

Brazil Mini-Case Study 2003

Brazil's SCM Licensing Service Category:
A Step Toward Convergence

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This case study examines Brazil's experiences in establishing a new licensing category for the provision of multimedia services.

1. General Background

Brazil is the fifth largest country in the world with a population of about 173.8 million, a GDP of approximately USD 508.5 billion and a GDP per capita of USD 2,959.¹ Until the end of 2001, Brazil was the largest Latin American economy and eighth largest economy in the world. In 2002, Brazil became Latin America's second-largest economy after Mexico, and its ranking in the world economy fell to eleventh place. Nonetheless, having the largest population of Latin America and the second-largest population in the western hemisphere, Brazil is one of the most important emerging markets in the world. Although Brazil's history of privatization and liberalization of its telecommunication sector is recent, it has earned a reputation for effective sector reform.²

Since 1998, as a result of privatization and the introduction of competition, Brazil's telecommunications market has grown at a rapid pace. The fixed telephony teledensity rate increased from 10.66 in 1997 to 22.32 in 2002. Likewise, mobile telephony subscribers increased from 4,550,000 in 1997 to 34,881,000 in 2002.³ This outstanding performance came as a result of the new Telecommunications Law of 1997 and the auction of monopoly incumbent operator Telebras in 1998, which generated USD 19 billion of investment from foreign and local investors.

Until 2002, Brazil was divided into a series of operating regions. By the means of the General Concessions Plan of April 1998 Brazil was divided into three different local fixed line regions, one area for long distance services and eight regions for mobile services. In the case of fixed line services, there was one "public" operator, the privatized former incumbent operator or public switched telecommunications network (PSTN) operator, and a "mirror" private operator in each of the three regions. Operators were allowed to provide services only within their respective authorization or concession area. Competition has now increased since the Agência Nacional de Telecomunicações (ANATEL), Brazil's regulatory agency, subsequently authorized local telephony operators to provide new telecommunications services other than those indicated in their concession contracts. These additional services include international long distance, local telephony service throughout the country, and wireless telephone services⁴.

Brazil's licensing regime uses a series of service categories to authorize the provision of communications services. The main three service categories are fixed line telephony, including PSTN, wireless and Pay TV. In addition, Brazil initially established about 15 other service categories,⁵ mainly value-added services, when the nation's telecommunications sector was first liberalized. In 2001, these 15 disparate service categories were united into a single category for licensing, SCM (Serviços de Comunicação Multimídia). SCM, used to provide a variety of multimedia communications services, primarily to private corporate networks or the

¹ ITU World Telecommunication Indicators Database (see <http://www.itu.int/itu-d/ict/statistics>). Population data for 2002; GDP data for 2001.

² Source: Latin American IT Business Risk and Rewards in Financing With America's Neighbors, by Rafael Castillo-Triana; available at <http://www.thealtagroup.com/pdfs/LatinAmericarewardsandrisk.pdf>, p. 10.

³ ITU World Telecommunication Indicators Database (see <http://www.itu.int/itu-d/ict/statistics/>)

⁴ In April, 2002, Telesp was granted a long-distance license; in August 2002 Embratel was able to obtain a license to operate local telephone services throughout Brazil; and Telenorteleste Participações TNL received authorization to launch new services and expand outside of its operating area. Following ANATEL's authorization, TNL launched wireless telephone services in June 2002. In July 2002, TNL launched international and domestic long distance and data transmission service nationwide.

⁵ The SCM replaced, among others, the so-called network and circuit services, telecommunication transport network services, packaged commuted network services and circuit commuted network services, which were cataloged as "specialized limited services".

customers of Internet Service Providers, is the subject of this mini case study. While Brazil has yet to adopt a completely technology-neutral approach to licensing, its initial experience may be of interest to other countries that wish to transform their segmented licensing regimes.

2. Regulatory Background

The Telecommunications Law of 1997⁶, which changed the role of the State from telecommunications service provider to sector regulator and policy maker was the main legal instrument through which Brazil's telecommunication sector was privatized and opened to competition. A comprehensive description of Brazil's telecommunications privatization and liberalization process can be found in ITU Effective Regulation Case Study: Brazil 2001 (available at <http://www.itu.int/ITU-D/treg/>.)⁷

3. Convergence

Technologically, convergence refers to the merger of packet switching technology with telephony signaling and call-processing intelligence, which allows carriers to provide a new range of information and communication technology (ICT) services. "As networks become digitized and broadband capacity is established, telecommunication broadcast services can be provided over the enhanced information infrastructure and on the Internet"⁸.

ANATEL began addressing the convergence phenomenon in 2001, when, with the assistance of ITU, the agency studied the impact of technological developments in the telecommunications sector, including broadcast and information technology⁹. The only precedent in regulating convergence in Brazil at the time was Resolution 190 of 1999, the purpose of which was to facilitate interconnection between mass communication service infrastructure, such as cable, satellite and Multichannel Multipoint Distribution Service (MMDS) networks¹⁰ and valued added infrastructure, mainly Internet infrastructure. Resolution 190 was intended "to allow the use of that infrastructure (cable, TV, satellite TV and MMDS) by any (operator) for the provision of Value Added Services (VAS) like Internet Access"¹¹. The Resolution generated an increase in the number of cable modems users in Brazil from 88,000 in 2001 to 131,000 in 2002, representing 19% of the total broadband users in Brazil¹². In 2002 there were approximately 690,000 broadband subscribers. By June 2003, Brazil had 780,000 broadband subscribers.¹³ Resolution 190 was also designed to promote free-market competition between Internet Service Providers by permitting the use of cable TV infrastructure without having to invest in a new network.

⁶ Other regulatory milestones include: (i) the issuance of Constitutional Amendment No. 8 "which authorized the entry of private, domestic, and foreign investment into the telecommunications sector"; (ii) The minimum law, which "required only specific market segments to be open to competition, namely mobile cellular, satellite telecommunications signal transportation, and value added services".

⁷ ITU Effective Regulation-Case Study: Brazil 2001, Doreen Bodgan-Martin and Mindel De La Torre available at <http://www.itu.int/ITU-D/treg/>.

⁸ Anders Henten, Rohan Samarajiva and William H. Melody, Designing Next Generation Telecom Regulation: ICT Convergence or Multisector Utility?, January 2003, p. vii. Available at <http://www.regulateonline.org/2002/dp/dp0206.htm>

⁹ See Section 3.5 of ITU Effective Regulation Case Study: Brazil 2001, p. 10.

¹⁰ Multichannel Multipoint Distribution Service (MMDS) is a broadcasting and communications service that operates in the ultra high frequency (VHF) portion of the radio spectrum between 2.1 and 2.7 GHz. MMDS is also known as wireless cable. It was conceived as a substitute for conventional cable television. However, it also has applications in telephone, fax and data communications.

¹¹ Speech by Dr. José Leite Pereira Filho, member of ANATEL Board, "The Broadband and Digital Broadcasting Conference", American Chamber of Commerce – Sao Paulo, 23 April 2003, p. 10.

¹² Idem.

¹³ Brazil-Key statistics, Telecom Market and Regulatory Overview - Telecom and Information Highways-.doc6/11/2003

4. Multimedia Communications Services

After a thorough analysis and public consultation, ANATEL issued Resolution No. 272 on 9 August 2001, regulating Multimedia Communication Services. Multimedia Communication Services, or *Serviços de Comunicação Multimídia* in Portuguese, are referred to in this report by their Portuguese acronym, SCM. SCM was devised and regulated by ANATEL to accommodate the growing need for convergence of telecommunication services and to adapt to new technologies provided in an increasingly globalized telecommunication market.

Services Covered by SCM

According to Resolution 272/01, SCM covers audio, video, data, voice (corporate voice) and other sound, image, text and related signals, conveyed, sent and received through fixed telecommunication networks rendered by the private sector in the collective interest¹⁴, on a domestic or international basis and in any format, to subscribers within a certain service area¹⁵. While SCM license operators can provide certain services to the public at large, including individuals, in practice the license is used mostly to provide services to private corporate networks. As is explained below, this is because Brazil maintains restrictions on the provision of fixed line voice and Pay TV services to the public at large.

Some of the most important applications provided through the SCM authorization include “broadband access to Internet, data communications, audio and video, telemedicine and tele-education”¹⁶. The SCM service category ended the requirement for operators to seek multiple authorizations depending upon the transmission means used¹⁷.

Additionally, Regulation 272/2001 allows SCM providers to access the Public Switched Telecommunications Network (PSTN), so that calls may be freely made from the PSTN to SCM users and vice-versa. Calls, however, must originate or terminate with an SCM user; an SCM operator is not permitted to transit calls between two PSTN customers.¹⁸ The main reason this restriction was included in the SCM regulation was because the PSTN operators were granted exclusivity rights for public fixed telephone service either by law and/or in their concession agreements. Moreover, these operators had incurred substantial investments in the privatization process and, unlike SCM operators, were subject to major network build-out obligations. In addition, the fixed line “mirror” operators had paid substantial license fees.¹⁹ Thus, ANATEL concluded that it would not be fair to allow a third party SCM operator who had not incurred such costs to compete with the fixed line operators for public fixed telephone services. The SCM authorization does, however, permit operators to provide “corporate voice” telephony services via private networks.

¹⁴ The Telecommunications Law introduced two new service classifications. Collective Interest Services are those services that must be rendered by the service provider to any interested party, without any kind of discrimination. Restrictive Interest Services are services to be used by the provider itself or rendered to a specific group of users chosen by the service provider.

¹⁵ Article 67 of Resolution 272/2001.

¹⁶ Presentation of Dr. Jose Leite Pereira Filho, Member of the Board of ANATEL, to ITU-T Seminar, Multimedia in the 21st Century, Porto Segura, Brazil, 4 June 2001, p. 9 available at <http://www.itu.int/ITU-T/worksem/multimedia/program.html>.

¹⁷ The SCM license replaced, among others, the so-called network and circuit services, telecommunication transport network services, packaged commuted network services and circuit commuted network services, which were cataloged as “specialized limited services”. As of August 9, 2001 ANATEL decided not to issue any further “specialized limited services” license. The operators who had these types of licenses are now required to request the adaptation “adaptação” of their former specialized limited services into SCM licenses, which requires a payment of 9.000 “reals” equivalent approximately to US\$3,000.

¹⁸ This prohibition had been contemplated by ANATEL even before it issued the SCM rules. As noted in ITU Effective Regulation Case Study: Brazil 2001 (available at <http://www.itu.int/ITU-D/treg/>), “the current view [i.e., in 2001] is that the fixed multimedia service would not be allowed to provide public fixed telephone service . . .”

¹⁹ According to Brazil-Key statistics, Telecom Market and Regulatory Overview- Telecom and Information Highways-.doc6/11/2003, the privatization process payments amounted to US\$12.1 billion and the license fees paid by mirror companies amounted to US\$128 million.

There were initial doubts as to whether SCM operators would be allowed to provide pay TV services, such as those provided to cable TV subscribers. Article 67 of Resolution 272/2001 could be construed as enabling “SCM operators to transmit audio and video signals of either (1) certain events, or (2) on the basis of a contractual relationship, or (3) in the form of pay per view”²⁰. National broadcasters challenged article 67 before the courts, arguing that it violated their exclusive right to broadcast to the public. The Court of Appeals rejected this argument and upheld Article 67²¹. ANATEL further clarified the court decision in its Letter (or “Sumula”) 06 of 24 January 2002, specifying that SCM licenses do not authorize holders to provide: (i) public fixed telephone service; (ii) free live TV and radio broadcasting; and (iii) paid TV.

In addition, SCM operators must also comply with the obligations set forth in their respective Terms of Authorization that specify the conditions under which SCM operators are able to transmit video, voice and data, in order to differentiate SCM from existing Paid TV Operators. SCM may be used for videoconferences, educational television and transmission of signals between producers and TV Broadcasters but not for pay-per-view exhibitions. The SCM regulations, however, do not limit the transmission means used by SCM operators²².

License Requirements

There are no limits to the number of SCM licenses that ANATEL may issue. In fact, by December 2003, 151 different companies had obtained an SCM license²³. The fee for the license is 9,000 Brazilian reais, equivalent to approximately USD 3,000. If the SCM provider uses radio frequencies to render the service, it must pay an additional fee for the use of those frequencies established under Resolution 68 of 1998²⁴.

Terms and Conditions of the License

The SCM license is granted for an indefinite term, and is not subject to any bidding process, such as a beauty contest. The interested party is required only to submit an application and if certain minimum requirements are met, the license is granted²⁵. The SCM licenses are granted on a non-exclusive basis and the licensees are obliged to comply with telecommunications regulations applicable to all telecommunication operators. The licenses provide for the rendering of the services to subscribers throughout Brazil and internationally.

The SCM License: A First Step Towards A Technology-Neutral License

Regulation is often slow to adapt to technological developments such as convergence, especially the integration of telecommunication and broadcast media regulations. While Brazil has taken initial steps to enable the convergence of telecommunications, IT and broadcast, in particular on private corporate networks, it has not yet developed a regulatory framework to enable full convergence between public fixed line telephone, cellular and Pay TV operators. This is due in part to the fact that Brazilian broadcast laws

²⁰ Designing Next Generation Telecom Reform. Annex to Draft Report, Country Summaries, www.regulateonline.org

²¹ Idem.

²² The following transmission means among others may be used for SCM: Frequency bands: 2.5 GHz, 3.5 GHz, 10.5 GHz and 24 GHz to 31 GHz; MMDS Network; DTH Network; Cable TV Network; XDSL Technology.

²³ See ANATEL’s web page at <http://www.ANATEL.gov.br>.

²⁴ Resolution 68 of 1998 establishes the terms and conditions for the payment for the use of radio frequencies. The system is based on bandwidth usage and other considerations. Also, according to radio frequency rules (Resolution 259 of April 2000), the following frequencies are reserved for fixed local telephony and to SCM: 3.450 MHz to 3.500 MHz; 3.550 MHz to 3.600 MHz; 10.15 GHz to 10.30 GHz; 10.50 GHz to 10.65 GHz; 25.35 GHz to 28,35 GHz; 29,10 GHz to 29,25 GHz and 31,00 GHz and 31,30 GHz.

²⁵ Requirements are posted on ANATEL’s web page and refer to: (i) information regarding the applicant, including declarations of their partners that they do not participate in other companies rendering the same service; (ii) documents attesting to the technical qualification of the company requesting the license; (iii) a declaration of financial solvency; and (iv) evidence on being current on its tax obligations. http://www.anatel.gov.br/index.asp?link=/Comunicacao_Multimedia/scm/documentacao.htm?Cod=1947

have not yet been liberalized in the same manner as the nation's telecommunications laws.²⁶ Like SCM operators, public fixed line and wireless telecommunications operators, for example, are currently prohibited from providing Pay TV services.

ANATEL is aware of the benefits of a simple and neutral multimedia licensing system. Nevertheless, the rights granted to the incumbent operators in Brazil through their service contracts constitute a legal obstacle to the creation of a single technology neutral license under which all types of services could be offered. Therefore, the regulations establishing the SCM service category mark a first step by ANATEL towards a technology neutral license.

The SCM license has also simplified Brazil's licensing scheme, combining some 15 service categories into one license so that operators wishing to offer a variety of services need seek only one single authorization (see note 16). SCM license holders have highlighted the advantages of SCM. One operator announced that its SCM license, which replaced a previous specialized limited services license, would enable it to offer transmission capacity, as well as to send and receive multimedia content to subscribers throughout Brazil and internationally. Another operator, which has been granted a license to provide SCM for an indefinite term on a non-exclusive basis, announced that it plans to use its SCM license to provide corporate network services, intranet, extranet, Internet access, web server hosting, e-mail, and videoconferences, among other services.

The SCM regime is also a step towards a technologically neutral license to the extent that the service rules are independent from the transmission means and the frequency spectrum used by the SCM operator. Furthermore, any operator may apply for an SCM license. Thus each of the four PSTN operators have obtained SCM licenses and may now offer a wider range of services in addition to public fixed telephony, including broadband access to Internet, data communications, audio and video (except free live TV broadcasting and paid TV). As a matter of practice, moreover, each of the four PSTN operators also provides wireless services.

A key lesson from Brazil's experience is the need to grant telecommunications licenses in a manner that facilitates their adaptation to technological developments. Although ANATEL concluded that it could not move to a completely technologically neutral licensing approach, it was able to introduce SCM regulations as a transitional mechanism. The SCM regime has enabled Brazilian operators to provide additional services that were previously not available and to allow new operators to compete, at least partially, with the incumbent operators.

Nevertheless, the SCM rules have demonstrated the legal restraints that prevent the issuance of rules responsive to convergence and to the fostering of the information society. Perhaps Brazil may find it easier, now that these non-technological restrictions have been disclosed, to introduce a technology neutral license that may better respond to technological changes and thus provide consumer with a greater variety of services at affordable prices.

Certainly, as this case study was being finalized, ANATEL was conducting a public consultation on a new licensing service category, Serviços de Comunicação Digital (SCD), which may both be an additional step toward a more technologically neutral licensing approach and a means of promoting broadband Internet access in Latin America's largest nation.

²⁶ For example, foreign ownership of broadcast companies is still limited by the Federal Constitution; in addition, broadcasting activities are regulated by the Ministry of Communications and not ANATEL. Convergence in the broadcasting industry is therefore still being debated.