity requirements for assessing compliance of customer premises equipment (eg, cable modems) used for connecting users to Internet services providers' networks.

The National Strategy of Cybersecurity (*E-Cyber*), published by means of Decree No. 10,222/2020, establishes goals to be achieved by the federal government and actions to be taken as regards cybersecurity, both nationally and internationally.

Moreover, the National Information Security Policy, issued by Decree No. 9,637/2018, is aimed at assuring the availability, confidentiality, authenticity and integrity of information in the national territory.

Big data

Is there specific legislation or regulation in place, and have there been any enforcement initiatives in your jurisdiction, addressing the legal challenges raised by big data?

Big data is not subject to specific legislation in Brazil, although several legal texts touch upon big data. As an example, LGPD rules on the protection of data subjects' privacy and self-determination concerning their personal data, set forth rules on personal data processing, and assigns duties and rights to processing agents and data subjects.

The Consumer Protection Code (Law No. 8,078/1990) grants consumers access to their data gathered in databases. The Internet Law (Law No. 12,965/2014) promotes adherence to open technological standards that allow accessibility, communication and interoperability between databases and applications.

Data localisation

Are there any laws or regulations that require data to be stored locally in the jurisdiction?

At the moment, there are no rules demanding storage of personal data in the Brazilian territory. The LGPD and the Internet Law are silent regarding data localisation, despite covering matters related to international data transfers and security measures for data storage.

The regulated economic sectors, such as health protection, banking, insurance, and pensions may set forth specific rules. For instance, the Brazilian Central Bank issued Resolution No. 4658/2021, establishing a cybersecurity policy. This rule also addresses requirements for contracting storage and cloud computing services applicable to financial institutions. According to this Resolution, the Brazilian Central Bank must be previously informed of the hiring of data storage services, including information about the data that may be stored, and the countries or regions where the services may be provided.

Furthermore, Complementary Norm No. 14/IN01/DSIC/GSIPR establishes guidelines for the use of technologies in agencies of the government. For instance, it mentions cloud computing and aspects related to security and data protection. This norm establishes that secret or top secret information cannot be processed in the cloud, for any reason. Additionally, data centres within the Brazilian territory are the place of choice to store data and metadata produced by and (or) under the responsibility of an agency.

Key trends and expected changes

Summarise the key emerging trends and hot topics in communications regulation in your jurisdiction.

Major investments are presently ongoing as a consequence of commitments undertaken by the winning bidders of the 2021 auction, the largest in Brazil's history, which resulted in Anatel granting authorisations for the use of radio frequencies in the 700MHz, 2.3GHz, 3.5GHz and 26GHz bands, implementation of 5G technology in 2022, and expanded access to communications and services in the country, including with 4G technology. However, at the end of 2023, Winity Telecom, winner of the 700MHz band, renounced the related authorisations. The final decision on the use of this radio frequency is still to be defined by Anatel and may lead to another bid.

Other radio frequencies might come to be used for 5G applications following public consultations and further analysis and approval by Anatel, but it is not possible to predict whether or when the applicable reallocation might become effective.

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