

Brazilian regulator approves asymmetric rules to foster competition and announces 'regulatory holiday' on fibre networks

The board of Anatel has [approved](#) the general competition plan (PGMC), a comprehensive regulatory package aimed at fostering competition in relevant telecommunications markets.

The PGMC introduces for the first time in Brazil a regulatory approach based on market analyses, i.e. identification of relevant markets susceptible of being regulated ex ante, identification of operators with significant market power (SMP), and imposition of regulatory obligations where deemed necessary.

The PGMC:

- establishes a general set of rules based on competition law principles applicable to telecommunications markets. A general methodology to carry out market analyses (i.e. identification of relevant markets, criteria for SMP determination and asymmetric obligations imposed on SMP operators in relevant markets) has been adopted in a regulation;
- identifies five relevant wholesale markets susceptible of being regulated ex ante, defines undertakings with SMP and asymmetric regulatory obligations applicable on such undertakings in each market:
 - copper and coaxial cable networks access at speed up to 10 Mbps
 - voice call termination on mobile networks
 - transport networks at speed up to 34 Mbps, including leased lines, backhaul, and long distance interconnection
 - passive infrastructure, including masts and ducts
 - national roaming
- establishes a new body within Anatel with the responsibility to manage a fast track dispute settlement procedure to enforce the PGMC; and
- defines a number of organisational measures to improve transparency and facilitate the emergence of robust wholesale markets.

The PGMC also establishes a 'regulatory holiday' for new generation networks based on fibre. No access obligations will be imposed (including fibre unbundling or access to dark fibre) on these networks for a period of nine years (i.e. until November 2021). Anatel considers this measure will incentivise investment in higher speed networks in Brazil.

The PGMC will be immediately in force from its publication in the Official Journal, expected on November 12, 2012. On the same date Anatel will also publish the designations of operators with SMP in each relevant market.

Operators may file a request to Anatel to lift their SMP designation in specific municipalities or licensing areas within 180 days from the date of SMP notification. Operators must demonstrate in that case that such areas are competitive and the SMP designation is unjustified. Anatel will decide on the admissibility of such requests on a case by case basis.

On November 12 Anatel will also consult interested parties for 40 days on a general methodology to assess replicability of incumbents' retail services. This new methodology will be systematically used by Anatel prior to approval of retail offers of operators with SMP.

SMP designations will be reviewed by Anatel every two years, and remedies will be reviewed every four years.

A. Relevant markets

The final version of the PGMC partly amends the list and scope of relevant markets submitted for [public consultation](#) in October 2011. In its draft proposal Anatel identified nine relevant markets, four at the retail and five at the wholesale level (see [Latin America Telecom Update October 2011](#)). The inputs received from the public consultation as well as a thorough internal analysis and discussion within Anatel led to a final list of five wholesale relevant markets only, described in Table 1 below.

Table 1 – List of relevant markets: initial proposal and final decision

	Scope of the relevant market	
	Initial proposal (2011)	Final PGMC (2012)
Retail markets		
Voice calls on fixed networks	Voice services offered on fixed local access network.	✗ Anatel considers that as retail product and service markets are analysed prior to relevant upstream wholesale markets, any possibility for the SMP undertaking to leverage its market power may be corrected by means of asymmetric regulatory obligations imposed in relevant wholesale markets.
Access to "other signals" on fixed networks, regardless of speed	Data services, including both narrowband and broadband Internet access on fixed networks, at any speed.	
Voice calls and access to "other signals" on mobile networks	Both voice and data services (at any speed) on mobile networks.	
Pay-TV services	Pay-TV services on cable, satellite or MMDS platform.	✗ New regulation on pay TV services approved in September 2011 already addresses the main concerns at the retail level. No additional regulatory obligations need to be imposed.
Wholesale markets		
Interconnection on fixed networks	Fixed network elements required to terminate calls on a fixed network (regardless of call origination).	✗ Market is already regulated. No additional regulation is required.
Mobile call termination	Call termination on mobile networks used for provision of cellular or <i>trunking</i> services.	✓ Same scope. SMS are excluded from the scope of this relevant market.
Wholesale access to fixed network	Includes fixed network elements used for the provision of voice, multimedia or pay-TV services.	✓ Final definition specifies the market includes copper and coaxial networks only, and data transmission threshold at a speed below 10 Mbps.
Access to passive infrastructure	In the initial proposal this market was on wholesale access to mobile network. Access to mobile network infrastructure, including access to base stations (ERB), routers and other elements.	✓ Includes access to both mobile and fixed passive network infrastructure, including towers, masts, poles, and ducts.
Transport services	Local and long distance point-to-point traffic transmission capacity, including backhaul and backbone leased lines.	✓ Same scope, but market only includes transmission at speed below 34 Mbps

	Scope of the relevant market	
	Initial proposal (2011)	Final PGMC (2012)
National roaming	Not included in the draft proposal	<p style="text-align: center;">✓</p> <p>National roaming services, i.e. voice and data services provided by a mobile network operator to another mobile network operator's customers in case of no coverage of this latter with own network in a defined mobile service area.</p>

B. Implementation

Anatel identifies general organisational measures to implement the PGMC, as well as specific obligations to be imposed on operators with SMP in the relevant markets.

A summary of the main organizational measures implementing the PGMC and of the regulatory obligations imposed on operators with SMP in the relevant markets are provided in Tables 2 and 3 below, respectively.

Table 2 – Organisational measures for PGMC implementation

Organizational measure	Description	Proposed implementation schedule
Dispute resolution body	<p>A committee is set up in charge of solving PGMC disputes under a simplified and short procedure. The committee is composed of three members appointed by Anatel for a three year period.</p> <p>Only operators without SMP may ask the body to intervene to settle a dispute pertaining to a relevant market. The burden of proof is always on the operator with SMP in that market.</p> <p>The dispute resolution body may impose temporary injunctions. Decisions may be appealed before the board of Anatel.</p> <p>The body will be created by a formal act of Anatel which also indicates its functioning and responsibilities, as well as its members for the first term.</p>	November 12, 2012
Implementation group for the creation of a wholesale database and for the setting up of the brokerage entity managing demand and supply of wholesale services (GIESB)	Working group including both operators with and without SMP and under Anatel supervision.	December 12, 2012
Brokerage entity operationally in charge of managing a centralised wholesale database	<p>Body in charge of operationally managing a centralised database on wholesale services of SMP operators created by the GIESB, and of brokerage of demand/supply of wholesale services.</p> <p>The body will be selected by Anatel under public procedure – in accordance with specifications provided by the GIESB.</p>	April 12, 2013
Creation of wholesale department within operators with SMP	Operators with SMP must create specific division exclusively in charge of managing and making available regulated wholesale offers.	By May 12, 2013

Table 3 – SMP designations and regulatory obligations

Relevant market	Geographic scope	SMP operators ('economic groups')	Regulatory obligations
Wholesale access to fixed network (fixed (copper or coaxial) network for data transmission at speed up to 10 Mbps)	Municipalities within the respective concession regions	<ul style="list-style-type: none"> • Telefónica • Oi • Telmex • CBTC • Sercomtel 	<p>Access obligations:</p> <ul style="list-style-type: none"> • full local loop unbundling (copper) • bitstream access (copper and coaxial cable) <p>Transparency and publication of reference offer, to be approved by Anatel by May 12, 2013</p> <p>Prices are defined commercially, but must be included in reference offers and be non discriminatory.</p> <p>Temporary measures in case of dispute, when reference offer is not yet available:</p> <ul style="list-style-type: none"> • reserve 20% of physical capacity • retail minus pricing methodology: <ul style="list-style-type: none"> • bitstream access: minus (15%) of the lowest retail price for access to data services offered by the operator with SMP • LLU: minus (20%) of the lowest retail price for access to data services offered by the operator with SMP.
Mobile voice call termination	Mobile licensing regions	<ul style="list-style-type: none"> • Claro • Oi • TIM • Vivo 	<p>Transparency and publication of reference offer, to be approved by Anatel by May 12, 2013</p> <p>MTRs are defined commercially, but reference MTRs are applied in case of dispute</p> <p>MTRs are defined by Anatel in accordance with three-year glide path ending in 2015; cost oriented MTRs based on cost accounting model will apply from Jan. 2016.</p> <p>Full billing of MTRs among MNOs with SMP in this relevant market. Partial bill and keep applies when one of the two parties involved has no SMP in this market.</p> <p>Initial proposal prohibiting to discriminate between on-net and off-net calls has been withdrawn from the final decision.</p>
Transport services (local and long distance point-to-point traffic transmission capacity, including backhaul and backbone leased lines for data transmission below 34 Mbps)	Municipalities within the respective concession regions	<ul style="list-style-type: none"> • Telefónica • Oi • Telmex • Sercomtel • CTBC 	<p>Obligation to offer leased lines, backhaul capacity and fixed interconnection between transport networks at a speed below 34 Mbps</p> <p>Transparency and publication of reference offer, to be approved by Anatel by May 12, 2013</p> <p>Reference prices for leased lines and backhaul are the ones specified in a regulation of May 2012</p> <p>Temporary measures in case of dispute, when reference offer is not yet available:</p> <ul style="list-style-type: none"> • reserve 20% of physical capacity for leased lines and Interconnection class V • reserve 50% of backhaul capacity (this obligation can only be imposed on a concession holder in the respective concession area) • full peering (class V)
National roaming	Registry area (as defined for geographic numbering purposes)	<ul style="list-style-type: none"> • Claro • Oi • TIM • Vivo 	<p>Obligation to provide national roaming services</p> <p>Transparency and publication of reference offer, to be approved by Anatel by May 12, 2013</p> <p>Initial proposal obliging host network to send SMS to visiting network's end user to inform he/she is using another provider's network and the related roaming prices has been withdrawn from the final decision.</p>

Relevant market	Geographic scope	SMP operators ('economic groups')	Regulatory obligations
Passive infrastructure	National code	<ul style="list-style-type: none"> • Telefónica • Telemar • TIM • Telmex 	Access to the related facilities Transparency and publication of reference offer, to be homologated by Anatel by May 12, 2013 Temporary measures in case of dispute, when reference offer is not yet available: <ul style="list-style-type: none"> • reserve 10% of physical capacity • reference prices to be defined in accordance with international benchmarking
Towers and masts			
Ducts and manholes			
Additional obligations for Oi Oi is subject to specific obligations since the acquisition of Brasil Telecom in 2008. As a condition for approving the merger, Anatel imposed network investment obligations on Oi "to be further specified in the PGMC".	National	<ul style="list-style-type: none"> • Oi 	Obligation for Oi to invest in transport networks in all regions of Brazil. Minimum coverage investment obligations in transport networks in municipalities covering the Brazilian population as follows: Cumulative population coverage targets from date of closing of merger: <ul style="list-style-type: none"> • 50% in 3 years • 60% in 5 years • 70% in 7 years.

C. Impact

The asymmetric measures introduced with the PGMC – which might look mild to the eye of a European observer - are indeed a significant step in the Brazilian telecommunications regulatory and market environment.

Mobile voice communications and broadband services will be markets most affected by the PGMC:

- Currently mobile termination rates (MTRs) are negotiated among operators, with reference rates defined by Anatel applicable only in case of dispute. However, the PGMC paves the way towards a gradual decrease of MTRs until 2016 (when cost oriented reference rates based on cost accounting model will be introduced), and defines billing asymmetries based on partial bill and keep between SMP and non-SMP operators (see [Table 21](#) on MTR regulation in the Latin America Telecom Cross-Country Analysis).
- Operators with SMP in the fixed access market will be obliged to offer, under transparent and non discriminatory conditions, wholesale services which are currently not available in Brazil, i.e. full local loop unbundling (LLU) and bitstream access services. Bitstream access is mandated also on cable operators with SMP. In spite of wholesale rates being defined commercially, and of the 10 Mbps threshold set by Anatel above which no regulation is imposed, transparency tools, like reference offers and the centralised database showing availability and access conditions, will support new entrants to balance market entry alternatives and perform a more efficient planning of their operations; (see [Table 14](#) on overview of wholesale services in the Latin America Telecom Cross-Country Analysis).
- Similar benefits, in terms of improved planning and operational efficiency for operators, are foreseen in the leased lines and in the passive infrastructure markets; (see [Table 18](#) on leased lines regulation and [Tables 19](#) and [23](#), respectively on duct and mast sharing regulation, in the Latin America Telecom Cross-Country Analysis).

This is also the first time a regulator approves a regulatory holiday for fibre access networks in Latin America. In spite of the several arguments in favour or against such measures in the current regulatory policy debate around the world, an objective and neutral European observer will certainly note the significance of this step for industry as well as Brazilian society at large.

Last but not least a few words on Anatel: the Brazilian regulator has set a considerable challenge, not only for the telecommunications industry but also for its own organization. The implementation of the PGMC will be a remarkable task for Anatel in terms of market analysis reviews, mediation activities, dispute resolution, and enforcement.

Contact the author:

Elena Scaramuzzi

elena@cullen-international.com

+32 81 25 74 78