

## 4. Institutional framework

*This chapter provides an overview of the institutional framework related to telecommunication and broadcasting in Brazil. It first examines the role of regulatory authorities such as the National Telecommunications Agency, the National Film Agency and the Administrative Council for Economic Defence. The chapter then discusses government institutions engaged in communication policy design, advocacy for competition and consumer protection, among others. Following a review of judicial institutions and high-level oversight bodies, the chapter looks at decentralised structures, as well as the role of non-governmental organisations and other stakeholders. It also analyses the independence of the regulator, as well as the personal liability of public civil servants by accountability and auditing bodies.*

## Overview of institutions involved in the telecommunication and broadcasting sectors

Different institutions in Brazil have powers, functions and attributions related to the telecommunication and broadcasting sectors. The Brazilian regulatory framework overseeing the telecommunication and broadcasting sectors is complex with several authorities having different powers. Increased convergence blurs the contours of previously distinct sectors, increasing the inherent complexity of how these institutions interact. In this intricate system, the handling of converged services can be challenging given the lack of certain legal and administrative procedures.

A number of bodies or agencies in Brazil have direct or indirect responsibilities over the communication sector. In 1997, the General Telecommunications Law (Law No. 9 472, Lei Geral de Telecomunicações, LGT) defined the general principles governing communication services. It established the National Telecommunications Agency (Agência Nacional de Telecomunicações, Anatel) as the communication regulator. The Ministry of Science, Technology, Innovation and Communications (Ministério da Ciência, Tecnologia, Inovações e Comunicações, MCTIC) designs public policy to foster the use and adoption of information and communication technologies (ICTs).<sup>1</sup> The competition authority in Brazil, the Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica, CADE), promotes competition and investigates antitrust violations in communication markets. It also issues *ex ante* opinions on transactions that may hamper competition.

Roles for different services providing audio-visual content are less clear. For broadcasting, specifically free-to-air television (FTA), MCTIC acts as a public policy maker and a quasi-regulator. To that end, it theoretically monitors and controls the broadcasting sector, directly and indirectly. Concerning pay TV, which is defined as a telecommunication service within the Brazilian legal framework, Anatel and the National Film Agency (Agência Nacional do Cinema, Ancine) co-regulate the service. Ancine, in addition to overseeing certain elements in the value chain for pay TV, also has the mandate to foster competition within the Brazilian film industry; it also regulates development of the industry, including content-related issues.

### *Regulatory authorities*

#### *National Telecommunications Agency*

The LGT created Anatel in 1997 “to organise the provision of telecommunication services.” The term “organisation” in the LGT includes “the regulation of the performance, commercialisation and use of services, and telecommunication networks’ deployment and operation, as well as the use of orbit and radio spectrum resources.”

Anatel has responsibilities regarding pay TV services, but does not have oversight over broadcasting services. Anatel regulates content distribution, but not programming or content packaging that fall under Ancine’s responsibilities. This falls within the pay TV framework, established in 2011 by the Law of the Conditional Access Service (Law No. 12 485, Lei do Serviço de Acesso Condicionado, SeAC).

Spectrum allocation and management in Brazil is complex, and for broadcasting, spectrum assignment has concurrent powers that make this process highly inefficient. As defined by the law, Anatel is “generally” responsible for spectrum management in Brazil, including spectrum auction design. For both broadcasting and pay TV services (i.e. categorised as Conditional Access Services [Serviço de Acesso Condicionado], SeAC), Anatel is responsible

for spectrum planning. However, when it comes to spectrum assignment for broadcasting services, the licensing follows a complex structure (Chapter 6). Several entities participate in the process (i.e. MCTIC, the President of the Republic and Congress).

In broad terms, while linked to MCTIC, Anatel is an independent regulatory agency. Formally, as an autonomous body, Anatel does not respond to a higher authority. It holds administrative and legal independence, has financial autonomy and its commissioners have a fixed tenure. Independence of the regulator, understood as the separation between regulatory functions and policy-setting and fiscal policy functions, can enhance the role of the regulator in mitigating market failures at minimum cost (OECD, 2016<sup>[1]</sup>). The OECD recognises that independence is crucial to ensure the regulator can exercise its mandate efficiently with the purpose of promoting widespread access to communication services at competitive prices in the market (OECD, 2016<sup>[1]</sup>).

As defined in the LGT (art. 8), Anatel has financial autonomy. Its budget is determined by the Annual Budget Law (Lei Orçamentária Annual, LOA), approved annually by Congress. However, until June 2019, prior to this approval in Congress, Anatel had to submit its annual budget proposal to the sectoral ministry (i.e. MCTIC). This ministry would then forward it to the Ministry of Economy, which includes budget plans in the draft LOA. In June 2019, the Law of Regulatory Agencies (Law No. 13 848, Lei das Agências Reguladoras) entered into force. As a result of reforms to regulatory agencies, Anatel now submits its budget proposal directly to the Ministry of Economy (see also Box 4.1). This proposal is accompanied by a multi-annual revenue and expenditure planning that aims to achieve budgetary and financial balance in the five subsequent years (Brazil, 2019, p. art. 49<sup>[2]</sup>).

Law No. 13 848 improves over the previous framework as it increases Anatel's financial independence from MCTIC. However, all the fiscal contingency measures in the regulator's budget proposal (OECD, 2018<sup>[3]</sup>) still limit Anatel's independence (Nunes et al., 2017<sup>[4]</sup>). Fiscal contingency measures refer to the delay or non-execution of part of the expenditures contemplated within the Annual Budget Law due to insufficient national revenues. At the beginning of each year, the federal government issues a decree limiting the amounts authorised in the Annual Budget Law, related to "discretionary or non-legally mandatory expenses (i.e. investments and costing in general)" (Ministério da Economia, 2015<sup>[5]</sup>). Meanwhile, only a small fraction of the Telecommunications Oversight Fund (Fundo de Fiscalização das Telecomunicações, FISTEL), which was established to cover the costs of monitoring telecommunication services, has been used to finance Anatel (Table 4.1). This artificial budgetary constraint has hampered Anatel's new projects and affected its monitoring and regulatory activities. The collection and allocation of sectoral funds is further discussed in Chapter 7.

In principle, the legal framework is consistent with granting financial autonomy to the regulator. In practice, contingency measures applied by the Executive Power undermine Anatel's ability to carry out its regulatory functions and also compromise its independence. Sectoral fees collected under FISTEL should guarantee Anatel's financial autonomy. However, the limitation, reduction or delay of executing these resources has undermined the effectiveness of this mechanism. Indeed, after approval of Anatel's proposed budget, ministries can impose significant contingency measures. These constrain the regulator from executing the values provided for in the Annual Budget Law. The Federal Court of Accounts (Tribunal de Contas da União, TCU) has raised this concern several times (TCU, 2006<sup>[6]</sup>; TCU, 2011<sup>[7]</sup>).

Ensuring adequate funding is vital in enabling the regulator to operate efficiently and to fulfil effectively the objectives set by legislation and the government (OECD, 2014<sup>[8]</sup>). Given that Anatel does not have direct and autonomous administration over the sectoral

fees collected under FISTEL, its budget should be clearly defined and ring-fenced from the rest of the government budget. This would allow Anatel to minimise the government's ability to use it for other purposes or to withhold it (i.e. achieving fiscal balance with the agency's resources) (OECD, 2008<sup>[9]</sup>). Likewise, multi-annual budgets are preferable as they are less vulnerable to short-term political influences.

**Table 4.1. Impact of fiscal contingency on Anatel (2006-17)**

Year	Fee revenue (BRL million)	Expenditure (BRL million)	Share of FISTEL's revenue actually spent by Anatel (%)
2006	1 832.36	229.74	12.5
2007	2 040.56	262.88	12.9
2008	2 685.12	300.26	11.2
2009	2 652.51	325.83	12.3
2010	3 065.95	390.30	12.7
2011	3 712.13	401.15	10.8
2012	3 094.95	443.02	14.3
2013	2 895.44	475.90	16.4
2014	2 880.65	459.45	15.9
2015	3 077.85	449.73	14.6
2016	1 840.51	473.46	25.7
2017	1 666.77	499.19	29.9

*Note:* From 2016, of the total collected in the inspection fee revenue (FISTEL), 30% of the revenue unbundling has already been deducted in accordance with Constitutional Amendment No. 93 of 2016.

*Source:* Anatel's response to the questionnaire of the review.

Anatel's internal organisational structure is composed of several departments that oversee different regulatory functions. It is governed by the Board of Commissioners (Conselho Diretor), which is composed of five members. Anatel's commissioners must be Brazilian nationals with a university degree and an excellent reputation in their fields of expertise. They are chosen and appointed by the President of the Republic upon approval by the Senate. Since the changes brought by the Law of the Regulatory Agencies, commissioners can no longer be re-appointed. The Board decides by absolute majority in a collegial manner. It makes official rulings through resolutions, summaries, acts and ordinances. It has a secretariat that undertakes the daily administrative activities of the Board.

The functions of Anatel's presidency (Presidência) are described in Article 135 of Resolution No. 612 of 2013. The presidency is the highest hierarchical body, exercising the corresponding administrative powers and ensuring compliance with the functions granted to the Board of Commissioners. Anatel has the following areas that support and respond directly to the presidency:

- Technical Advisory Office (Assessoria Técnica)
- Parliamentary and Social Communication Affairs Office (Assessoria Parlamentar e de Comunicação Social)
- Institutional Relations Affairs Office (Assessoria de Relações Institucionais)
- Internal Affairs Office (Corregedoria)
- Executive Superintendent (Superintendente Executivo)
- International Affairs Office (Assessoria Internacional)
- Consumer Relations Affairs Office (Assessoria de Relações com os Usuários).

The Advisory Council (Conselho Consultivo), linked to the Board of Commissioners, is the consultative body of Anatel. It is composed of representatives appointed by the Senate, the Chamber of Deputies, the Executive branch and entities representing telecommunication operators, consumers and society. Members of the Advisory Council elect the president for a one-year appointment. The functions of the Advisory Council are established in Article 35 of the LGT. This includes providing an opinion on general communication policy objectives, advising on licensing and authorisation plans, analysing the annual reports of the Board, and proposing actions for the Board. However, recommendations of the Advisory Council are not binding.

Within the organisational structure of Anatel, other bodies oversee its different functions. For instance, the Internal Audit (Auditoria Interna) evaluates the efficiency and effectiveness of internal monitoring. This aims to protect assets and enable compliance with the laws and standards established for the adequate management of resources (Anatel, 2013, p. art. 141<sub>[10]</sub>). The Ombudsman (Ouvidoria) oversees the quality of regulation put in force by Anatel, and ensures that regulatory measures are timely. Furthermore, it addresses complaints, suggestions, claims and information requests from consumers (i.e. citizens and businesses alike), provided they relate to Anatel's regulatory performance and its compliance with the applicable legislation.<sup>2</sup>

Additionally, different superintendencies carry out regulatory activities and substantiating decisions from the Board related to the following areas:

- competition (Superintendência de Competição)
- consumer affairs (Superintendência de Relações com Consumidores)
- control of regulatory obligations (Superintendência de Controle de Obrigações)
- inspection (Superintendência de Fiscalização)
- internal information management (Superintendência de Gestão Interna da Informação)
- licensing and resources (Superintendência de Outorga e Recursos à Prestação)
- management and finances (Superintendência de Administração e Finanças)
- planning and regulation (Superintendência de Planejamento e Regulamentação).

An important factor relevant to the independence and autonomy of regulatory agencies is the mechanism defined for appointing its governing body (OECD, 2014<sub>[8]</sub>). Law No. 13 848 intends to limit the risk of capture by eliminating the possibility of reappointment of commissioners (Box 4.1). This law maintains the requirement of Anatel's head to be nominated by the President subject to approval by the legislative branch. Different OECD countries have such a mechanism to limit the political influence over regulatory agencies. Additionally, the five-year appointment is in line with practice in the OECD.

Anatel also has several areas dedicated to consumer protection and user relations. For instance, the Consumer Affairs Superintendence promotes, defends and monitors consumer rights individually and collectively regarding the obligations of the agency and of telecommunications service providers (Anatel, 2013, p. art. 160<sub>[10]</sub>). Pursuing such a mandate, Anatel has developed an app called “Anatel Consumidor”,<sup>3</sup> a website<sup>4</sup> and a call centre<sup>5</sup> to receive consumer complaints against communication operators.

Anatel also relies on external experts to advise on consumer protection. The Consumer Protection Committee for Users of Telecommunication Services (Comitê de Defesa dos Usuários de Serviços de Telecomunicações, CDUST) advises the Board of Commissioners in

matters concerning consumer rights. The CDUST was created in 1999 (Resolution No. 107 of 1999). However, it effectively commenced activities in 2008 when Anatel published new rules for the CDUST, which were amended by Resolution No. 650 of 2015. The CDUST has 16 members: 4 from Anatel, 5 from public and private institutions, and 7 from civil society (e.g. non-profit representatives of telecommunication users or consumer protection entities).

#### **Box 4.1. The Law of Regulatory Agencies**

In June 2019, the Law of Regulatory Agencies set forth a new legal framework for agencies such as Anatel to standardise aspects of their administration, organisation and decision-making process. Acknowledging the importance of independence, the law reaffirms that regulatory agencies do not report to higher authorities, and strengthens their functional, administrative and financial autonomy.

The law mandated regulatory impact assessment (RIA) prior to issuing regulatory measures that are of general interest to economic agents. It also established mechanisms for public consultations and hearings. However, there has been no oversight body to monitor how the RIAs are undertaken.

To further improve accountability, the law mandates the preparation of different documents. These include external control and annual activity reports, a strategic plan, an annual management plan and a regulatory agenda. Moreover, the law harmonises the following functions of the internal ombudsman in each regulatory agency:

- ensure the quality and timeliness of the services provided by the regulatory agency
- follow the internal process of interested parties' complaints on the performance of the regulator to which agencies are exposed
- prepare an annual report on the activities of the agency.

Finally, the law promotes co-ordination among governmental entities, including competition agencies, regulatory agencies, consumer and environmental protection agencies, and regulatory bodies at state, district and municipal level.

*Source:* Brazil (2019<sup>[2]</sup>), “Lei No. 13 879, de 3 de outubro de 2019”, [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2019-2022/2019/Lei/L13879.htm](http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Lei/L13879.htm).

Anatel, in addition to addressing consumer issues internally, has mandated the establishment of external consumer advocacy bodies. These bodies, known as users' advisory boards, were initially conceived in 2008 as one board for each fixed telephony concessionaire (Conselhos de Usuários do STFC, Resolution No. 490 of 2008). This approach was modified in 2013 when Anatel formalised advisory boards for each service that was available to end users.

In keeping with Anatel's Resolution No. 623 of 2013, service providers must implement advisory boards in each region with at least 50 000 subscriptions. At present, 35 boards advocate for consumer rights and obligations, evaluate the quality of services and propose improvements. The boards have up to 12 advisers, split between representatives from consumer protection entities and consumers. They are all elected following rules defined by the service provider, which is responsible for making these boards viable (i.e. holding elections, organising meetings and providing the funding).

Anatel has powers to enforce regulations, but it has collected fewer fines than warranted by Board decisions on fines in recent years. Between 2010 and 2017, Anatel imposed 60 000 fines. Of these fines, only 66% were fully paid by operators, representing 13% of the monetary value of the total fines imposed (Anatel, 2017<sub>[11]</sub>).

The significant divergence between the fines applied and collected results from several factors. These include the role of the judiciary in the enforcement of regulatory decisions, as well as the high value of the fines. A significant number of companies appeal the fines imposed by Anatel. Such processes can take up to ten years to resolve (Rosa, 2018<sub>[12]</sub>).

Anatel's administrative decisions can be appealed through administrative or judiciary processes. In 2017, the judiciary suspended 1.2% of the fines imposed by Anatel (Anatel, 2017<sub>[11]</sub>). Fines contribute to regulatory compliance only insofar as they are a credible deterrent against non-compliance. Anatel intends to modify its oversight regulation to adopt preventive and reparatory measures instead of punitive ones (Anatel, 2019<sub>[13]</sub>). It would consider a variety of sanctions beyond monetary ones, including remedial conduct and issuance of warnings.

As it prepares this new regulation, Anatel should follow best practice principles. These include rational and proportionate sanctions, and consideration of aggravating and mitigating factors when imposing fines such as the severity of the violation. It should also consider the resulting harm to consumers and prior infringements (OECD, 2018<sub>[14]</sub>).

According to the OECD Best Practice Principles on the Governance of Regulators, regulators should have enough autonomy to conduct their functions without interference from the Executive, Congress or Parliament. A clear framework for accountability needs to be balanced with effective autonomy of the regulator. The maintenance of certain prerogatives is essential to ensure the technicality, impartiality and predictability of the regulatory function (Moreira, 2004<sub>[15]</sub>).

To that end, the regulator should adopt internal procedures to guarantee transparency; ensure an open dialogue with the executive and legislative branches, associations, consumers, citizens and non-governmental organisations (NGOs); strengthen *ex post* assessment; and guarantee clear and transparent appeal decisions.

Analysing the costs and benefits of regulatory measures can help improve regulatory outcomes by assessing effects on investment and consumer surplus. Anatel has been one of the most active regulatory agencies in Brazil in promoting regulatory impact assessment (RIA). In 2018, Anatel developed new standards for RIA practices.<sup>6</sup> Although Anatel recognises the importance of RIA, and has conducted several RIAs on qualitative issues, it has limited experience with quantitative RIAs (Aquila et al., 2019<sub>[16]</sub>). Additionally, Anatel's information related to RIA implementation is difficult to access.

Recently, Anatel has tried to improve accessibility of these reports by consolidating all documents related to regulatory decisions, including the RIA reports, on its website.<sup>7</sup> However, the only available documents are those produced in 2019 and 2020. Earlier reports are only accessible through research in Anatel's general electronic information system. Finally, despite previous OECD recommendations, there is still no independent body in Brazil to oversee the quality of RIA reports. This is necessary to support effective implementation of RIA (OECD, 2016<sub>[17]</sub>).

Anatel has carried out public consultations systematically since its creation. On its website, Anatel publishes its consultation processes (i.e. documents, related comments, public hearings and final decisions) to ensure an open and constant dialogue with society. Anatel's online platform System for Accompanying Public Consultations (Sistema de Acompanhamento

de Consultas Públicas, SACP)<sup>8</sup> has enabled greater efficiency for engaging the public in its regulatory decisions.<sup>9</sup> The SACP analyses and answers all comments individually.

### *The National Film Agency (Ancine)*

Ancine was created to develop the Brazilian film industry. Since the passage of the SeAC law, Ancine has expanded its functions. It has exclusive responsibility for management of programming and audio-visual content packaging. It is also the regulatory body in charge of audio-visual content distribution of pay TV and FTA TV. As such, Ancine enforces compliance with regulations related to audio-visual content distribution, such as local content quotas, quality and foreign ownership restrictions.

The Collegiate Board of Directors (Diretoria Colegiada), which runs the entity, is composed of a president and three directors. They are appointed by the President of Brazil and then approved by the Senate. All decisions of the Board must be made in a collegial manner, and by simple majority of votes; the president is elected for one year, and runs the meetings. The Board is the final administrative authority and analyses, discusses and decides on Ancine policies, and regulates in the areas of its competence (Ancine, 2014, p. art. 6<sub>[18]</sub>). In addition, it has a secretariat, which co-ordinates and assists the directorate at the administrative level (Ancine, 2014, p. art. 15<sub>[18]</sub>).

Ancine has different units that oversee its performance. For instance, the Secretariat of Internal Management Policies (Secretaria de Políticas de Gestão Interna), monitors Ancine officials as well as internal activities. The Internal Audit (Auditoria Interna) carries out internal control actions such as advising on the execution of the government's plans. It also helps implement recommendations by the units of control of the Executive branch and TCU. It must communicate irregularities that could affect the Treasury, and elaborate the annual plan of internal audit activities. The Ombudsman (Ouvidoria) receives petitions and complaints from citizens and institutions related to Ancine and works to resolve issues within the agreed deadlines. It also co-ordinates public consultations and proposes adjustments to administrative procedures to improve institutional performance (Ancine, 2014, p. art. 24<sub>[18]</sub>).

Ancine is organised into the following superintendencies: registration (Superintendência de Registro), inspection (Superintendência de Fiscalização), promotion (Superintendência de Fomento) and economic development (Superintendência de Desenvolvimento Econômico).

### *The need for a convergent regulatory approach*

According to international principles for good regulatory practices developed by the OECD, regulators should have a well-defined mission and distinct responsibilities. Different actors must clearly know their role and purpose. In this way, they can complement rather than duplicate each other (OECD, 2014<sub>[8]</sub>).

In the context of growing convergence of media content and communication services, the question of creating a converged regulator arises. In Brazil, distinct regulators for communication markets and broadcasting services make it challenging to clarify roles. Relevant bodies in the communication and broadcasting industries have potentially conflicting and competing functions. For instance, Anatel regulates communication services and audio-visual media distribution. This means that Anatel and Ancine regulate different levels of the audio-visual value chain. Given this arrangement, it is unclear which body should regulate distribution of content over the Internet.

As convergence progresses, it will become more challenging to differentiate operators according to how they deliver services. This will affect the clarity of regulators' roles given



the potential for duplication. In the context of convergence, a number of OECD countries such as Australia, Hungary and the United Kingdom have merged their broadcasting and communication regulators. Others have made it easier for regulators to limit conflicts over co-ordination and to help implement converged regulation (OECD, 2008<sup>[9]</sup>; OECD, 2017<sup>[19]</sup>). In this respect, Brazil could respond to the challenge by creating an independent and convergent regulator responsible for communication and broadcasting markets. At the least, it should consider transferring some powers from Ancine and MCTIC to Anatel.

### ***The Administrative Council for Economic Defence***

The Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica, CADE) enforces antitrust regulation and promotes competition in all economic sectors, including communication and broadcasting. These objectives are complemented by other regulators: Anatel promotes competition in the communication sector through *ex ante* regulation, while Ancine is responsible for programming and audio-visual content packaging. CADE has a co-operation agreement with Ancine, but no formal one with Anatel.

In 2011, the Brazilian competition law (Law No. 12 529, Lei de Defesa da Concorrência, LDC) re-organised the Brazilian competition policy framework. It granted CADE responsibilities for administrative proceedings related to “violations against the economic order”, as well as for merger control.

CADE is made up of an Administrative Tribunal, a General Superintendence and a Department of Economic Studies. The Administrative Tribunal makes decisions. The General Superintendence investigates and conducts proceedings to rebuke abuse of economic power and analyse mergers. The Department of Economic Studies prepares economic opinions and studies in all areas related to CADE’s competences, including mergers, anticompetitive conduct and promotion of a competition culture. Further details follow below.

CADE’s Administrative Tribunal has a president and six commissioners who are Brazilian nationals over the age of 30. The Senate approves the president and the commissioners after they are appointed by the President of the Republic. The president and commissioners hold office for four years, and cannot serve consecutive terms (Brazil, 2011, p. art. 6<sup>[20]</sup>). They are also prohibited from engaging in the activities of political parties (Brazil, 2011, p. art. 8<sup>[20]</sup>).

CADE’s General Superintendence has a General Superintendent and two deputies. The Senate approves the General Superintendent after appointment by the President of the Republic. The General Superintendent appoints the deputies (Brazil, 2011, p. art. 9<sup>[20]</sup>).

A specialised Attorney General’s office provides legal consultancy and assistance to CADE, and represents it in and out of courts. It promotes the judicial enforcement of CADE’s decisions and sentences. It also promotes adoption of judicial measures requested by the tribunal or by the General Superintendence. These could include measures needed to cease “violations of economic order” or to obtain documents for fact-finding purposes, among others.

A Chief Economist, appointed jointly by the General Superintendent and the President of the Tribunal, heads the Department of Economic Studies. The Chief Economist prepares economic studies and opinions, engages in advocacy, ensures technical and scientific accuracy of decisions of the main body, and studies the effects of CADE’s decisions in certain markets. Regarding communication issues, CADE has published various decisions of merger control (Chapter 6).

### *Governmental institutions*

#### *Ministry of Science, Technology, Innovations and Communications*

MCTIC, established in 2016 by the merger of the Ministry of Communications and the Ministry of Science, Technology and Innovation,<sup>10</sup> is responsible for communication policy design. According to Decree No. 9 612 of 2018, MCTIC promotes implementation of ICT-based infrastructure and services for development of digital and intelligent cities. Additionally, in relation to public communication policies, Law No. 13 844 (art. 25) of 2019 and Decree No. 9 612 of 2018 (art. 7) defines its roles as the following:

- detail communication policy objectives and guidelines, and publish the results of public policy initiatives
- define guidelines, strategies, actions and mechanisms for monitoring
- supervise Anatel's actions resulting from objectives and guidelines
- promote participation of civil society through public hearings and consultations, in addition to other instruments
- establish contracts, agreements, adjustments and other instruments to achieve the objectives.

The powers of MCTIC and Anatel do not regularly overlap and the entities generally co-ordinate activities. If an uncertainty arises with respect to a particular function, the two usually negotiate a consensus. Additionally, MCTIC and Anatel have signed different co-operation agreements.

Regarding broadcasting, MCTIC has classic industrial policy responsibility for the whole sector. It also assigns broadcasting licences, given the absence of an independent regulatory agency for the entire sector. While FTA has no regulatory agency oversight, Anatel and Ancine regulate pay TV services jointly.

MCTIC awards broadcasting licences. In the case of municipal or educational broadcasters, these are awarded upon request. In the case of commercial broadcasters, the award is based largely on public benefit criteria. These include the amount of local content committed and news coverage.

Although licensing commercial TV stations is a competitive bidding process, multiple institutions participate. MCTIC starts the process by publishing an invitation. If valid, the demand for the licence is sent to the President of the Republic for approval and signature. However, the licence will only be valid after final approval by Congress. The procedure continues at Anatel, which issues a permit for use of the radiofrequency spectrum.

To promote efficient spectrum management, Anatel, or a new converged regulator, should be entitled to license and allocate spectrum for commercial broadcasting services. The complex and lengthy process of issuing a broadcasting licence is detailed in Chapter 6.

#### *Secretariat for Competition Advocacy and Competitiveness*

The government reform of 2019 re-organised the ministries. The Ministry of Economy was created to integrate the activities of two other ministries (i.e. finance and labour) through Provisional Measure No. 870 of 1 January 2019 (Ministério da Economia, 2020<sub>[21]</sub>). Within the Ministry of Economy, the Secretariat of Competition Advocacy and Competitiveness

(Secretaria de Advocacia da Concorrência e Competitividade, SEAE) conducts competition advocacy directed towards government agencies and society.

SEAE analyses public policies, self-regulation and normative acts of general interest of economic agents, and consumers through a competition lens. It also evaluates bills presented to Congress and by regulatory agencies, including Anatel, in terms of competition advocacy in all sectors of economic policy.

### *National Consumer Secretariat*

The National Consumer Secretariat of the Ministry of Justice of Brazil (Secretaria Nacional do Consumidor, Senacon) formulates, promotes, co-ordinates and implements the National Consumer Protection Policy. Senacon also represents the interests of Brazilian consumers and the National Consumer Defence System (Sistema Nacional de Defesa do Consumidor, SNDC) in international organisations such as Mercosur and the Organization of American States (Consumer International, 2019<sup>[22]</sup>).<sup>11</sup>

Senacon has a role in communication policy issues related to the protection of consumer rights and the quality of services. Senacon analyses consumer protection issues that have national repercussions, promotes sectoral dialogues with suppliers and undertakes technical co-operation with regulatory agencies (e.g. Anatel). It also imposes sanctions on practices that go against consumer rights, which include penalties to communication operators. It has formed several working groups with Anatel, such as one created in 2016 within the Internet Civil Rights Framework (Marco Civil da Internet, Law No. 12 965 of 2014). The group addresses issues related to Internet services.

Within Senacon, the Department of Consumer Protection and Defence (Departamento de Proteção e Defesa do Consumidor, DPDC) assesses complaints by consumers or representatives of consumers. DPDC advises consumers about their rights and raises consumer awareness. Moreover, Senacon asks the judicial police to deter breaches of consumer law that may be subject to criminal sanctions. In Brazil, only the judicial police can initiate criminal investigations, which may include issuing judicial warrants for the surveillance of criminal activities. Finally, Senacon has the power to propose improvements of legislation on consumer rights.

In the communication sector, for example, DPDC fined Oi, Claro and Vivo BRL 9.3 million (USD 2.54 billion) in 2018 for violation of the Brazilian Consumer Defence Code.<sup>12</sup> According to DPDC, these communication operators violated consumers' rights in "value-added services." Among other things, the three companies had billed for goods and services that had not been ordered by consumers (Ministério da Justiça e Segurança Pública, 2018<sup>[23]</sup>).

Anatel protects consumer rights and the quality of telecommunication services, and can impose sanctions. Anatel co-operates with Senacon by providing relevant information on administrative actions and procedures relating to consumer rights. Due to the technical nature of complaints (e.g. mobile service quality) and Anatel's complaint handling procedure being in place longer than Senacon's, Anatel deals with more consumer protection issues in the telecommunication sector than Senacon. In this regard, Anatel has regulated the rights of consumers of communication services. It has also obliged providers to increase transparency for consumers.

Anatel and Senacon require more formal co-ordination to treat consumer-related issues. At present, they exchange information about consumer complaints against communication operators within SNDC, including state and municipal Procons. In addition, Senacon is a formal member of the CDUST and helps draft regulatory measures by Anatel (e.g. most

RIA assessments include Senacon as a crucial stakeholder). In November 2019, Anatel and Senacon established a Memorandum of Understanding, together with the Supreme Court and communicator operators, to foster the adoption of an online portal ([consumidor.gov](http://consumidor.gov)) and establish it as the first resort for dispute resolution of consumer complaints.<sup>13</sup>

### *Ministry of Justice*

Following the mandate established by the 1988 Constitution and the Statute for Children and Teenagers (Law No. 8 069 of 1990, Estatuto da Criança e Adolescente), the Ministry of Justice regulates and monitors the classification of radio and TV content, as well as public entertainment. Its decision No. 1 189 of 2018 details the scope for classification (all audio-visual work, including video-on-demand, role-playing games, electronic games and applications, but excluding browser-based games not stored locally). Content providers self-classify ratings, and the ministry monitors them. Brazil is part of the International Age Rating Coalition (IARC). Ministry authorisation is unnecessary for electronic games and applications for which IARC has established ratings.

### ***Judicial institutions***

#### *Federal Supreme Court*

The highest level of the Brazilian judiciary is the Federal Supreme Court (Supremo Tribunal Federal, STF). The STF combines competencies of a supreme court (i.e. the court of last resort in civil and criminal cases) and a constitutional court, which considers constitutional issues regardless of concrete litigation. Fundamentally, it protects the Constitution of 1988, analysing cases that involve a violation of the latter.

The STF Board is composed of 11 ministers who must be Brazilian nationals with outstanding legal knowledge and unblemished reputations. The President of the Republic nominates ministers, who must be approved by an absolute majority of the Senate.

The main mandate of the STF includes judging the direct action of unconstitutionality of a federal or state law or act, declaring the constitutionality of a federal law or regulation, dealing with the allegation of non-compliance with a fundamental precept arising from the Constitution itself and extradition requested by a foreign State.<sup>14</sup>

#### *Federal Court of Accounts*

Although not strictly a judicial institution, the Federal Court of Accounts (Tribunal de Contas da União, TCU) acts as an independent and autonomous constitutional body. It helps Congress monitor the budget. TCU is composed by nine members: the Chamber of Deputies appoints six members, while the President of the Republic appoints the remaining three. The Senate must approve all nominations.

TCU is the external monitoring organ of the federal government. It helps Congress monitor the budget and finances of the country to promote an effective, ethical, agile and responsible public administration. TCU is responsible for the accounting, financial, budgetary, operational and patrimonial oversight of the country's public bodies and entities regarding legality, legitimacy and cost-effectiveness.<sup>15</sup> TCU is further responsible for overseeing the Fiscal Responsibility Law (Supplementary Law No. 101, Lei de Responsabilidade Fiscal), the Law on Tenders and Contracts (Law No. 8 666, Law on Tenders and Contracts) and, annually, the Annual Budget Law (LOA).

TCU processes may be initiated *ex officio*, or at the request of any person with knowledge of irregularities that fall within its competence. The same procedures take place if the process is initiated by an individual member of Congress. However, approved congressional requests sent to TCU will be classified as a National Congress Request. Thus, they are given preferential treatment pursuant to Resolution TCU No. 215 of 20 August 2008.

TCU imposes administrative penalties related to the misuse of public funds, and conducts the administrative investigation, judgement and sanction (Aranha, 2018<sup>[24]</sup>). TCU may apply sanctions once an irregularity is found. Possible sanctions include fines, damage reimbursement, asset freezing, disqualification from holding public office and the inability to participate in biddings related to projects within the federal public administration. TCU will forward a copy of the relevant files to the federal Public Prosecutor's Office to initiate civil and criminal actions as deemed appropriate (Gomes, 2006<sup>[25]</sup>). As a consequence of TCU's judgements, public servants may face prosecution for administrative improbity (Article 11 of Law No. 8 249 of 1992, Law on Administrative Improbity).

TCU issues two types of decisions: determinations, which are mandatory; and recommendations, which are not. Both are made within the framework of TCU powers, such as audit. There is no accountability for not following recommendations. However, they are considered mandatory and usually impose a deadline for compliance (de Azevedo et al., 2019<sup>[26]</sup>).<sup>16</sup> According to Articles 277-289 of the TCU bylaws (Regimento Interno do TCU), its proceedings can be challenged or appealed.<sup>17</sup>

As TCU representative, the rapporteur oversees legal aspects of the proceedings to produce a decision taken by the collegiate body. In case of an appeal, she or he shall assess its admissibility. TCU carries out all the procedure exclusively. If the appeal is not admissible due to gross error, bad faith or regular postponements, the rapporteur shall submit it to the collegiate body and deny the motion in a substantial way.

Control by TCU is potentially undermining Anatel's independence, limiting its capacity to carry out its functions. As previously acknowledged by the OECD in 2008, performance assessment by national audit offices can protect the public interest. Although TCU usually acts *ex post*, it acts *ex ante* in bidding and privatisation. The extent to which *ex ante* assessment (or simultaneous audit) and advice from TCU is applied to the regulatory agencies in Brazil is unusual (OECD, 2008<sup>[9]</sup>). In 2007, The World Bank also advised moderation in the monitoring exercised by TCU. Extensive involvement of TCU in reviewing concessions, it said, posed a possible regulatory risk. It seems this advice has not been followed.

TCU's mandate is specified in the Constitution (art. 70 and 71). In addition, Law No. 9 491 of 1997 (art. 18) gives TCU responsibility to "examine the files related to privatization processes," i.e. it may review procurement processes. However, a recent government decision determined that TCU could exert prior control over tender invitations in infrastructure projects (i.e. before establishment of a contractual relationship between the public administration and the private operator) (Jordão, 2014<sup>[27]</sup>). TCU has thus possibly expanded its scope of action and affected Anatel's decisions (Gomes, 2006<sup>[25]</sup>). The latter may undermine the independence of the regulatory agency by potentially subjecting it to a hierarchical control.<sup>18</sup>

The recent public guideline "Projeto Crescer" of 2016 (PPI, 2016<sup>[28]</sup>), further extended TCU's role. It determines the *ex ante* control by TCU of the agencies' administrative acts. This may be paving the way for TCU to play the role of the regulator and influence decisions when developing infrastructure projects (Jordão and Ribeiro, 2017<sup>[29]</sup>). In principle, the public guideline has no binding force. In practice, however, the regulatory agencies submit their auction and procurement procedures to TCU for prior consideration. They fear being held accountable of any irregularity found in TCU's *ex post* control (Lenzi, 2018<sup>[30]</sup>).

#### Box 4.2. The role of TCU in telecommunication issues

In the past few years, there has been a growing discussion on the role of TCU and its likely co-regulatory power in the communication sector. TCU has opened 455 cases on actions by Anatel. Most cases are related to regulation, as well as fiscal and accountability issues.

TCU does performance audits of federal agencies, which include the area of regulation. For example, TCU has questioned issues related to reversible assets and transfers of corporate control of the concessionaires in the communication sector. It also examines Anatel's procedures for hiring external consultants, the criteria for technical studies conducted in spectrum auctions, and the negotiation between Anatel and Telefônica Brasil S.A towards a Conduct Adjustment Agreement (Termo de Ajustamento de Conduta, TAC) (TCU, 2017<sup>[31]</sup>).

In the negotiation of the TAC between Telefônica Brasil and Anatel, there was not a specific suspension of Anatel's decision to establish the TAC. However, TCU brought up issues to be addressed before Anatel could conclude the TAC with Telefônica Brasil (TCU, 2017<sup>[32]</sup>). TCU conducted its analysis after the Anatel Board of Directors approved the TAC, and before Anatel and the company signed it. In their analysis, several aspects of the agreement seemed to contradict Anatel's regulations, as well as other applicable legal provisions. TCU issued determinations and recommendations to Anatel. If these determinations had been fulfilled, the agreement could have gone ahead. However, according to Anatel's Board, Telefônica Brasil did not agree to adapt the conditions in the TAC. In the end, TCU's pressure seems to have convinced Anatel's Board to not conclude the agreement, which led to the termination of negotiations (Anatel, 2018<sup>[33]</sup>).

#### Viasat – Telebrás

TCU has also exercised control on other agents of the telecommunication sector in the midst of the decision process. It analysed the partnership agreement between the State-owned Telebrás and the American company Viasat for the provision of Internet connection services through the Geostationary Defence and Strategic Communications Satellite (Satélite Geostacionário de Defesa e Comunicações Estratégicas, SGDC), after the signature of said agreement by both parties. In this case, highly covered by the Brazilian press, TCU approved the Viasat–Telebrás agreement, but ordered multiple modifications. The agreement aimed at a collaboration between Telebrás and Viasat for the use of the SGDC to provide Wi-Fi service in remote areas of Brazil.

This agreement was signed in February 2018, but could not be implemented until May 2019. TCU had issued a decision to adjust some clauses of the contract, without suspending it entirely. The Supreme Federal Court finally suspended the contract (TC No. 022.981 of July 2018). For TCU, the agreement was clearly not well balanced and disadvantageous to the Telebrás; therefore, TCU ordered a renegotiation of those clauses that the court had considered as unbalanced.<sup>1</sup>

1. The provisions that required renegotiation or modification included negotiating reduction of the contractually foreseen value for the monthly payment of Telebrás to Viasat. It also included modifying a clause to allow the possibility of alterations in the agreement between the parties (clause 5.3(a)(ii) should be in accordance with Article 81, VI, of the Lei das Estatais), among others.

Although TCU recognises the public administration's autonomy to act, the entity “seeks to act preventively and act as soon as possible to avoid failures and irregularities” (TCU, 2020<sup>[34]</sup>). Together with the experiences highlighted in Box 4.2, this may indicate the

entity's preference for simultaneous monitoring of regulatory measures. In this respect, TCU's core tasks should be focused on *ex post* assessment of the effectiveness and efficiency of policies, programmes and processes.

Previous OECD work has highlighted the importance of incorporating *ex post* evaluations as an integral part of the "regulatory cycle" (OECD, 2015<sup>[35]</sup>). The OECD has also noted that supreme audit institutions like TCU may consider a less audit-like approach towards evaluation. To that end, they can examine if their performance audits and evaluations should be more suggestive and less prescriptive (OECD, 2016<sup>[36]</sup>).

### *High-level oversight bodies*

Apart from TCU, Brazil has other high-level control bodies in charge of preventing, detecting and sanctioning corruptive practices. These include the Public Prosecutor's Office (Ministério Público, MP), an independent body that does not belong to executive, legislative or judiciary branches. The MP is composed of the Federal Prosecutor's Office (Ministério Público da União, MPU) and the State Public Prosecutor's Office. The MPU, in turn, is composed of the Federal Prosecutor's Office (Ministério Público Federal, MPF), the Labour Prosecutor's Office (Ministério Público do Trabalho), the Military Public Prosecutor's Office (Ministério Público Militar) and the Federal District and Territories Prosecutor's Office (Ministério Público do Distrito Federal e Territórios).

The MPF upholds the legal order, the democratic regime, and social and individual interests, as well as a functional and administrative autonomy. It is a prosecutorial body, with a guaranteed budget (Aranha, 2018<sup>[24]</sup>) and the function of promoting class actions for the protection of the State's property, the environment, and other collective and diffuse interests. In this respect, the MPF has the legitimacy to promote consumer protection before the federal courts, which in turn, will conduct the judicial judgement and sanction. In the telecommunication area, the MPF has been active in initiating class actions to determine the legality of Anatel's performance. It has also actively requested information from Anatel about the provision of telecommunication services.

### ***Decentralised governmental institutions***

#### *State government and prefectures*

Brazil has 26 federated states, 5 570 municipalities, including the Federal District. The state governments and prefectures belong to the Executive branch of government and have functions and powers related to the communication sector, namely taxation, consumer matters and infrastructure.

The effective implementation of sectoral regulation sometimes depends on other related laws. This is also the case for the telecommunication and broadcasting sectors, as relevant issues of both industries are handled at a federal, state and municipal level. For example, municipalities legislate the deployment of infrastructure and communication networks in urban areas, in line with environmental, territorial planning standards (Brazil, 1988, p. Arts. 20 and 30<sup>[37]</sup>) (Brazil, 1997, p. art. 74<sup>[38]</sup>) (Brazil, 2002, pp. Arts. 1286, 1369, and 1371<sup>[39]</sup>). The 2008 OECD Review of Regulatory Reform highlighted a significant overlap of functions between federal, state and municipal regulatory agencies in Brazil. Although mechanisms for co-ordination existed, they were not frequently used (OECD, 2008<sup>[9]</sup>).

There is a lack of co-ordination among federal, state and municipal levels of government in some key issues affecting communication and broadcasting markets. This is illustrated,

among other examples, by the tax on telecommunication services (Imposto sobre Circulação de Mercadorias e Serviços, ICMS). With respect to taxation, inconsistent policy goals may have limited the development of the telecommunication sector due to high taxes (Chapter 7). Other examples include antenna deployment (i.e. power density regulations and licences for the installation of cellular sites). In addition, rights-of-way regulation (i.e. towers, ducts, etc.) for network deployment may include use of public buildings, roads and street furniture (Brazil, 2015<sup>[40]</sup>). These co-ordination issues at different levels of government may hamper infrastructure deployment, as well as the access and adoption of communication services.

The Brazilian states share the power to legislate on consumer matters, provided they respect the “general clauses” instituted by federal law.<sup>19</sup> Additionally, there are more than 800 state and local departments for consumer protection (Procon) linked to the Executive Power, which also oversee communication companies.

The creation of a Procon is subject to each state or municipality, which leads to different levels of access to consumer protection organisations throughout the country. Procons also gather information that is periodically published in the National Information System for Consumer Protection (Sistema Nacional de Informações de Defesa do Consumidor), created in 2003 and managed by Senacon.

Functions continue to overlap in consumer protection for telecommunication services, including between Senacon, Anatel and Procons. Regarding the latter, Procons promote greater effectiveness in the protection of consumer rights by facilitating line of communication with consumers that require interventions at a local level. Furthermore, the presence of consumer protection bodies in states and municipalities acknowledges the states’ heterogeneity in terms of connectivity, consumer awareness and education levels. On the other hand, the plethora of Procons may also lead to some co-ordination issues. Anatel has the technical capabilities and knowledge to protect consumer rights in discussions of specialised issues like signal quality. To promote legal certainty and regulatory coherence, Anatel, Senacon and Procon would gain from actively increasing their co-operation and transparency.<sup>20</sup>

### ***Non-governmental organisations and multi-stakeholder bodies***

#### *CGI.br*

The Brazilian Internet Steering Committee (Comitê Gestor da Internet no Brasil, CGI.br) was created by Inter-ministerial Order No. 147 of 31 May 1995. The order was amended by Presidential Decree No. 4 829 of September 2003. CGI.br co-ordinates and integrates all Internet service initiatives in Brazil, as well as promotes quality of service, innovation and dissemination of Internet services.

The CGI.br is comprised of members from the government, private sector, civil society, the Internet technical community and academia. As such, it is a unique model for the effective participation of society in decisions involving Internet governance. Based on the principles of multilateralism, transparency and democracy, the CGI.br has elected representatives from civil society since July 2004. They take part in discussions and define priorities for Internet policy together with the government.

NIC.br is the operational body of CGI.br, created to implement its decisions. NIC.br has a General Assembly composed of current and former members of CGI.br. The General Assembly, in turn, elects the Board of Directors consisting of seven members with a two-year term. Four members are from civil society and three from the government. The Board selects the



Executive Directors, who manage and represent the organisation. Membership on the General Assembly or Board is unpaid.

NIC.br is also responsible for domain name registration and administration of the country code top-level domain (ccTLD) “.br”, carried out through Registro.br. It also promotes studies and recommends procedures for Internet security through CERT.br. In addition, it produces internationally comparable ICT statistics and indicators, as well as capacity building programmes on survey methodologies through CETIC.br. These allow maintenance of technical quality and innovation in use of the Internet. Under NIC.br, IX.br promotes and manages Internet exchange points in Brazil.

### *Self-Regulatory Advertising Council*

The Self-Regulatory Advertising Council (Conselho Nacional de Autorregulamentação Publicitária, CONAR) is an NGO that promotes freedom of expression and defends the constitutional prerogatives of commercial advertisement (Conselho Nacional de Autorregulamentação Publicitária, 2020<sup>[41]</sup>). Within its mission, CONAR handles complaints from consumers, authorities, associates and those formulated by CONAR’s Board members. The Ethical Council judges the complaints and its recommendations are followed on a voluntary basis.

CONAR applies the ethical rules in the Brazilian Code of Self-Regulatory Advertising, which was developed by the advertisement community. While not legally binding, the document has great influence over economic agents in the advertisement industry. Based on this code, CONAR has four possible responses. First, it could issue a warning. Second, it could make a recommendation to modify an advertisement. Third, it could recommend suspending the disclosure of an advertisement. Fourth, it could issue a public notice announcing its position with regard to the economic agent for non-compliance.

CONAR conducts an *ex post* evaluation of content, excluding prior censorship of advertising content. In most cases, the involved parties (e.g. advertisement or communication agencies) heed CONAR’s recommendations (IDEC, 2014<sup>[42]</sup>).

In 2018, individual consumers initiated 211 of 302 CONAR proceedings. CONAR itself initiated the remaining 91 proceedings. In 2019, most of the 302 proceedings were related to the following industries: telecommunication (8.6%), alcoholic beverages (14.2%), food (13.9%) and health (13.6%). The remainder (49.7%) was related to other industries such as automotive, fashion and electronics (CONAR, 2020<sup>[43]</sup>).

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## Notes

<sup>1</sup> On 10 June 2020, the President of Brazil announced the recreation of the Ministry of Communications (MC). The MC had existed prior to 2016, which then became the Ministry of Science, Technology and Innovation (MCTIC). At the moment of writing, the implications to the institutional framework of this newly re-created Ministry were still to be finalised.

<sup>2</sup> See Article 22, paragraph 1, Lei das Agências Reguladoras (Law No. 13 848 of 25 June 2019) – the matter was previously disciplined (barely, one might say) by Article 45 of LGT (Law No. 9 472 of 16 July 1997). See also Articles 138 and 139 of the bylaws (Resolution No. 612 of 2013).

<sup>3</sup> See [www.anatel.gov.br/consumidor/anatel-procon-ou-juizados-especiais/58-atendimento/canais-de-atendimento/483-aplicativo](http://www.anatel.gov.br/consumidor/anatel-procon-ou-juizados-especiais/58-atendimento/canais-de-atendimento/483-aplicativo).

<sup>4</sup> See <https://sistemas.anatel.gov.br/sis/cadastrosimplificado/pages/aceso/login.xhtml?i=0&codSistema=649>.

<sup>5</sup> See [www.anatel.gov.br/consumidor/anatel-procon-ou-juizados-especiais/58-atendimento/canais-de-atendimento/153-telefone](http://www.anatel.gov.br/consumidor/anatel-procon-ou-juizados-especiais/58-atendimento/canais-de-atendimento/153-telefone).

<sup>6</sup> Before the release of the RIA guidelines by the presidency (Casa Civil) in 2018 (Brazil, 2018<sup>[45]</sup>), Anatel had already developed diverse measures for RIA implementation.

<sup>7</sup> This represents 1.16% if measured in monetary value. See [www.anatel.gov.br/setorregulado/agenda-regulatoria/agenda-2019-2020](http://www.anatel.gov.br/setorregulado/agenda-regulatoria/agenda-2019-2020).

<sup>8</sup> See <https://sistemas.anatel.gov.br/sacp/>.

<sup>9</sup> See <https://sistemas.anatel.gov.br/sacp/>.

<sup>10</sup> The Ministry of Communications was formally created in 1967. MCTIC was established by Provisional Measure No. 726, and converted into Law 13 341.

<sup>11</sup> Senacon’s mandate is established in Article 106 of the Consumer Protection Code (Law 8 078, Código de Defesa do Consumidor, CDC), Article 3 of Decree 2 181 of 1997, and Article 17 of Decree 9 662 of 2019.

<sup>12</sup> Using the BRL/USD exchange rate for the year 2018 of 3.653825 from OECD.stat (<https://stats.oecd.org/>).

<sup>13</sup> See [www.anatel.gov.br/institucional/component/content/article?id=2437](http://www.anatel.gov.br/institucional/component/content/article?id=2437).

<sup>14</sup> The STF may hear claims of a statute being unconstitutional in the first or second instance. It depends on whether the party is authorised to raise the specific constitutional claim directly to the STF. This is, for example, the case of the General Federal Prosecutors (Procuradoria Geral da República, PGR).

<sup>15</sup> The constitutional and exclusive powers of TCU are set forth in Articles 33, 70, 71, 72, 74 and 161 of the Constitution of 1988.

<sup>16</sup> An empirical study in 2019 analysed the oversight dynamic between Independent Regulatory Agencies and Federal Court of Accounts. Among other points, the study concluded that “[...] (i) the recommendations are mandatory by nature, since the Federal Court of Auditors expects them to be observed by the Agencies while the latter also feel bound, such that quite often they are referred to as determinations [...]”. In the same regard, it specifies that recommendations made by TCU “are effectively determinations, and in most cases it imposes a deadline for compliance. It should be noted, however, that no sanctions are imposed for failing to comply with recommendations. Analyzing each phase of the dialogue, there is expectation on the part of the Federal Court of Auditors that its recommendations will be complied with, while the Agencies, with the exception of National Energy Agency (Aneel), feel themselves bound to follow the Court’s determinations.” (de Azevedo et al., 2019<sup>[26]</sup>)

<sup>17</sup> As TCU decisions are administrative, there is recourse to the judiciary regarding legal and formal aspects. As regards the merits, the main object of the proceedings, there is only recourse to TCU (TCU, 2019<sup>[44]</sup>).

<sup>18</sup> “[f]ar from being a technical issue, prior control transforms the Court of Auditors in a quasi-administrative body. The practical routing of the prior control is to condition the orders of expenses to the registration by the Court of Auditors, involving this institution in the administrative process itself. In fact, the Court would thus become an ally of the Treasury against the ministers in the containment of expenses. But in other cases, such as the one illustrated above, the Court would be an administrative body with veto powers, even if not inserted in the hierarchy of the Executive Power.” (Speck, 2000<sup>[46]</sup>)

<sup>19</sup> See Article 24, numeral “V” and paragraph 1, of the Constitution.

<sup>20</sup> See Article 160, numeral VII of Anatel’s Bylaws.



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