


**MEDIA
OWNERSHIP
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coletivo brasil de comunicação social

**REPORTERS
WITHOUT BORDERS**
FOR FREEDOM OF INFORMATION

REGULATORY FRAMEWORK OF THE BRAZILIAN MEDIA SYSTEM

Author

Daniel Fonsêca

Review and edition

Jonas Valente

Translation

Allan Santos

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Study for the Media Ownership Monitor, MOM - Brasil 2017

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INTRODUCTION

The present analysis of the regulatory framework of the Brazilian media was produced within the *Media Ownership Monitor (MOM)*'s project, promoted by the organization Reporters Without Borders (Germany) and executed, in Brazil, in partnership with Intervozes – Collective Brazil of Social Communication. This legal reading of the sector aims to provide to the information collected among the companies and the governments the due historical and political contextualization, revealing legal environments and the way how regulation has been implemented as a structuring element of the property of these vehicles.

The Brazilian legislative framework is fragmented and dispersed. Principles, guidelines, specific rules and regulations combine themselves in a little consistent way and expressing a legal production from punctual political disputes at certain historical moments. The mechanisms intended on curbing the concentration and ensuring transparency are little robust. This scenario is complexified by an absence of a more effective implementation and supervision stance by the Brazilian State.

The emerging themes are related to the update of norms, the control of information and the monitoring of the effective fulfillment of the legal order of the area. These procedures, if poorly implemented, shortly monitored or even neglected, can directly compromise the accountability and penalties in the case of disobedience to the principles and requirements predicted in the normative set of the journalistic activities – in what is for the State to rule (especially property) – and of the broadcasting and telecommunications sectors.

These normative provisions and their realization are scrutinized with the understanding that it is necessary to establish policies and legislation that promote the decentralization of media property, avoiding, for example, the vertical, horizontal and crossed concentration. It can be affirmed that the evaluation indicators that guide the MOM's investigation are relatively more robust if compared to the legal framework and its efficiency in Brazil.

This document is divided in four parts. The first, "Methodology", explains the references used for the gathering and the analysis of the Brazilian norms and regulatory framework. The second, "Institutional and legal bases of the Brazilian media system", is a synthesis of the legislation's outline, as well as a presentation of the bodies working within the

sector. The third, "Overview of the Brazilian media system: control, concentration and transparency", makes a summary of the legal framework in the light of the questions raised within the scope of the MOM, working as the document's 'executive. The fourth, "Regulatory framework of the Brazilian media system", makes a more detailed analysis of the universe, developing aspects dealt more concisely in the previous sections.

1. METHODOLOGY

The study seeks to produce a mapping of the regulation and regulamentation of the Brazilian communications, adopting a descriptive dimension, of norms' presentation, and an analytical dimension, of assessment against the central aspects in the context of the MOM: (1) the control of the means of communication; (2) the market's structure of the sector, in particular the confrontation between concentration and plurality; and (3) transparency in the access to the vehicles and services' information.

In the first group are the forms of media control, with attention to specific actors, such as foreign and political groups. In the second are the mechanisms for discouraging horizontal, vertical concentration and cross-ownership, as well as the ways to define these processes, the indicators used and the mechanisms provided for in the legislation that promotes this type of market structure. The third group covers the legal obligations for information disclosure, both to the regulatory authorities and to the public, and the publicization of legal proceedings (such as grants' approval) and of revenues and funds used, included in this the legal advertising.

These references permeate the exposition of the constitutional, legal and infralegal norms throughout the work, and are seen not only in what is written, but through an assessment of the effective practice, by the Brazilian State, of the implementation, monitoring and sanction and punishment of the violations and disrespects.

Regarding the scope, the adopted cut was the same as the MOM Brazil's project: the TV, radio, print and Internet media. In the case of TV, are included the various modalities, whether open or paid, State or private property, for commercial or educational purposes. In the case of radio, are included the forms of sound broadcasting service, such as commercial, educational or community. The print media is treated from its vehicles' perspective, since it is not classified as service in the Brazilian legislative framework. And yet the Internet is included with a focus on websites and portals, and not in the ensemble of its regulation (which could comprehend themes such as access and privacy, for example).

The time spectrum has its focus on the present, but seeking to give a historical dimension. The legal changes are focused on those occurred between 2011 and 2017, covering all the previous and current legislature of the Chamber of Deputies and Senate, as well as the first (2011-2014)

and the second (2015-2016) governments of Dilma Rousseff (PT). The timeline also includes a relevant change of direction in the Brazilian politics: the controversial Dilma Rousseff's impeachment process with the subsequent rise of Michel Temer (PMDB) to the Presidency of the Republic.

The document analyzes the legal and constitutional framework in broadcasting activities (open radio and television) and in journalism's (print and online) in the midst of a period of intense transformations, that happen in different levels, of which can be pointed some specific examples, in the following aspects:

1) economic: digitization of open television broadcasting, entry of new actors in the audiovisual market ("over-the-top" services), crisis in the telephony, broadcasting and print journalism's sectors – in the case of the latter, can be verified a critical situation already deepened that, although with seasonal fluctuations, reveals itself quite relevant to the understanding of the organization of economic activities.

2) regulatory: approval of the "Conditioned Access Service Law" (Law 12.485/2011) and the changes promoted by the Temer's administration, among which the Law 13.424 of 2017, and the Decree 9.138 of 2017;

3) sociocultural: the occurrence of gradual changes, but permanent in the habits of cultural consumption of the Brazilian population, of which the most impoverished sectors had a momentary, but substantive increase in the access to services (Internet, paid TV) and consumer goods (digital televisions; mobile phones), among other things.

4) political: still ongoing political and institutional crisis, whose highlights have been the deposition of former President Dilma Rousseff (PT), followed by the administration of the current President, Michel Temer (PMDB), who was Rousseff's Vice-President; the attempt to implement reforms on the Constitution and on ordinary legislation that can make the State even more hermetic to the wills of the social majorities, among other equally urgent elements.

2. INSTITUTIONAL AND LEGAL BASES OF THE BRAZILIAN MEDIA SYSTEM

The Brazilian legal system in the communications' area is fragmented, with various rules for different services and their specific aspects. Being these various legislations the result of disputes between State, business and social agents, each of them expresses political victories in a given historical moment. The result is a not very cohesive picture and with important gaps, both regarding its own rules and its implementation.

In a schematic representation, the legal "skeleton" of the communications could be summarized as follows:

- Constitutional Principles
- Large service groups (broadcasting and telecommunications)
 - Broadcasting:
 - Systems (private, public and State-owned)¹
 - Services (sounds and sounds and images)
 - Type of licence (broadcasting, educational, communitarian)
 - TV (broadcasting of sounds and images):
 - Differentiation regarding the generation (generators, relays)
 - Radio (broadcasting of sounds)
 - Differentiation regarding the frequency (OM, OC, OT, FM)
 - Telecommunications:
 - Telephony
 - Difference regarding the physical connection (fixed and mobile)
 - Cable TV (Conditioned Access Service)
 - Internet (Multimedia Communication Service and Added Value Service)
 - Other services

The Federal Constitution defines two central groups of services (broadcasting and telecommunications), which can be exploited directly or by third parties. Due to the privatization of telecommunications, the

1. Provided for in the Constitution (Art. 223).

Art. 21 predicts their submission to a specific regulatory body, which then came to be called the National Telecommunications Agency (Anatel). The text lays down a set of guidelines for such services and to the area as a whole.

With regard to the freedom of expression, the Constitution brings statements like: "it is free the expression of thought, being forbidden the anonymity" (Art. 5, item IV); "it is ensured the right of reply, proportional to the injury, in addition to the compensation for material damage, moral or to the image" (Art. 5, item V); "it is free the expression of intellectual, artistic, scientific and communication activity, regardless of censorship or license" (Art. 5, item IX); "it is ensured to everyone the access to information and protected the confidentiality of the source, when necessary for professional practice" (Art. 5, item XIV); "the manifestation of thought, the creation, the expression and the information, in whatever form, process or vehicle will not suffer any restriction, in accordance to the provisions of this Constitution" (Art. 220); and "it is forbidden all and any censorship of political, ideological and artistic nature" (Art. 220, § 2º)².

With regard to media ownership, the Constitution creates the figure of the broadcasting division in three systems: public, private and State-owned (Art. 223), forbids the means of communication to be object of monopoly or oligopoly (Art. 220, § 5º), fixes the ownership of journalistic company or broadcasting station for Brazilians (born or naturalized), allowed the presence of up to 30% of foreign capital.

About content in general, the Constitution points out as principles for radio and TV stations' production and programming (Art. 221): "I - preference for educational, artistic, cultural and informative purposes; II - promotion of the national and regional culture and incentive to independent production that aims at its propagation; III - regionalization of the cultural, artistic and journalistic production, in accordance to percentages established in law; IV - respect to the ethical and social values of the person and the family". The document also provides legal restrictions on advertising of tobacco, alcoholic beverages, medicines and therapies. Finally, the Constitution creates the Social Communication Council (Art. 224), an advisory body of the National Congress for the debates of legal proposals concerning the area.

These principles are detailed in specific legislations, presented and analyzed throughout the document. The Brazilian Telecommunications

2. BRAZIL. Brazil's Constitution. 1988.

Code (CBT, Law 4.117/1962) was a general mark in the sector, but after the telecommunications' privatization (1997) passed on to only discipline the conditions of execution of sound broadcasting services (radio) and sounds and images (TV). The Decree-Law 236/1967 created the educational television service. Yet the law 11.652/2008 regulated the public broadcasting in the scope of the federal government, authorizing the creation of the Brazil Communications Company (EBC). The Decree 5.820/2006 stipulated rules for the transition of broadcasting of sounds and images to the form of digital transmission in what came to be called Brazilian Digital TV System.

The telecommunications were regulated by the Law 9.472/1997 (Telecommunications' General Law). The cable TV went on to be disciplined by the Law 12.485/2011 (Conditioned Access Service Law - SeAC). The Internet has some regulations³, but none of them establishes the offer of content as a service or offers fixed conditions for the operation of websites and portals.

The implementation and enforcement of these norms, as well as the general supervision of the services, is responsibility of a group of institutions and authorities:

(a) Ministry of Science, Technology, Innovation and Communications (MCTIC)⁴ - To it fits the definition of most part of the communication's policies. In this area, the organ has as responsibilities: 1) to formulate and implement the public policies of broadcasting and telecommunications; 2) to regulate, grant and oversee broadcasting services; 3) to control and manage the use of the radio frequency spectrum, in partnership with Anatel; 4) to oversee Anatel; and 5) to perform postal services through Brazilian Postal and Telegraph Company.

(b) Ministry of Culture (MinC) - The Ministry has important role in the country's audiovisual policy. The department's Audiovisual Secretariat makes the formulation and implements it through various programs, most of them focused on small and medium-sized producers. The Ministry has, among its attributions: 1) to partially formulate and

3. The Internet's Civil Mark (12.965 Law/2014) deals with users' rights, privacy, network neutrality and content removal. The Multimedia Communication Service (SCM), which allows users' access to the Internet, is standardized by Anatel's Resolution No 614, of 2013.

4. Between the 1990's and 2016 the organ was named Ministry of Communications, with particular focus on the area. With the overthrow of President Dilma Rousseff and the rise of Michel Temer to the Presidency, the department was unified with the then Ministry of Science and Technology, receiving the new name.

implement the policy for the audiovisual (CSC); 2) to implement part of the policy with incentives to agents, genres and formats; 3) to supervise the National Film Agency (Ancine); and 4) to formulate and implement the policy on copyright.

(c) Communications Special Secretariat (currently linked to the Civil House of the President's Office) - The Secretariat establishes and executes the institutional communications policies, including the actions related to advertising and propaganda, as well as commands the means of public communication. It is also responsible for the supervision of the Brazil Communications Company (EBC).

(d) National Telecommunications Agency (Anatel) - It is the regulatory authority for the telecommunications services. It has as assignments: 1) to implement the National Telecommunications Policy and the governmental decisions concerning the area; 2) to regulate the telecommunications' activities in the infralegal sphere; 3) to concede telecommunications services; and 4) to manage the radio frequency spectrum.

(e) Film National Agency (Ancine) - Authority which has as its attributions foment, regulation and inspection of the movies and audiovisual's market in Brazil. Ancine approves and controls the execution of co-production, production, distribution, and infrastructure projects realized with public funds and tax incentives. The Agency's key role in terms of media ownership is the regulation and enforcement's supervision of the Conditioned Access Services (paid television).

(f) Economic Defense Administrative Council (Cade) - Autarchy linked to the Ministry of Justice which has the responsibility to ensure free competition through actions such as: 1) to analyze and decide on mergers and acquisitions, as well as on other measures with impact on market structure; 2) to investigate and judge harmful initiatives to the free competition (such as cartels); and 3) to promote the culture of free competition by means of awareness, education, studies and research actions. The Cade is not a specific organ in the area of communications, but has impact once it operates in any sphere provided that there is interest to competitive dynamics.

(g) National Parliament - The Brazilian Parliament is formed by two houses, Deputies' Chamber and Senate. Regarding the sector, in addition to developing and changing laws, the two institutions also have the prerogative to validate the concessions or renewals processed by the federal government. Without their approval, the license has no legal

validity.

(h) Judiciary - The Brazilian Judiciary has the prerogative to analyze the cases formulated by public and private entities and the application of sanctions if it considers that there has been infringement of the law or of any norm. In the sector's specific case, the Constitution indicates that only this power can cancel a concession before its deadline.

3. OVERVIEW OF THE BRAZILIAN MEDIA SYSTEM Control, concentration and transparency

In this section, is presented an overview of the communications system based on the central aspects that are focus of the MOM project: media control, concentration of ownership and transparency. The information in this synthesis are developed throughout the document. The section lists the system's laws which lay under this optics and is discussed the level of implementation and real execution of these norms.

3.1 Legislation

The media in Brazil can be controlled by the State, by private individuals and legal entities. This last group covers commercial enterprises as well as foundations and non-profit associations. In the case of broadcasting services, these entities, considered "third parties", should apply for a grant to the federal government, responsible for authorization of services. The same goes for other State bodies (such as Deputies' Chamber, Senate, courts and public institutions in the state and municipal spheres). On cable TV, licenses are granted by Anatel. For print vehicles and websites and portals in the Internet there are no control restrictions nor the need to obtain a grant or license.

With regard to foreign capital the Brazilian legislation has different requirements depending on the service. As mentioned earlier, the Brazilian Constitution limits the presence of foreign capital to 30% of the voting capital in broadcasting stations and journalistic companies. There is a controversy in analysis in the judiciary if this percentage would be valid or not for websites and portals⁵. Yet, in the case of TV operators the Law 12.485/2011 changed the previous limit for cable TV operators, then 50%, and allowed any foreign capital's participation in this sector.

A specific constraint media's control is the one provided in Art. 54 of the Constitution, according to which deputies and senators cannot be owners, controllers or directors of a company that has favor due to contract with a legal entity of public law, category that would include broadcasting concessions. The Decree 52.795/1963 provides as ban for the request of

5. Based on this provision, the National Newspaper Association (ANJ) filed a Direct Action of Unconstitutionality (ADI) No 5.613 requesting journalistic sites and portals on the Internet to be considered newspaper companies and submitted to the foreign capital limits of Article 222 of the Constitution and the Law 10.610/2002, which regulated it. The case still hasn't had any outcome.

concession the existence of leader in elective mandate. However, the MCTIC does not apply this deterrent to any part of the stockholders, but only to the directors of the companies. This understanding is object of questioning at the Federal Supreme Court⁶.

The concentration in the media is handled by the Federal Constitution. The Article 220 prohibits monopoly and oligopoly in this economic sector. But in reality, the existence of few mechanisms to implement it and how the inspection is conducted, including the penalties incurred as a result of this process, are insufficient to truly accomplish a diverse and plural market structure.

Among the rare legal provisions to curb the concentration of property is the Law-Decree 236/1967. The Article 12 (Subsection 2) limits the number of licenses for broadcasting of sounds and images (open TV) to 10 throughout the entire national territory, being, at most, five on VHF band and two per state⁷. For the broadcasting of sounds (open radio), the maximum, divided by reach and frequency, is: a) locals: medium wave - 4; modulated frequency - 6; b) regional: medium waves - 3; tropical waves - 3, being at most 2 per states; and c) Nationals: medium waves - 2; shortwaves - 2.

The Decree 52.795/1963, which regulated the Brazilian Telecommunications Code (CBT), prohibits that a partner of a controlling company of broadcasting services (in any mode) be also a member of the shareholders' board of other concession to provide the same service in the locality. In other words, the same person or company cannot be the owner of two networks of the same service in the space in which the vehicle performs (which may be a municipal county or region)⁸.

6. Two Claims of Non-Compliance of Fundamental Precept (ADPF), numbers 246 and 379, were filled by the PSOL with the STF. They question the granting of concessions to entities with politicians in elective mandates among its partners.

7. The band's specification attended the reality of the time, in which the first stations were in VHF (channels 2 to 13). In recent decades there has been an occupation of the UHF (channels 14 to 69) by other stations. With the transition to Digital TV, the VHF has been abandoned, with the migration of licenses to UHF. The channels 60 to 69, reserved for public stations, have been awarded for the provision of mobile broadband service.

8. Says the Decree 52.795: Art. 15. For the license, will be required of the legal entities interested related documentation. § 2º Without prejudice to any other statements that can be requested, the application for a grant referred to in subsection 1 of § 1º will contain statements that: II - none of the partners or directors participate in the shareholders or directors' board of other legal entity performing the same type of broadcasting service in the locality in which the concession or permission is sought, nor of other legal entities providing broadcasting service in several municipalities, in excess of the limits set out in art. 12 of the Decree-Law nº 236 of February 28, 1967.

These are the only restrictions on horizontal concentration (control of more than a number considered excessive of vehicles of the same service). The notion of concentration here is linked to the total or partial equity participation. And yet, the limitations presented cover only the broadcasting services of sounds and sounds and images. There is no mechanism of this type nor for printed media nor for portals or websites.

In the case of vertical concentration (when an entity or group controls several stages of the production chain, such as production, programming and distribution), only the Law 12.485/2011, which regulates the pay TV, deals with the subject. It prevents the relationship of control and ownership between the sectors of broadcasting and production/programming of audiovisual and telecommunications of collective interest, such as telephony services, Internet and cable TV.

Thus, these two types of agents of the audiovisual sector and the entities that hold concessions and permissions of broadcasting entities cannot control more than 50% of the social capital of participation of telecommunications carriers of collective interest (Law 12.485/11, Art. 5). Conversely, these telecommunications carriers cannot have participation of more than 30% of the total and voting capital of broadcasting companies (Law 12.485/11, Art. 5). In this example, the concentration is defined by the equity participation only, and not by the number of licenses.

In the case of journalistic activities with online distribution, there is no legal provision or normative to the limits of concentration or the need for prior authorization of any competent authorities for acquisition, merger or other similar acts. This norm is only valid for the relationship of control and ownership between the sectors of broadcasting and audiovisual production/programming and of telecommunications of collective interest, in accordance to the Law No. 12.485/2011.

In the Brazilian legal system, the Law 12.529/2011 structures the Brazilian Competition Defense System (SBDC). It defines the infractions to the economic order⁹ and establishes among them the condition of dominant position "whenever a company or group of companies is able to change unilaterally or coordinately the market conditions or when control 20% (twenty per cent) or more of the relevant market, being possible to alter

9. Among them: "I - to limit, distort or in any way harm free competition or free enterprise; II - to dominate relevant market of goods or services; III - to arbitrarily increase profits; and IV - to exercise improperly dominant position" (Law 12.529/2011, Art. 36).

this percentage can be by the Cade to specific sectors of the economy"¹⁰

At the time of the production of this document, there was no legislation under debate in Congress with focus on building more effective mechanisms to curb the concentration of ownership in the media sector. Civil society's organizations have been pressuring the federal government and the Congress for years for the update of the regulatory framework. The Media Democracy Coalition (FNDC), main network of local entities, came to draw up a draft bill in 2012 to get signatures to present to the Parliament. The text brings a series of proposals for anti-concentration mechanisms inspired by legislations of other countries¹¹.

From the market structure's perspective, the biggest changes have taken place in the print media sector. The group "Diários Associados" – which controls newspapers and TV and radio stations – is going through severe financial crisis and has been restricted basically to the newspapers "Correio Braziliense" and "Estado de Minas", with minority stakes in other vehicles. One print media important economic group, "Abril", has shut down several magazines, but from the control's point of view it has remained with the same structure since it sold 30% of equity to the international group Naspers, in 2006.

According to data from the National Telecommunications Agency (Anatel), responsible for regulating the use and the occupation of the radio frequency spectrum, Brazil has 545 generators and 13.630 television between concessions and permissions granted. Yet regarding the radio, there are 3.533 modulated frequency stations (FM), 1.790 of medium wave (OM), 61 of shortwave (OC) and more 72 of tropical wave (OT). There are, still 4.775 communitarian radios approved by the Federal Executive.

The picture in the TV sector follows stable with the leadership of the main networks (Globo, SBT, Record, Bandeirantes and RedeTV). The newness in 2017, after the arrival of Michel Temer to the Presidency, was the disassemble of the Public Network TV through an offensive on the Brazil Communications Company that included the elimination of its organ of social control (Board of Trustees) and drastic reductions in the budget. On the radio, there is also a stable leadership of consolidated networks (Jovem Pan, Gaúcha, Globo AM/FM Band FM, CBN, and Transamerica). New agents who have gained visibility and reach are the

10. Law 12.529, of 2011. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/Lei/L12529.htm.

11. The full text can be read on the website <http://www.paraexpressaraliberdade.org.br/projeto-de-lei/>.

networks linked to religious institutions, such as Rede Vida and Gospel on television and Rede Católica de Rádio and Rede Aleluia on radio.

On the Internet sector, despite the emergence of websites and portals with various approaches and inclinations, there's also a consolidated leadership of the portals Uol, Abril, Globo, IG, Estado and R7, all linked to groups with presence in other threads. In the universe examined in the project, emerge as new agents the sites Revista Fórum, with a left wing news coverage, and O Antagonista, with a conservative agenda.

Looking to the regulatory framework, it is possible to notice various and important gaps in terms of ensuring competition, plurality and diversity. There aren't any anti-concentration mechanisms for print media and online vehicles. In the case of print media, the only legislation on the topic, the Press Law, was overturned by the Supreme Court in 2009, but it didn't have clear requirements in terms of concentration. In the context of the Internet, this absence is extremely worrying because the field has been marked by the rise of giants, being in the distribution of content (like Netflix) or as multiple services platforms (is how multiple platforms services (such as Google, Facebook and Apple).

Yet, in the broadcasting field, there is a severe picture of lack of effectiveness of the existing legislation. The absence of regulation of the constitutional mechanism which prohibits monopoly and oligopoly in media sector (Art. 220) leads that the principle has little concreteness. There is no uniformity with regard to the definition of oligopoly or monopoly nor on the definition of concentration and ways to measure it.

The only mechanisms, previously listed, are also insufficient. The legislation does not regulate clearly the formation of national networks, although the §7 of the Law-Decree 236/1967 (Art. 12) prohibits the submission of grants to the logic of "networks". According to this mechanism, the concessionary companies or services licensees of broadcasting "cannot be subordinated to other entities that are constituted with the objective of establishing direction or a single orientation, through chains or associations of any kind." However, there is no supervision on this restriction.

In addition, the limits are easy to be circumvented. There is in Brazil a practice of performing partial or integral transfers of networks' control without the official recognition of these changes along with the MCTIC, action that has become to be known as "drawer's contract". That is, the contract for the purchase or sale is accomplished, but not

officialized. Another strategy used by networks' owners is the use of several private individuals to cheat on the limits of grants provided by the law. So, it is only necessary a group or family to use different people for different networks that hardly ever the station's restriction number will be overcome¹².

This breach was historically exploited by key actors, both on radio and TV, in a system structured upon national networks, as well as in the United States. As a result, giant corporations like Globo, Record and SBT control hundreds of affiliates, dominating the sector. In the radio's segment there is a greater diversity, but the competition is harmed since only the conglomerates structured in networks are able to have a broader reach, while thousands of local stations jostle in a stagnant market with little advertising budget available. This scenario has opened up room for the advancement of religious broadcasters.

Another serious problem is the lack of veto or limitation mechanisms for cross-property, except those mentioned between producers/programmers/broadcasters on one side, and telecommunication carries on the other. Unlikely laws in countries such as the United States, groups can control TVs, radios, newspapers and magazines. This permissive scenario was also explored by companies to set up a system of national groups (with several vehicles¹³) in position of networks command ("network-heads", in the jargon used in the sector) formed by regional groups through affiliation. Therefore, these regional groups are also, in general, controllers of TV and radio stations, print and Internet portals¹⁴.

Another feature of this system is the conglomerates' political affiliation, which usually occurs in the case of regional groups. As mentioned earlier, although the legislation expressly deals with the prohibition of elected politicians' participation in broadcasting stations, this practice is common

12. An example is the existence of several localities with TV Record and Recordnews. Although clearly belonging to the same corporate group, broadcasters in this condition are not object of supervision and sanction because of maneuvers as the ones described, as well as by the lack of effective supervision by the responsible authorities.

13. For example: the Globo Organizations controlling Rede Globo, Globosat, Rede CBN, O Globo newspaper, Época magazine and Portal Globo-GShow, G1 and Globoesporte. The grupo Bandeirantes controlling Rede Bandeirantes, Bandnews, Rede Band FM/AM, Metro newspaper and portal Band.com. Record group controlling Rede Record, Recordnews, R7 portal.

14. The RBS Group controls in southern Brazil the RBS TV in Rio Grande do Sul and Santa Catarina, the newspaper Zero Hora and Diário Catarinense and the ClicRBS, among others. The Diários Associados have the newspapers Correio Braziliense and AquiDF in Brasília and Estado de Minas in Minas Gerais, besides owning stake on TV Brasília in Brasília and on TV Alterosa in Minas Gerais, the Super Radio Tupi in Rio de Janeiro and portals such as Correioweb and UAI.

in Brazil and the responsible bodies do not oversee the situation claiming an interpretation that such a constraint would apply only to the directors of the networks and not to the entire group of shareholders.

3.2 Implementation

In the general plan, Brazil counts with an institutional system aimed to analyze the economic concentration in markets, called the Brazilian Competition Defense System (SBDC). Its two main institutions are the Economic Defense Administrative Council (Cade) and the Secretariat for Economic Monitoring of the Ministry of Finance (SeAE-MF).

The SBDC is responsible for ensuring free competition, investigating and analyzing complaints of anti-competitive conduct, violation of the economic order and of abuse of economic power. The Cade, its main body, was created in 1962, linked to the Ministry of Justice, and received the status of autarchy in 1994. The Law 12.529/2011 ordered the prior submission to the Cade the concentration acts (mergers and acquisitions) of companies that may have anticompetitive effects. The Council analyzes and approves acts of concentration, investigates situations and agents' conducts and, in the cases of established injury to free competition or abuse of economic power or dominant position, can apply sanctions. It is also the institution's assignment to conduct studies and research and contribute to promoting the culture of free competition.

The organ is composed by a court, integrated by a president and six councils, and by a general superintendence, headed by a general-superintendent and two adjunct-superintendents. The nominations are made by the Presidency of the Republic and validated by the Federal Senate. The mandates have duration of four years, not coincident. The choice, therefore, has a strongly political component and responds to the interests of the Federal Executive's administration, in spite of the validation mechanism by the Parliament. In Brazilian political culture, it is not usual the Parliament to deny appointments to bodies such as this.

There are few cases analyzed by the Cade in media sector. An example of the Council's acting in the broadcasting and print journalism's fields involves the sale by the RBS Group of two open television stations, two FM radio and yet four printed newspapers (also online) in the state of Santa Catarina (SC), in the southern region of Brazil. This process has special relevance because the TV networks traded are Rede Globo's affiliated, which belongs to the largest communications group in the country. The transaction was approved without restrictions.

The Cade also examined important case involving the TV stations SBT, Record and Rede TV!, which commands, each one, a national network. On may 11th, 2016, the Court approved, in trial session, the formation of a joint venture between SBT, Record and Rede TV!. The new company, named "Simba", acts in the creation of content, programs and channels intended for closed TV and on licensing the digital signal of these networks to paid-TV service providers.

The approval was conditioned to the signature of an Agreement on Merger Control (ACC). To prevent possible anti-competitive problems arising from the joint activities of the three business groups, ACC included, among others, the following measures: 1) the obligation of investment in the joint venture; 2) subsidies to small and medium-sized cable TV operators; and 3) establishment of a deadline for both the ACC's and the company's duration – six years after signing the first contract with a major carrier.

At the time this document was written, the Cade was involved in a major case. The general superintendence drew up a contrary opinion to the acceptancy of the merger between the north american telecommunications operator AT&T and the Time Warner group, also based in the United States. The decision, taken in August 2017, was motivated by the concern with the effects of the merger in the paid-TV Brazilian market.

AT & T controls the second largest cable TV operator of Brazil, Sky. Yet, Time Warner has several channels, such as Warner Brasil, CNN, HBO, TNT, Cartoon Network and Esporte Interativo, among others. According to the superintendence's opinion, the merger would deepen the vertical concentration (by unifying important distributor and programmer) and would create possibilities for anti-competitive practices. The decision will be taken by the Council's plenary.

Cade also approved a sanction against communication group in 2013, when analyzed the performance of Infoglobo, the company responsible for the newspapers O Globo, Extra and Expresso in Rio de Janeiro. The council verified that the discounts offered to advertisers undermined free competition and determined the end of such practice. The company was also forbidden the "concession of discounts that, on the time of contracting advertising in the three Infoglobo's newspapers, imply lower

value than stipulated in just one of these vehicles”¹⁵.

In the sector’s specific context, the Ministry of Communications and the National Telecommunications Agency are the organs with prerogative relating to acts of control and concentration and with responsibility to apply the legal provisions about this theme. The Decree 52.795/1963, Titles X and XI, regulates licence’s direct and indirect transfers. The Decree 9.138/2017, published by Michel Temer’s administration, changed the Decree 52.795/1963 putting an end to the mechanism that conditioned the direct or indirect permission of concession or permission to prior consent of the federal government (Art. 90)¹⁶.

Also, it is responsibility of the MCTIC the analysis of the concessions and renewal of licenses. In this procedure, the limits for horizontal concentration provided by the Decree-Law 236/1967 and the Law-Decree 52.795/1963 shall be reviewed by Ministry. However, there is no news of sanctions imposed by the Ministry to entities for disrespecting these legal mechanisms. There is also no public information available of procedures and initiatives of the Ministry and the federal government to, in fact, inspect these demands.

Regarding the MCTIC’s structure and autonomy, the organ is part of the Federal Government and the indication of its holder is of sole and exclusive responsibility of the President. The occupation of the position, therefore, is totally dependent on political interests. But not just interests of parties as well as from media groups. In recent history, the nomination of the Communication’s Ministers has been marked by an alternation between political appointees, often to meet the quota of parties¹⁷, and names with strong connections with the economic agents, in particular the broadcasting¹⁸.

15. CADE. CADE determines end of practice that could affect market of printed newspapers. Available at: <http://www.cade.gov.br/noticias/cade-determina-fim-de-pratica-que-poderia-afetar-mercado-de-jornais-impressos>

16. The new text of the article only establishes the authorization and the instruments that this will occur: "Art. 90 - The transfer of the concession or permission shall be allowed: I – regarding the sound broadcasting services, through Order of the Minister of State for Science, Technology, Innovation and Communications; and; II – Regarding the broadcasting services of sounds and images by means of Decree of the President of the Republic, which will be preceded by a processual instruction to be carried out by the Ministry of .Science, Technology, Innovation and Communications".

17. In the Lula and Dilma Rousseff’s governments there were cases of Miro Teixeira (2003-2004) and André Figueiredo (2015-2016), placed to contemplate the presence of PDT, Paulo Bernardo (2011-2015) and Ricardo Berzoini (2015), appointed regardless of knowledge on the subject by the need to keep these people in the first governmental level, Eunício Oliveira (2004-2005), chosen to comply with the PMDB’s demands.

18. The most notorious example was the appointment of Hélio Costa (2005-2010), former journalist of the Globo and then Senator with strong ties to the company and the broadcasting’s business community.

Although imposing these limits of concession for the broadcasting and even foreign capital participation on this sector and journalism companies, the State's instruments to measure compliance with the norms are extremely weak. The Federal Government, which has constitutional jurisdiction to regulate the broadcasting sector, is not able to perform its duties effectively. The same is true in relation to the regulatory agencies. The Ministry of Science, Technology, Innovation and Communications (MCTIC), heir to the specific department of Communications (extinct in may 2016), has an extremely reduced team to monitor the amount of radio and TV stations granted, in addition to the thousands titles of newspapers and magazines, that even need the prior authorization of the Executive power.

The lack of public and trusted information on this type of MCTIC's enforcement acts and on sanctions applied to broadcasters also hinders a precise measurement on how much these legal requirements are considered or not during the processes of granting licenses. The unavailability of data on the owners of the stations, on service providers and on changes in the constitution of the shareholders are further evidences on the lack of political will on ensuring that there is an effective monitoring on the limits provided by law.

The Anatel also has the prerogative to watch over for the competition in the telecommunications industry. Sticking to the MOM's¹⁹ object, the Agency has the role to supervise the respect to the limits of stock control between producers/programmers and broadcasters, on one side, and telecommunications' carriers, on the other.

An example of the shortcomings of the Agency's action is the already mentioned case of AT&T and Time Warner's merger. While the General Superintendence of the Cade objected to the transaction because of the impact on the paid-TV market, the Anatel took a different position. Although the Agency had decided to wait for the position of the Cade, its technical area's opinion report understood that the merge didn't contradict the limits of the Law 12.485/2011 because the "involved programmer, in the case the Time Warner, does not have headquarters in

19. Once MOM deals with radio, TV, print and Internet portals/sites, the text will not advance on the competitive analysis of other telecommunications services, such as fixed telephony (STFC) and mobile (SMP) and Internet access (Multimedia Communication Service).

Brazil, but only keep itself and act on the country through subsidiaries”²⁰.

Regarding the structure and forms of nomination, the Anatel was created in 1997 with the promise of being an independent agency, within the process of privatization of the State telephone system, Telebras. The central body is the Board of Directors, comprised of five members chosen by the President of the Republic and with nomination submitted to the Senate. The office term is five years, starting in sequence. As for transparency and social control, Anatel has more mechanisms than MCTIC. The Agency counts on its structure with an Ombudsman's Office, with a Committee of Users and with an Advisory Board. Most of its actions is submitted prior to public consultations of which any citizen can participate. Rules and decisions are made available on the site.

As to the availability of resources, Anatel's budget has been far shorter of what it could be, once the activities of the Agency should be made possible by fundraising, such as the Telecommunications Enforcement Fund (Fistel). But the vast majority of the money from this fee is not allocated at the Agency, but in other purposes.

According to the audit conducted by the Union Court of Auditors in 2016 (Ruling TCU 1093/2016), only 5% of the resources of these funds are applied to its purpose. The Fistel collected between 1997 and 2016 R\$ 85 billion, with allocation of only 4.5% to Anatel. The remainder is divided between transfers to the Treasury (general budget, even as values for primary surplus) and for other funds, such as the National Culture Fund.

This scenario is an important example of how the availability of information is simply insufficient. The Agency is strongly captured by the interests of telecommunications carriers. In spite of the mechanisms listed, positioning of entities of consumer's rights defense, NGOs, collectives or workers organizations are rarely contemplated²¹.

When compared the roles of each listed institution, it is possible to notice that the Cade has a more general attribution, of defending the free competition and analyzing the abuse of economic power. Yet the MCTIC

20. BITTENCOURT, Rafael. Anatel sends to the Cade initial analysis of the merge between Time Warner and AT&T. Valor Econômico Online. Posted: June 1, 2017. Available at: <http://www.valor.com.br/empresas/4989570/anatel-envia-ao-cade-analise-inicial-de-fusao-entre-time-warner-e-att>.

21. LEFEVRE, Flavia. Anatel ignores law and runs Council to approve plan of goals. Intervozes' Blog. Published on June 20th, 2017. Available at: <https://www.cartacapital.com.br/blogs/intervozes/anatel-segue-distante-dos-mecanismos-democraticos-de-decisao>.

and the Anatel experience specific responsibilities of monitoring the law and the few existing limits on it in relation to concentration of ownership. The case of the merger between Time Warner and AT&T is an example of how such prerogatives may overlap if there are different positions between the two organs. A situation like this, however, has not yet occurred in the recent history of this institutional arrangement.

3.3 Transparency

In Brazil, the public administration's normative order does not provide for a specific legal or constitutional instrument that determines, in general terms, the obligation to give publicity to information – as the example of corporate board, shareholders composition and board of directors – on the companies providing public services awarded, in which category fits the broadcasting of sounds and images. The absence of this obligation extends to the print vehicles and the Internet sites.

The law foresees the compulsory of part of the service providers to make some information public to the regulatory bodies. In the specific case of broadcasting, the Decree 52.795/1963 (Art. 15) stipulates as one of the necessary information to the competent body (currently MCTIC) to obtain a concession the shareholders' composition and the participation of each partner (number of shares). Also, are required at the time of the granting's request of each controller of share quota: 1) proof of the condition of Brazilian born or naturalized, birth certificate or marriage; 2) reservist certificate; 3) identity card; 4) certificate of naturalization issued more than ten years; 5) professional portfolio; and 6) work document and social security or passport.

If there are changes in the shareholders composition, the media company also needs to inform them to the Ministry. However, the Law 13.424/2017, result of a Provisional Measure²² of Temer's government, changed the Brazilian Telecommunications Code (CBT, Law 4117/1962), loosening requirements related to this aspect. According to the new writing given to the Art. 38, subparagraph b, "the contractual or statutory changes should be forwarded to the competent body of the Executive Power, within 60 days after the completion of the act, accompanied by all the documents that prove compliance with the legislation in force".

22. Provisional measures are legal instruments of the federal government in emergency situations. That wasn't the case. The legal change through MP aimed to prevent the due legal process and a broader debate about it.

The most important change was in subparagraph c of the same article. While the previous text conditioned the "social objectives' change, the change in the controlling interest of businesses and the transfer of grant, permission or authorization" to prior informed consent of the competent organ (now the MCTIC), the Law 13.424/2017 has reduced this requirement only to the "transfer of concession or permission from a legal entity to another". That is, the Law removed the necessity of consent for "shareholders composition's changes", "social objectives' changes" and transfers between individuals.

The control changes involving foreign capital have specific treatment in legislation. The Law 10610/2002 (Art. 2) provides "to the organ of Executive Power expressly defined by the President of the Republic to request from the journalistic companies and the broadcasting ones, the bodies of commercial registration or civil registration of legal persons the information and documents required for verification of compliance" with the limits laid down. In Art. 3rd, the changes of corporate control of journalistic companies and of radio broadcasting of sounds and images will be communicated to the National Congress.

As for advertising, this information is available in databases of the National Telecommunications Agency called "interactive systems". Among them are the Stock Control Tracking System (Siacco). This mechanism allows the consultation by company's register (CNPJ) or name of the entity and provides the members of the corporate framework (with the values of the shares) and the board of directors. Another example is the Information System of the Mass Communication Services (Siscom), which makes information available about the providers of each broadcasting service allowing consultation by service mode or location (state or city).

Despite these obligations and forms of provision, it is not possible to affirm that those mechanisms constitute a framework of effective transparency. Firstly, because there are many ways to circumvent these requirements. In addition to the so-called "drawer's contracts" and all sorts of "informal" corporate change and without change in the statutes and official boards of the companies, there are also full or partial lease practices of broadcasters and schedules. In practice this means a form of transfer of concessions (in full or in part) without the competent organ having knowledge.

This situation is aggravated by the reduction of the need of reposting the information, as above explained. Add to this the fact that between the request for a grant and its renewal, where the demands are greater, the

period is 15 years for TV and 10 for radio. Many broadcasters have the culture of only update information at the time of licence's renewal. Yet, the Law 13.424/2017 has still make the renovation process even more flexible, allowing broadcasters to continue operating even if they have not completed this procedure. In this case, the information is even more precarious.

In this way, it is hard do know if the information provided by the listed channels, in particular the systems of Anatel, is accurate and up-to-date. Since there is no culture on the part of the competent organs to punish the companies for not providing or not updating information, it creates a spiral of opacity in relation to broadcasting.

With regard to production, programming and distribution's information of pay TV, Law 12.485/2011, which regulated the Conditioned Access Service (SeAC) and unified the norms on cable TV, instituted the already mentioned cross-ownership limits laid down for the pay TV sector and started to be applied from march 2012, six months after the beginning of the validity of the law. On that date, all the companies that performed, at that time, activities or packaging had to adapt, without financial compensation to the necessary acts for adaptation to the limits mentioned above (in accordance with Art. 37). The Regulation of the SeAC (Anatel's resolution 581/2012) only details how the paid TV providers would adapt themselves to the new legislation.

The law imposes the obligation to inform the competent body (in this case, the Film National Agency) shareholders composition data, but also to make them available to the public. According to the Art. 10 of the Law of the SeAC, the programmers and packagers must deposit and keep updated, at Ancine, report with the identification of the professionals [responsible for the management, direction, selecting and editing], the documents and corporate acts, including those relating to the choice of head-officers and managers in exercise, of the physical individuals and legal entities involved in their control chain, whose information should be available to the public knowledge, including through the World Wide Web.

Other way, although limited, of publicizing information about the means of communication is the companies' obligation to register their shareholders composition in an organ called "Commercial Joins". The vast majority, however, charge for the access to this information. The identification of the service controllers is also a complex task, often being necessary information not available to the population, as the inscription of these companies in the National Registry of Legal Entities (CNPJ).

Regarding the control of the shareholders composition and equity participation from civil records, the situation reveals itself even more serious. For example, neither the commercial joints, nor the civil registry offices have efficient policies of transparency and of access to information so they can be used as an instrument of public control. In addition, as they have local or regional character (state), the possibilities of access to such information vary in accordance to the municipal county and estate in which they are. And, with the possibility of legal entities to integrate the broadcasters' corporate board, another relevant obstacle has been created to identify the physical individuals who, in practice, are the real controllers of the private entity that holds the concession.

3.4 Other State influences

This last subsection of the present overview discusses various forms of possible undue State influences or elements related to the regulatory authorities that impact the competition framework, plurality and diversity of media in Brazil. Among these mechanisms are fees, the application of legal transparency, procedures of granting concessions and, finally, barriers to general entry in the sector.

The broadcasting services (of sounds and sounds and images) licence's definition process is operated by differentiated procedures. The dispute of a broadcasting license involves a bid. That is, the entity that presents the highest bid obtains the right to explore that service. Yet the educational TV or radio service involves solicitation along with the MCTIC. The authorization for community radio starts from a habilitation notice from the Ministry and from a litigation of an association of residents of that locality.

In the case of the broadcasting stations, Lopes (2008) shows how in practice the so-called technical criteria (such as designated time to journalistic, educational and informational programs; time destined to news service; time destined to cultural, artistic and journalistic programs to be produced and generated in the own location object of the concession) have little effectiveness. The bidding model (definition in accordance to the group that offers more resources in investment and costing) has consolidated a logic based on economic power in which the entity with greater economic capacity ends up winning the case.

This logic is already, in itself, prohibitive for actors without or with few resources. An option to non-profit entities is to request the permission of an educational television or radio license. Even so, as the legislation

defines (Law-Decree 236/1967), the purpose of this type of station is well defined. Thus, an entity that wishes to make a generalist station in theory could not apply for this type of license.

For educational TV and radio permissions or community radio authorizations, as well as citizenship channel (kind of local public TV that involves public power and civil society entities' programming), there isn't a specific taxation. In this sense, there isn't an impediment by means of this mechanism. However, the implementation of network of this type is quite costly, including equipment to capture sound and image, editing and image generating. This is not a fee imposed by the State, but ends up being a major cost to the entities wishing to explore a channel.

The procedure for issuing licenses involves a process that goes from the Executive to the Legislative. The applications of the entities wishing to explore each of the services are sent to the MCTIC, which has the role of assessing whether the legal obligations are respected. The request goes through the Civil House of the Presidency of the Republic. The body consolidates the Government's decision on the request, which is submitted to the Parliament for consideration at the Deputies' Chamber and at the Senate, which may or may not validate it. At the Parliament, the culture is only to endorse the position of the Government on the licenses. Cases of denial of the licenses requested are rare. This path is all done within the federal sphere, not having the state or municipal governments or parliaments any prerogative in this process.

These processes are not transparent nor participatory. There isn't neither by the MCTIC's part, nor by the Congress', any initiative to hear the population both at the time of the grants' awards nor at the time of the renovations. This situation has led civil society organizations, commanded by the Media Democracy Coalition (FNDC), to launch in 2008 the "Campaign for Transparency and Democracy in the Radio and TV Concessions". The agenda was then incorporated into the Popular Initiative Democratic Media Bill, formulated by the campaign "Express the Freedom".

There isn't, in this process, a division of the spectrum allocation. The only management's logic is the availability or not of channels. As mentioned earlier, in spite of the licensing procedure to predict "technical criteria", these are totally residual, being valid the logic of greater investment. However, it is worth mentioning that the only measure of diversity promotion involving the allocation of frequencies has been reversed in recent years. In the process of digitalization of TV, started in

2006, the band of channels 60 to 69 was reserved for public and state broadcasters. However, in 2016 the federal government decided to put an end to this reserve and allocate the band (700 Mhz) for mobile broadband offer in 4G technology.

Displaced, many public broadcasters (such as the Public TV Network, the Legislative TV Network) began to have difficulty to find available frequencies in the spectrum. In the management held by Anatel, these broadcasters were actually deferred in favor of secondary services (such as repeaters and links) – meaning that, connection services and amplification of signals, but not destined to the viewers' houses.

On the radio, there's another discriminatory spectrum management's measure. The community radio stations have frequency set at the beginning of the dial. The movement of community radios is critical to this standardization, since several appliances can't even tune the stations in the frequency set. This is one more of the regulatory asymmetries between communitarian radio and the rest that make those stations "of a second class" compared to the other stations.

3.4.1 Entry Barriers

The Brazilian media market has a number of entry barriers. On television, the continental dimension of the country makes it too costly to compete with national networks. Even if a certain entity wants to only act in a locality, the dynamics explained above for obtaining a broadcasting license (bidding) makes it easier for groups with more resources to acquire the concession. Even if an entity gets the license, this network's dynamic makes it very difficult for new entrants to establish themselves on the market.

Another entry barrier in the network's dynamics are the distortions in the advertising market. Rede Globo has advertising revenues share superior to its audience because of the prestige and the relationship developed with the advertising agencies. In the case of local affiliates, who joins a network celebrate contracts very strict both in terms of the exhibition of the "network's head" content, as well as in the participation of the heads in the advertisements.

As already explained, the Brazilian media system involves the articulation of national networks with regional groups, in general controllers of different types of media and with political affiliations. This is another major obstacle. These political relations may hinder or facilitate the obtaining of licenses and the collection of official advertising resources in

the three spheres (federal, state and municipal). This scenario makes even a group willing to get on a local, regional or state market to have difficulties.

In other words, it is very difficult to install and keep a broadcasting vehicle without heavy investment and without relations with political parties or leaders. These barriers make the new entrants in the market to stay restricted to large conglomerates of the most varied segments (from health to business consulting).

In the pay TV market, there are also important entry barriers. Globo Organizations dominated the industry's consolidation, with participation in the two major carriers (Sky and NET). Not by chance the law of SeAC brings programmers quotas and of national content, one of the few democratic mechanisms in the Law. This duopoly formed by NET and Sky, with Globo's influence through its programmer, Globosat, makes independent programmers entry a complex task. For that, other national networks (Record, SBT and RedeTV) have teamed up to create the joint venture "Simba", as already mentioned. If considered then an entity without specific performance in the industry, or with low economic capacity, the market entry becomes even more difficult.

The radio and print segments have particularities. They have witnessed bigger market changes. This is due to a combination of two factors: they are activities that require less investment and, at the same time, the stagnation of the advertising revenues against the TV's domain and the Internet's growth have had negative impact on the groups' business models, making room for the mentioned entrance of new business actors external to the communication's business.

Evens so, the continental dimension of the country makes the entry on a national scale to be still a huge obstacle. The bigger newspapers are still the traditional ones (Folha de S. Paulo, Estado de São Paulo and O Globo), the same being valid for the radio networks (such as CBN, Band, Gaúcha, Jovem Pan etc.).

3.4.2 Government's Advertising

Governments have big budget for official advertising in Brazil. There is no census showing the total amount, since it involves governments, parliaments, judiciary bodies and public enterprises of the three spheres (federal, state and municipal). If taken only the federal government, it is already possible to realize the huge amount of money spent on ads in the most varied media.

According to a survey of the Portal Poder360 (RODRIGUES, 2015), between 2003 and 2014, period that covers the two Lula's governments (2003-2006 and 2007-2010) and the first of Dilma Rousseff's (2011-2014), there were spent R\$ 14 billion in broadcast TV, R\$ 2.1 billion in printed newspapers. Yet the main magazines, between 2000 and 2014, received R\$ 2.2 billion. The Internet portals earned in that same time range R\$ 88 million, but had the biggest growth, reaching today to the condition of the second media with greater volume of resources invested by the Government.

The government advertising in Brazil is directed according to political affinities and affiliations. But in the federal government for more than a decade it has been adopted the so-called "technical criteria", according to which the advertising strategies should in general consider the number of viewers and maximize the reach according to the investment. The Normative Statement of the Communication Special Secretariat of the Civil House of the President's Office 7, of december 19th, 2014 sets out the guidelines for the planning of the media actions (Art. 7th): "I - to use technical criteria in the selection of media and communication vehicles and promotion; II - to spread off the investment throughout media and vehicles; III - to value the regionalized programming of media and communication vehicles and of promotion".

The statement sets as technical criteria (Art. 8th): "I - to use market research and technical data to identify and select the most appropriate programming, according to the characteristics of each advertising action. II - investments aimed at each vehicle must consider their respective audiences, based, wherever possible, in market's technical data, research and/or media studies; III - to guide itself by a comprehensive programming whenever there are other media with regular situation in the Midiacad".

Without abandoning these criteria, the two Lula's governments performed a regionalization movement of the allocation of advertising funds. During the period, the number of media serviced grew 961%, leaving from 21 TVs and 270 radios in 2003 to 297 TVs and 2.597 radios in 2009 (RODRIGUES, 2009).

Dilma Rousseff's impeachment had strong participation of traditional media. With the arrival of Michel Temer to the power, the retribution to the support was strongly felt through the extension of official advertising budgets even in a scenario of economic crisis, recession and deficit in the accounts of the Federal Executive.

A survey by O Cafezinho blog revealed an increase on the allocation of funds for media that supported Dilma Rousseff's impeachment and the Temer's administration. The newspaper Folha de São Paulo had an increase of 121%, the newspaper Estado de São Paulo, of 229%, Época magazine, of 252 %, Veja magazine, of 489%, TV Record, of 510% and Istoé magazine, 1384% (ROSÁRIO, 2017). In 2017, only a campaign, for the approval of the pension reform, consumed R\$ 100 million from the government, 55% of the total forecasted for advertising campaigns on that year, R\$ 180 million (PRAZERES, 2017).

Surveys like this are possible because the expense of the federal budget is recorded and made available in some databases. The first of these is the Transparency website (transparencia.gov.br), managed by the Ministry for Transparency and Comptroller General of the Union (CGU). Another is the Integrated System of the Federal Government's Financial Administration (Siafi), which is not available to the public but is accessible to federal lawmakers, including to those of the opposition parties. The website of the Secretary of Communication of the federal government used to offer periodic reports. However, at the time of production of this text the information was less structured, arranged by contracts with advertising agencies and not facilitated through media and by vehicle advertised.

The Law 12.527/2011 (Information Access Law) is an important norm which establishes a number of obligations on public's power bodies in the country, making the access to public information a rule, with exceptions, such as with data considered to be sensitive. Citizens can request from public agencies at the federal, state and municipal spheres information about investment in various sectors, including in official advertising.

3.4.3 Judicial decisions

Another form of Government's interference in the media sector is through judicial decisions. The removal of articles or even sites or the prevention of the treatment of certain themes are strategies used by the most different actors to vet content considered by them to be annoying.

In 2000, the former President and Senator José Sarney filed and managed through the Justice to censor the newspaper O Estado de S. Paulo prohibiting the publication of news reports about investigations against his son, Fernando Sarney. In 2016, the journalist Marcelo Auler was prevented from the Justice to make news reports criticizing the "Lava Jato Operation", by the Federal Police and the Attorney General's Office, on the blog that takes his name. These are just two of many examples.

The project Ctrl + X, from the Brazilian Investigative Journalism Association (Abraji)²³, counted 3068 judicial actions in court against the disclosure of information. The main allegations are defamation (67%), violation of electoral legislation (32%), copyright violation (8%) and violation of privacy (7%)²⁴.

Interestingly, even the media themselves are supporters of this practice. The newspaper Folha de S. Paulo filled a lawsuit and managed to censor for a long time the humor site "Falha de S. Paulo", which criticized the vehicle, until it lost the case in higher courts. On the Internet, the disclosure of critical media content to the means of communication is challenged in court under the justification of copyright violations when there's use of images of the criticized media.

23. Learn more at: <http://www.ctrlx.org.br> .

24. Although the use of actions in court to restrain the journalistic activity is customary in Brazil, is not assumed here the point of view that any action is an attempt at censorship. Brazilian legislation typifies many kinds of abuse, such as slander, defamation, violation of human dignity, violation of privacy and has detailed bill for electoral processes.

4. REGULATORY FRAMEWORK OF THE BRAZILIAN MEDIA SYSTEM

4.1 History

The origins of broadcasting in Brazil, if considered the first precursor initiatives of amateur radio and if considered the initial legislation, seemed to point that it would follow the paths traversed by European models or even from neighboring Argentina. However, this perception was limited to the period of fifteen years, between 1923 and 1932, in which the radio operation, in early stage – as the designation of the precursor enthusiasts pointed –, didn't exceed the amateur character, without great pretensions and with local influence and coverage. After the first decade, with predominance of the experimental or cultural character, the radio came to have consolidated business objectives, including as a result of legislation passed to allow for the advertising.

The Decree 16.657, of november 05th, 1924, was the norm which established for the first time in Brazil the regulatory framework of the activity, still called "radio-telephonic diffusion (*broadcasting*)" (Martins, 2007, p. 306). The new legislation was the result of the first broadcasting activities, which began in September 07th, 1922, in the centennial celebrations of the Brazil's Independence, during the World Exhibition held in Rio de Janeiro. Until then, the activity was limited to the action of amateur radio clubs, among which stands out the Radio Club of Pernambuco, regarded by some researchers as the forerunner in Brazilian radio.

Despite the legal restrictions regarding the advertising, the foundation of Mayrink Veiga radio²⁵ (1926), in Rio de Janeiro, starts to approach the radio with commercial character. Although maintained via direct listeners' contribution, the station already paid appearance fees to musicians, like Silvio Caldas, which was remunerated by audition.

Then, from 1932, when the radio had already had official permission for running ads²⁶, began the commercial exploration of the vehicle. In that

25. SETHI, Carla. Radio Mayrink Veiga [article]. CPDOC, FGV. Available at: <www.fgv.br/cpdoc/acervo/dicionarios/verbete-tematico/radio-mayrink-veiga>. Access in: 06 July, 2017.

26. Through the Decree-Law No. 21,111, approved in a discretionary way by Getúlio Vargas, raised to power by the "Revolution of 1930", the second coup of the republican period.

period, are launched the National Radio of Rio de Janeiro (1933), Radio Tupi (1935), also in Rio de Janeiro, and the Radio Tupi of São Paulo (1937). In the same year, the legislation changed to allow advertising on radio, which was initially limited to 10% of the programming. With that, the broadcasters have come to count on a more permanent financing, gathering conditions to create more stable schedules (Ortiz, 1989, p. 39-40).

Radio Nacional's²⁷ history deserves a special digression, not just for the inflections for which it passed in the administrative model, but especially for what it represented to the main media between the decades of 1940 and 1960 in Brazil. This contribution is especially linked by the fact that the network has started, popularized and consolidated the soap opera as a media reference content with large Brazilian peculiarities, besides the auditorium shows. Both would be, then, two anchors on television programming that would arise in the 1950's.

Although the foundation dates from 1933, the National Radio's history goes back to 1931 and, unlike the state character it would have, it appeared first as a private enterprise. In an irony of history, in the same year that Roberto Marinho, at 26 years old, assumed the direction of the newspaper *O Globo*, the newspaper *A Noite*, of which partnership his father had been knocked back in 1924, was transferred to the Brazil Railway company²⁸, of which was subsidiary the Railway São Paulo-Rio Grande. Under the control of William Guinle, director of the group's Brazilian office, the new management began to invest in broadcasting, founding the Brazilian Civil Society National Radio in may 1933. Once again, the apparent nationalist profile of Vargas did not prevent a foreign group from controlling one of the major newspaper in the country.

It was in the middle of the Geúlio Vargas' dictatorship, the Estado Novo (1937-1945), that the President reviewed the case of the National Radio, nationalizing it in march 1940 through another Decree (No. 2.073). The government claimed the existence of debts of the controlling company (Brazil Railway) with the State, but kept all the companies, which were

27. AZEVEDO, Lia Calabre. National Radio [article]. CPDOC, FGV. Available at: <www.fgv.br/cpdoc/acervo/dicionarios/verbete-tematico/radio-nacional>. Access in: 06 july, 2017.

28. In another suggestive irony, Geraldo Rocha had to dispose himself of the paper *A Noite* after going into debt with the Railway group, which found irregularities committed by him in the administration of the brazilian subsidiary. Rocha was the same who, in the absence of Irineu Marinho of the country, in 1924, proceeded a sudden increase in the stocks quotas of the paper *A Noite*, which they had founded in 1911, to drive out the patriarch of the Marinho family, who then would find the *O Globo* in 1925.

considered to be "relevant to the public interest and to the interest of the country". The network, which had already had plenty of success, acquired even more robustness to update the system, improve production and, especially, increase the cast of musicians and actors who made up the network's *star system*.

The consolidation of the Brazilian media regulation model came with the approval of the Brazilian Telecommunications' Code (CBT), in 1962. The Code reinforced the private exploration logic through the State permits and went on also in defining rules for the telecommunications with the creation of the Telebras System. In the CBT's approval, there was new demonstration of force of the business community. The President, João Goulart, sanctioned the Law with 52 vetoes. All of them were shot down by the Parliament, in a movement that gave rise to the Brazilian Radio and Television Broadcasters Association (Abert). Two other decrees (52.795/1963 and 236/1967) detailed the rules for broadcasting, establishing standards such as the limit of five nationwide stations on VHF band (until the channel 13), the lease time of 15 years for TV and 10 for radio.

In 1988, the approval of the Federal Constitution in force today renewed the Brazilian media regulation framework. Fruit of a clash that involved heavy business lobbies and pressures also from of civil society, the communication chapter brought progress and problems. Among the improvements are the prohibition of oligopoly and monopoly; the promotion of regional and independent production; the principle of complementarity of the public, private and state systems and the creation of the Council of Communication (although its limitation as an auxiliary body of the National Congress and not as a space of elaboration and monitoring of public policies, as similar example in the areas of health and social services). Among the problems are the high quorum not to renew leases and the definition of the time range of the licenses (which in general is established in infra-constitutional standards).

In the 1990's, Brazil was marked by a strong wave of liberal policies in various sectors, including in telecommunications. In this process, the Brazilian government's actions were decisive even to finance, by means of public banks, the purchase of state-owned enterprises²⁹. There was, also,

29. It was the federal government that initiated, in a proactive stance and in collaboration with major businesses groups of the country, to the period of dismantling of the Brazilian State through the National Program of Desestatization (PND), established by the Law No. 8.031, of 1990. In this process, the participation of the National Bank of Economic and Social Development (BNDES) was instrumental for the privatization of several companies.

enormous efforts to undermine and even extinguish legal and constitutional apparatus that predicted state monopolies or character of public regime in the provision of essential services, such as the telecommunications, industry that went through all the steps of privatization in the short period of three years, between 1995 and 1998. Until the 1980's, the biography of the development and the consolidation of Brazilian broadcasting – the radio with more than 60 years, and the TV had already passed 30 – wasn't already very encouraging, from the regulatory and economic point of view, in terms of respect for the public character.

The BNDES (National Bank for the Economic and Social Development) also would have an important role in the privatization of the Telebrás System, in 1998, providing very low-cost loans to the auctions winner companies. The Telecommunications General Law, approved in 1997, determined that the decision-making process concerning the privatization of the sector stayed in charge of a Special Commission of Supervision, linked hierarchically to the Ministry of Communications, and not under the umbrella of the National Desestatization Council (CND), to which the BNDES reported itself in matters of privatization, as the Manager of the National Desestatization Fund (FND).

However, in february 1998 a contract was signed between BNDES and the Ministry of Communications, attributing to the bank the coordination of the selling modeling and the actual auction of the Telebrás System, whose privatization took place on July 29th, 1998, setting up the biggest privatization of a control block ever held in the world. With the sale, the government collected a total of R\$ 22 billion, showing a premium of 63% of the minimum price laid down, which would serve as an alibi to justify the sale of public assets on behalf of a range of indicators, such as the primary surplus, control instruments of the national economy on the part of multilateral agencies (BNDES, 2012).

The events since the 1990's, strongly conditioned by neoliberal era, haven't been responsible for showing something more promising to help the social majorities who had no relevant public access and popular participation on radio and TV. According to César Bolaño (2007, p. 107), the State "cannot escape its function to organize and institutionalize the strategic and tactical engagements between the hegemonic private actors". In certain historical periods, in specific sectors of society, this gains very important emphasis, as the example of the telecommunications' restructuring or the technological "updates" on television. The case of broadcasting is always full of such examples of

governmental proactiveness in direct benefit of the businesses sectors.

Despite the changes recorded under various aspects – political, cultural, technological and socio-economic –, in the communication area, the leading actor is still the State, paper that is justified by the responsibility almost discretionary on the policies' formulation and for granting and renewing the broadcast concessions – even though the Constitution of 1988 determined the sharing of this competence with the Legislative.

In this stage are strengthened as protagonists, in the defense of particular interests, broadcasting businesses groups, gathered around entities such as the Brazilian Radio and Television Broadcasters Association (Abert), with domain of *Rede Globo*, and the Brazilian Broadcasters Association (Abra), led by Bandeirantes and Rede TV!; and those specific to printed media, organized mainly in the National Newspaper Association (ANJ) and in the National Magazine Editors Association (Aner).

The telecommunications companies also have gained strength in the last two decades, due to the privatization of telephone services took place in the 1990's and, of course, to the technological convergence. The electronics industry also shows itself with a lot of influence, especially in this time when the Brazilian open TV system migrates to the digital platform.

These groups operate, historically, based on political liaison, which involves physiological relations, blackmail and direct interest in contact with the state institutions, from *lobbies*, instrumentalized use of media and incursion, of themselves, in the partisan disputes. The segment of "no actors" is formed by the civil society organizations (non-profit organizations), who act in defense of the right to the communication – and, more recently, by the Attorney General's Office and also by entities of public media representation (Lima, 2011, p. 31).

In 1995, after the mandate of former President Itamar Franco (1992-1994), President Fernando Henrique Cardoso took office (1995-2002), who was responsible, already in the first moment, for breaking the state monopoly in telecommunications, with the approval, by the National Congress, in 1995, of the Amendment No. 8 to the Federal Constitution, which authorized the federal government to grant concessions for the exploration of the telecommunications services to the private sector.

Already in the following year, was sanctioned the Law 9.295/96, which allowed the bidding for cellular telephony's concessions of band B and laid the legal ground for that, in July 1997, the Parliament would approve

the Telecommunications General Law (Law 9.472/97), regulatory base for the sector with guidelines for the privatization of Telebrás, which would happen the year after.

In the midst of the new legislation, following the liberal logic of regulation, the National Telecommunications Agency (Anatel) was created, which would have the assignment, as autonomous institution and of public control, to regulate and also to enforce the regulatory framework of the sector. Fernando Henrique Cardoso's government, exceeding the regulatory powers of the new entity, delegated to the agency the role of conducting the politics regarding the digitalization of open TV in the country.

What could have been an important support for greater opening to the intervention of the population in the course of national communication policies – since COMTV's actions clearly showed that the commission was captured by the interests of the TV dealers' entities – turned into an additional obstacle, once the "autonomy" of the agency distanced it from the incidence of a more rigorous public control.

With the emergence of Anatel, there was no substantive change in the participation and social control of the population in the media sector³⁰. Sayonara Leal (2004), analyzing the democratizing possibilities of Anatel, identified that, years after the agency creation, the popular participation remained reduced, which, in fact, as she diagnosed herself, "simply never existed" in fact in the Brazilian media regulation.

In the context of these agencies, there are three central challenges: 1) the expansion of forms of citizen participation in the formulation and in the control of those policies, which concerns the public-State and non-State spheres; 2) do not allow that specific and technical knowledge emphasize differences and cancel public participation and 3) the insertion of social actors in the spaces of specific policies negotiations that are part of a macropolitic (Leal, 2004, p. 118).

In the evaluation of executives and technicians of the broadcasters, the uncertainty regarding the transmission pattern and of the transitional period for the Brazilian digital TV was no impediment for the process to be completed in a short time. With this projection, an article speculated

30. Despite this, he considers himself that there is identifiable progress in the Law nº 8.977/95 (Cable Law), which compliance is supervised by Anatel. In large part, the law was replaced by the Law No. 12.485/11, which deals with the Conditioned Access Services (SeAC).

that, within 15 years – that is, 2003 –, the digital TV would be already consolidated in Brazil (Koleski, July 1998, p. 15-16). Authorized by Anatel³¹, the two precursors groups began digital transmissions in the country. Even without any indicative of a decision on the system, interestingly, both chose to perform the first tests using the north american ATSC, and not the Japanese ISDB.

As for the entrepreneurs, it's evident the attempt to undercover the political negotiations to mainly "technical" processes. In this sense, it fits a brief digression to present the case of digital TV as a relevant example of how changes in the regulation of the communications are conducted in Brazil.

At the beginning of the digital TV systems' tests, both the *Rede Globo* as well the *Rede Record* used the ATSC standard, developed in the United States, to perform the experimental transmissions that took place in June 1998. There was a rush, and the concern of the stations' owners was more of maintaining trade relations with the U.S. than exactly seeking scientific evidence of which would be the best of the three systems – there were, also, the European DVB, and Japan was finishing the ISDB.

In September 1998³², the Director of the Globo's Engineering Office, Fernando Bittencourt, rushed himself in outlining the implementation of digital TV in Brazil, pointing to details on the "project" which would comprise three phases: 1) the Approach Plan that would be "more important than the choice of the system because it is very complicated technically and politically" – in this step, it would be guaranteed what now is called "*simulcasting*"; 2) the choice of the system, "ATSC or DVB, which will be able to transmit in the same current width of 6 MHz band", something which, a priori, the European system would not allow, because the channel has 8 MHz width; 3) to the last moment, would stay for analysis the production formats, the Globo's Director expected to be the same across the country. However, the question implied not only market actors and internal *technical* elements.

The rushing of executives was, also, due to the overwhelming arrival, in terms of capital robustness, of the transnational telecommunications carriers, which beat the hammer and took the Globo, in alliance with the Bradesco and an Italian group, to the defeat at the auction of the

31. FALGETANO, Edylita. *TelaViva*, year 07, n. 71, Jul. 1998, p. 28-31.

32. BUONFIGLIO, Mario Luis. *Technological Landscape*. *TelaViva*, year 17, no. 73, set. 1998, p. 19-21.

most profitable portion of the telephone system, the Telesp, which purchase it had taken granted.

The battle would still pass through the opening of 30% of the broadcasting to foreign capital in 2002, another market surge that would be supplemented, subsequently, with the reconfiguration of the regulation of the paid TV segment. The Abert, fragilized, with cracks that resulted in smaller entities, did not act alone. Also in september 1998, in the 12th Brazilian Congress of Television Engineering, the business men stated that the transition process was already "underway" in Brazil. "The national *broadcasters* already have prepared the funeral of its analog equipment production and begin to install digital retransmission systems"³³.

In the following period, in 2000 and 2001, the Anatel held protocol queries³⁴ and public hearings and even an international seminar in august of the same year³⁵, with the presence of delegations of the United States and several countries of Latin America, but without the intervention of civil society, with the exception of business organizations. Even the segments that, in addition to access and to be daily involved by television, analyze it and demand it in other forms, such as the university research groups, NGOs and trade unions linked to communication, couldn't find room for a more recognized intervention by the State.

At that time, the National Forum for the Democratization of Communication (FNDC), the most important front of civil bodies that focused on issues relating to broadcasting and telecommunications in the country, passed through a phase of profound organizational dispersion, situation which would start to improve partially exactly from 2001. In the following year, the Abert/SET group concluded, in addition to technical studies, economic analyses on the impacts of each of the systems

33. FALGETANO, Edylita. The digital reality. *TelaViva*, year 17, no. 72, aug. 1998, p. 18-20.

34. In the public consultation conducted between april and june 2001, the items that received more contributions were technological developments and applications (16% of manifestations); industrial production and standardization (15%); and business model (14%). Apparently, the production of different contents and the democratization of broadcasting were not accepted in the comments made on the documents presented by Anatel, which already indicated a distance of social movements in the area in relation to the regulatory authority (Anatel, aug. 30th, 2001).

35. Also in 2001, this time a little before, in february, "a delegation from broadcasters, regulator bodies and representatives of the governments of Paraguay, Uruguay and Argentina, at the invitation of Anatel, came to Brazil in the end of february to meet the first results and the development of digital TV tests in the country. The delegation attended the technical lectures about the technology and the operation of the three systems tested. The lectures were made in the CPqD, in Campinas, for experts of the foundation itself, the SET/Abert group and by technicians from the regulatory agency" (ENFIM, the report. *TelaViva*, year 13, n. 91, mar. 2004, p. 04, emphasis original).

recommended by the broadcasting sector of the International Telecommunication Union (UIT-R). Finished the work, the group gave as granted that the choice would be between the European and the Japanese standards, with an advantage to the last, among other reasons, because the DVB foresaw the use of a band of 8 MHz per channel, unlikely the Brazilian, which uses 6 MHz.

This would be the tone of the business positions on the TV digitization for the next two years, period in which the businessmen were more concerned with the growing and uncontrolled broadcasting indebtedness, hole in which everybody got in, including the powerful *Globo*, leading to structural changes in the administrative conduct of the network and even in the country's Constitution. They were more concerned in knowing how the entry of "dollars" would happen in order to save the television market³⁶.

The year 2002 came, and with it, the end of the eight years of the government of Fernando Henrique Cardoso (PSDB), in which there was an entire process of resizing the public telecommunications regime, becoming mostly a privatized service with goals of universality. In broadcasting, despite maintaining the collaborationist relationship with radio and television dealers, the federal administration tried, at least during Sergio Motta's entitlement (he died in 1998) in the Ministry of Communications (Minicom), to start the debate on the updating of the Brazilian Telecommunications Code (CBT), of 1962. Despite the name, the CBT no longer regulated precisely the telecommunications (telephony services, cable TV and Internet), standardized by the before mentioned Telecommunications General Law (LGT), of 1997.

In just over three years, Motta, who had already been responsible for one of the most significant changes in the sector regulation, the introduction of the bids in the process of concession, presented to the government at least six versions of what would be the new "Electronic Mass Media Law", which, in his words, would consolidate a new "regulatory framework" for the sector (Lima, 2012, p. 133).

With the imposition of the Decrees 1.720/95 and 2.108/96, different points of the CBT's regulation (which dated back to 1963) were changed. The most significant change brought by the new rules was in Art. 10, which determined, from that moment on, the need for bids prior

36. HOW will the dollars come in. *TelaViva*, year 11, n. 120, sept. 2002, p. 32.

to the granting of commercial broadcasting license. The bidding process, however, is the target of constant criticism, as occurs in the article cited, for not having changed both the relationships of exchanges and favors that have always conditioned the broadcasting concessions and grants.

To the bidding for licenses, joins the Constitutional Amendment No. 36, adopted in may 2002, which enabled the participation of foreign capital in the broadcasters at a rate of 30%. Before resistant to the idea, the most progressive parties, led by PT, negotiated their support in exchange of the installation of the Social Communication Council (CCS), that, provided for in the Constitution of 1988, had already been regulated by Law 8.389/91, sanctioned by Collor.

In the month of the adoption of the amendment, Luiz Inácio Lula da Silva (PT) was already the favorite pre-candidate in the opinion polls for the presidential election of that year. The FHC's government published yet, towards the end of the administration, in october 2002, the Provisional Measure 70, which regulated the entry of foreign capital and also further loosened some limits on the concentration of television licenses. Motta's successor, still at FHC's government, Pimenta da Veiga, was responsible for a seventh version, which got even to the point of being placed under public consultation, but also evolved to the point of influencing the National Congress or the federal government itself, which had at the support base heavy names of the category of broadcaster politicians, such José Sarney and Antônio Carlos Magalhães.

Juarez Quadros, the last Minister of Communications of FHC and currently at the presidency of the National Telecommunications Agency (Anatel) – starting from Michel Temer's government, still left to the following government an eighth edition of this draft bill, which was not considered by Miro Teixeira, Minister of Communications of the Luiz Inácio Lula da Silva's government, because, at least for the next two years, the revision of the regulatory framework of communications would not be a public agenda for the federal government. In summary, while offered few participations and speculated with legal abstractionisms to the general public, the Brazilian State guaranteed to entrepreneurs and their respective technocrats, from inside or outside the government, the direction of the country's communication policies, which included, of course, the definitions relating to the implementation of digital TV, item that was central in that moment.

With the consolidation of the SBTVD, the broadcasters wanted – with the optimization of transmissions, partial HD and nothing more – and faced

with the rift disputes, the broadcasters have left to the side the rush which marked the pressures against the federal government for the implementation of Digital TV. Since, at least, the end of 2011, a reorientation of the speeches has been registered (and, of course, of the practices) of broadcasters as a way to cope with the eagerness of telecommunications carriers in exploring the 700 MHz band to provide the mobile Internet LTE (4G)'s service.

4.2 The regulation of the Brazilian media

Historically, the different federal government's administrations have abdicated to move forward on different fronts in the organization of the broadcasting sector in Brazil. In addition to meaning a promotion of technical-scientific autonomy, the Brazilian Digital TV System (SBTVD) development was, also the motto for the reordering of the broadcasting sector in Brazil, which is still regulated by the Brazilian Telecommunications Code (1962), already mischaracterized over 50 years.

Despite brief moments of oscillation – as in the process of drafting of the Federal Constitution of 1988 and of the formulation of the Cable Law, in 1995 –, this is how the construction of the industry's architecture has happened since the first regulations of mass communication in Brazil, most noticeably after the adoption of the Brazilian Telecommunications Code (CBT).

It was precisely in the context of the approval of the Brazilian Telecommunications Code (CBT), in 1962, that the Brazilian Radio and Television Broadcasters Association (Abert), the main entity that brings together the entrepreneurs of broadcasting in the country, was founded. From the direct intervention of the business entity, articulated with a bench of broadcasters in the National Congress, were shot down all 52 vetoes determined by President João Goulart to the initial text of the project of Law 4.117/62.

4.2.1 Limitation mechanisms of horizontal and vertical concentration

The Decree-Law 236/1967 (Art. 12, Item 2) determines the maximum number of licenses for television – or "broadcasting of sounds and images", as it is formally denominated in the legislation. The limits are of 10 in the national territory, being at most 5 in VHF and 2 by state. The radio– or "broadcasting of sounds" - limits, according to the type and the reach of the network, are: a) locals: medium waves - 4; Modulated frequency - 6; b) regional: medium waves - 3; tropical waves - 3, being at

most 2 per states; and c) nationals: medium waves - 2; Shortwaves - 2.

According to data from the National Telecommunications Agency (Anatel), responsible for regulating the use and occupation of the radio frequency spectrum, Brazil has 545 TV generators stations and 13.630 television relay stations. Yet in relation to radio, there are 3.533 modulated frequency stations (FM), 1.790 of medium waves stations (OM), 61 shortwaves stations (OC) and more than 72 of tropical waves stations (OT). There are, still 4.775 community radio stations operating along the country.

Only the Law 12.485/2011, which regulates the pay TV, prevents the correlation of control and ownership between the sectors of broadcasting and audiovisual production/programming and telecommunications of collective interest, such as telephony, Internet and cable TV services.

Thus, these two types of agents of the audiovisual sector and the broadcasting's entities cannot control more than 50% of the social capital of participation in telecommunications carriers of collective interest (Art. 5). Conversely, these telecommunication carriers cannot have participation of more than 30% on the total and voting capital of broadcasters' companies (Art. 5).

In the case of the journalistic activities with online distribution, there is no legal provision or rules on concentration limits or on the need for prior authorization of any competent authorities for acquisition, merger or other similar acts. As stated, this rule is only valid for the correlation of control and ownership between the sectors of broadcasting and audiovisual production/programming and telecommunications of collective interest, in accordance to the Law 12.485/2011.

Brazil has no specific standards to regulate and restrict the concentration of corporate control and property in the printed journalistic medium (newspapers and magazines). Since the beginning of the 19th century, when it became permitted the publication of printed media, with the exception of the state policies of censorship in dictatorial periods, the sector has been regulated in a liberal regulation in the sector. However, according to the multiple versions of the Federal Constitution, the current, approved in 1988, prevents the participation of foreigners or naturalized Brazilian for less than ten years in journalistic companies of any type, including, of course, the printed media.

In 2002, after a crisis that settled in the communication area, it was discussed and approved, at the Parliament, an Amendment Proposal to

the Constitution (PEC) to change this device that forbade foreign capital. Additionally, the PEC, which was converted into the Constitutional Amendment (EC) nº 36/2002, authorized the participation of legal entities in the social capital of journalistic companies and of radio broadcasting of sounds and of sounds and images (television). Until then, it was only allowed the participation of physical individuals in the equity control of broadcasters, which allowed greater clarity in monitoring.

The Law 10.610/2002 (standard which regulated the Amendment 36/2002), in Art. 4, provides that, until the last day of every year, companies must report to the commercial registry bodies (joints) or of civil registry of legal entities (notary), "the statement with the composition of its social capital, including the appointment of the native Brazilians or naturalized for more than ten years who are holders, directly or indirectly, of at least, 70% of the total capital and voting capital".

It is not possible to understand the approval of this amendment to the Constitution without revisiting the late 1990's. In the second half of that decade, with tempers running high due to the artificial exchange rate parity that was built between the American dollar and the Brazilian real, the Globo organizations – as was called the Globo Group by then – and other communication conglomerates in Brazil decided to join quickly and with little caution, the telecommunications industry.

Besides the production and programming focused on paid TV (via Globosat), Globo, privileged in the case, the subscription TV, in special the cable TV and the satellite TV (DTH), respectively via NET and Sky, whose participation required hefty investments for which ended up mobilizing loans backed by dollar. In Brazil the hangover of this international crisis was confirmed from the first days after the victory in the re-election's first round of president Fernando Henrique Cardoso (PSDB), in October 1998, with the break of the artificial parity between the dollar and the real in the first months of 1999.

The situation worsened, even further, with the sharp devaluation of the real against the U.S. currency, which was coupled with various negative factors of great expression, such as: 1) the lack of market for paid TV, 2) the sudden increase of debts that were backed in dollar, 3) the abrupt deceleration of the national economy, affecting, thus, the advertising investments and the need for maintenance of large structures (physical network of the Net's distribution and yet the recent installation of Projac). So, the Globo Organizations began to accumulate unpayable debts between 1999 and 2002.

It was from the diagnosis of this crisis that the Globo Organizations made possible, along with the federal government and the National Congress, the approval of the amendment 36/2002, which was only regulated in one of the last acts of Fernando Henrique's administration, in december 2002, against such law, that was the result of the conversion of the Provisory Measure (MP) No. 70/2002, enforced by the Presidency of the Republic in october of that year.

The Law 10610/2002, Art. 2, § 1st, stipulates that "the companies effectively controlled by chaining of other companies or by any other indirect way, by foreigners or by naturalized Brazilian in less than ten years may not have more than 30% participation in the share capital, total and voting, of the journalistic and broadcasting enterprises".

Moreover, in Art. 2, §2nd, the device provides "to the organ of the Executive Power expressly defined by the President to request from the journalistic companies and of the broadcasting, of the bodies of commercial or civil registry of the legal entities, the information and the necessary documents for the verification of compliance" with the limits laid down. Even more, in Art. 3rd, the corporate control of journalistic companies and of radio broadcasting of sounds and of sounds and images changes will be communicated to the Parliament.

Although imposing these limits of granting concessions to broadcasting and even foreign capital's participation on this sector and on the journalism companies, the state instruments to measure the compliance with the standard are too weak. The Government, which has constitutional jurisdiction to regulate the broadcasting sector, cannot perform its duties effectively. The same is true in relation to the regulatory agencies.

The Ministry of Science, Technology, Innovation and Communications (MCTIC), heir to the specific department of the Communications (extinct in may 2016), has an extremely reduced team to monitor the amount of radio and TV stations granted, in addition to the thousands titles of newspapers and magazines, which don't even need prior authorization of the Executive Power.

Regarding the control of the shareholders board and the equity participation from the civil records, the situation shows itself even more serious. For example, neither the commercial joints, nor the civil registry offices have policies of transparency and access to information that are efficient so they can be used as instrument of public control.

In addition, as they have local or regional character (state), the possibilities of access to such information vary in accordance to the municipal county and the state in which they are. And, with the possibility of legal entities to control broadcast stations, another relevant obstacle has been created to identify the individuals who, in practice, are the real controllers of the private entity holder of the award.

4.2.2 Cross-ownership

In Brazil, there is some level of cross-ownership limits, but the Laws do not reach all the media market and only regulate the broadcasting sector in a collateral way, as a result of the pay TV legislation. The limits are present in the Law 12.485/2011, limiting itself to the correlation of control and ownership between broadcasters and audiovisual producers/programmers, on one hand, and telecommunications carriers of collective interest, on the other.

Thus, these two types of agents of the audiovisual sector and the broadcasting concessionary as well as permissionary entities cannot control more than 50% of the share capital of participation in telecommunication operators of collective interest. Conversely, these carriers cannot have participation of more than 30% of the total and voting capital of broadcasters.

Still, even considering these limitations, the regulations do not treat of number of viewers, circulation and revenues and consider only the distribution of social capital or the voting rights. In the correlation of cross-ownership between the sectors of print media, broadcasting and the Internet situation, for example, the legislation does not indicate limits of control or of property to the communication groups that own different means.

Even so, such standard does not reach the universe of open TV channels and news analyzed by the MOM. According to the Ancine's regulations, such as the classification of programming channels – updated monthly by the agency –, the *GloboNews* and the *BandNews*, both pay TV channels, are classified as "journalistic Brazilian channel". According to the regulations of 12.485, open TV channels (those 10 stations/networks of the Universe), sports and journalistic (the two mentioned) are not objects of any obligations of national content quotas provided for in the SeAC Law.

However, this does not affect structurally the television's scenario in the country, since most economic agents does not operate in the Conditioned Access Audiovisual Service, as it is called the pay TV modalities' group in

Brazil. This is a gap in the regimentation of the Federal Constitution (Art. 220, Chapter V), which prohibits the monopoly or oligopoly in the social communication.

4.2.3 Other requirements for broadcasting

The broadcasting services (radio and television) fit the profile of public services that can be directly explored by the Union, the states and municipalities or by third parties, through bidding process with subsequent approval by the National Congress. The Law 10.610/2002 regulated the Amendment 36/2002, the one that authorized the participation of 30% of foreign capital and the entry of legal entities in the shareholding structure of broadcasting and journalistic activities' companies.

Expressly, the Art. 38, subparagraph b, of the Brazilian Telecommunications Code (CBT) determines that "the contractual or statutory changes should be forwarded to the competent body of the Executive Power, within 60 days after the completion of the act, accompanied by all the documents that prove compliance with the legislation in force, in accordance with regulations".

This way, effectively, the compliance with this standard is dependent on governance practices of the companies themselves, to which is provided the decision to inform the changes to the competent bodies – in this case, the Ministry of Science, Technology, Innovation and Communication (MCTIC) and the National Telecommunications Agency (Anatel). In addition, the very authenticity of the information facilitated by the businessmen doesn't seem to go through a more rigorous supervision sieve before being made available in the Anatel's "interactive systems".

Moreover, in 2016, the Temer's government published the MP 747/2016 (converted into the Law No. 13.424/2017) that managed to make the requirements even less strict for the renewal processes and even to the transfer of licenses. Finally, the legislation does not clearly provide for significant penalties application (fines) in the case of breaches of these minimum standards of control that continued after the Law sanctioned in 2017. In fact, there is one penalty in the Law No. 13.424/17, but it is directed to the communitarian radios.

It is worth mentioning three other items of the CBT, besides the aforementioned, provided in Art. 38, which deals with the requirements to explore broadcasting services by authorizations, permits and concessions.

"Art. 38. In the concessions, permissions or authorizations to explore broadcasting services, will be observed, in addition to other requirements, the following provisions and clauses:

b) the contractual or statutory changes should be forwarded to the competent body of the Executive Power, within 60 days after the completion of the act, accompanied by all the documents that prove compliance with the legislation in force, in accordance with regulations; (text given by the Law 13.424, of 2017)

c) the transfer of the concession or permission from a legal entity to another depends on, for its validity, of previous consent of the competent organ of the Executive Power; (Wording given by the Law 13.424, of 2017)

i) the concessionary and permissionary of broadcasting services must submit, until the last working day of each year, to the Executive Power's organ expressly defined by the President of the Republic and to the bodies of commercial registry or civil registry of legal entities, statement with the composition of its social capital, including the appointment of native Brazilians or naturalized for over ten years, directly or indirectly, of at least 70% of the total capital and of the voting capital."

It is worth saying that § 3 of Art. 38 of the same Law 4117/1962 provides, only generically, criminal, civil and administrative sanctions if it is attested falsehood of the information provided. But the penalties are worth only for evidentiary documents of the condition of a partner or director that has been tried and convicted in second instance for the offenses envisaged in subparagraphs from 'b' to 'q' of Art. 1st of the Complementary Law No. 64, of May 18th, 1990. The list is enormous, involving from crime against the popular economy to administrative misconduct.

There is an element that stands out in MP 747 (Law No. 13.424/17), qualified by Abert as "the biggest victory of the last 50 years"³⁷. The Provisional Measure enshrined by Temer and Kassab, converted into law after approval by the National Congress, repealed the §2nd of this same Art. 38, which stipulated: "will be null and void of full-fledged the contractual or statutory changes, the transfers of quotas or shares or capital increase, as well as modifications on the directive board referred

37. INTERVOZES. O escárnio de Temer com as concessões de rádio e TV. Blog do Intervozes, Portal da Carta Capital. Publicado em 29 de março de 2017. Disponível em: <https://www.cartacapital.com.br/blogs/intervozes/o-escarnio-de-temer-com-as-concessoes-de-radio-e-tv>.

to in subparagraph b of the caption of this article which violate any regulatory or legal device, being the entities subject to the sanctions provided for in this code".

This was one of the cornerstones of deregulation (or re-regulation) carried out with this MP converted into ordinary law under direct coordination of leaders of business associations, but mainly of parliamentarians who are, themselves, broadcasters. In fact, the requirements based on law, although not met – with few and almost irrelevant penalties imposed by regulatory bodies –, are well below the accuracy that should exist for the granting of public service essential and scarce, as it is the communication (specifically, in the case of broadcasting).

Being more objective, the level of requirement that guides the MOM project already gives plenty of account of that which is provided for in law. The thing is, in practice, there is no regulation (standards update, information control, monitoring of compliance and accountability/penalty), and only that already gives us enough content for a good apprehension of the "state of the art" of the vacuum that is common in the broadcasting sector.

4.2.4 Competitive regulation

The Ministry of Science, Technology, Innovation and Communications (MCTIC) and Anatel are regulatory authorities that, regarding to broadcasting, limit themselves, respectively, only to the respect of the limit of the number of licenses granted to legal or physical persons and to the compliance with the technical standards for the exploration of the radio electric spectrum, but, even though, they both don't act proactively to restrain the infringement of these limits.

The MCTIC which regulates the broadcasting, and the Anatel have a supporting role in the process of buying/selling and mergers in the industry. Such assignment ends up having more strength along with the Economic Defense Administrative Council (Cade), regulatory authority for competition and economic power, based on the limits imposed by the Law-Decree 236/1967. Created in 1962, linked to the Ministry of Justice, the Cade was awarded autarchy status in 1994. Later, the Law No. 12.529/2011 determined the requirement of prior submission to the Cade of concentration acts (mergers and acquisitions) of companies that may have anticompetitive effects.

The Administrative Council for Economic Defense (Cade), although acting

in several cases involving concentration practices (especially acquisition) in the broadcasting sector, does not do so with the predominant parameter an analysis of the diagnosis and prognosis of the diversity and plurality of those who will be affected by the event analyzed. This understanding is worth not only for broadcast television, but also the radio, printed vehicles (newspapers and magazines) and journalistic portals on the Internet.

The Ministry is, in fact, the more involved, because, despite all the control and requirement flexibility brought up by the 13.424/17 (resulting from that MP 747/16, of Temer's Government), it is still in effect the entirety of the Decree 52.795/63, Titles X and XI, which regulates specifically the transfers (direct and indirect) of concessions and permits, in particular the Art. 90.

This article stipulates: "any transfer, direct or indirect of concession or permission, can be implemented without prior authorization from the Federal Government, being void, as of right, any transfer done without observance of this requirement". In this way, on the regulatory plan of the concession, the jurisdiction is of the Federal Government (MCTIC), leaving to the Cade the analysis of the competitive effects.

But the Cade has had some relevant actions in regulating competition in the broadcasting sector. An emblematic case of the role of Council in the broadcasting and print journalism's industry involves the sale, by the RBS Group, of two broadcast television networks, two FM radio stations and four printed newspapers (also online) in the state of Santa Catarina (SC), in the southern region of Brazil. This process has special relevance because the TV networks traded are Rede Globo's affiliates, which makes up the largest communications group in the country.

According to the Cade's statement in this process (Concentration Act nº 08700.004769/2016-97), the summary procedure, one of the factors that gave speed to the case was the fact that the situation of the buyer group corresponded to that which provides for the Art. 8, item II, Resolution Cade 2/12. According to this standard, in case of replacement of an economic agent, the summary procedure, which is analyzed by the general superintendence of the Cade, covers "situations in which the acquiring company or its group do not participated, before the Act, in the market involved, or of the vertically related markets and, neither, of other markets in which acted the acquired company or its group".

Another case, this more publicized and debated nationally in the industry, involved the open TV stations SBT, Record and Rede TV!, which

commands, each one, a national network. On May 11th, 2016, the Cade's court approved, in a trial session, the formation of a joint venture between SBT, Record and Rede TV! The whole process (Act of Concentration 08700.006723/2015-21), started in the previous year, on July 02nd, 2015, involved at least three legal statements and various administrative acts that prolonged the process for almost a year.

The new company, named "Simba", acts in the creation of content, programs and channels intended to the closed TV and on the licensing of the digital signal of these networks to providers of subscription TV services. The joint venture formation didn't involve the broadcasters' members of the three national chains that are not controlled by the owners of the so called "network-heads".

The approval was conditioned to the signature of an Agreement on Merger Control (ACC). To prevent possible anti-competitive problems arising from joint activities of the three business groups. The ACC included, among others, the following measures: obligation to investment in the joint venture; subsidies to small and medium-sized cable operators; and establishment of a deadline for both the ACC as for the duration of the company – six years after the signature of the first contract with a major carrier.

4.3 Media ownership's monitoring and transparency

4.3.1 Transparency

In Brazil, the Ministry of Science, Technology, Innovation and Communications (MCTIC) has the responsibilities of controlling, inspecting and sanctioning the broadcasting sector, while the National Telecommunications Agency (Anatel), created in 1997, in the case of broadcasting, has only the competence to control and inspect the compliance with the rules concerning the use of the electromagnetic spectrum. For another way, the National Cinema Agency, created in 2001, has a set of responsibilities that involves controlling, development and inspection.

The broadcasting regulatory environment does not provide for any mechanism that prevents the detention, by the same economic agent, of companies with relevant market power in different sectors, with the exception of the Law 12.485/2011, that imposes limits for the simultaneous control of open TV stations, pay TV channels and telecommunications carriers.

Provided for in Law 12.485/2011, the limits on cross-ownership planned for the pay TV sector began to be applied on March 2012, six months after the beginning of the validity of the law. On that date, all the companies that had, at that time, activities of programming or packaging had to adapt, without financial compensation to the required acts for adaptation to the limits mentioned above (in accordance with Art. 37).

The Regulation of the SeAC (Anatel's resolution 581/2012) only details how the paid TV providers would adapt themselves to the new legislation. The Law 12.485/2011 defines the obligation to dedicate spaces in the programming for audiovisual content, but only on certain channels which offer conditioned access audiovisual service (SeAC). According to the regulation, the companies should communicate to the National Telecommunications Agency (Anatel) the framing of their grants in the terms of authorization for the provision of the SeAC immediately after the publication of this Regulation ensuring the right to use the radio frequencies.

Yet the Resolution 101/99 of the National Telecommunications Agency (Anatel), basis for the application of the Law and the Regulation of the SeAC, is much stricter in defining the relations between controlled, affiliated and controller companies if compared to the stock corporation's legislation. From the point of view of the media property in Brazil, the SeAC legislation brought few consequences in the sense of spraying the control of the different communications sectors. On the contrary, the new standard, for example, completely freed the participation of foreign capital, generating even more concentration in the telecommunications industry.

In Brazil, the public administration's legislative planning does not provide for a specific legal or constitutional mechanism that determines, in general terms, the obligation to make information public – as the example of the shareholder structure, stock composition and board directive – about the companies that provide the public services awarded, in which category fits the broadcasting of sounds and images. In relation to the availability of information on the accounting demonstrations, only the stock corporations (of open capital) are obliged, by Law, to submit annual financial statements. The majority of the broadcasters and journalistic companies still maintain closed capital.

However, in the specific case of broadcasting, the Art. 38, subparagraph b, of the Brazilian Telecommunications Code (CBT) determines that "the contractual or statutory changes must be forwarded to the competent

body of the Executive Power, within 60 days after the completion of the act, accompanied by all the documents that prove compliance with the legislation in force, in accordance with regulations".

There are no legal device provided for in the Federal Constitution of 1988 or in the ordinary legislation (and infralegal standards) that determine, in a generic way, to the awarding powers, the disclosure of information on the authorizer, permissionary and concessionary entities of essential public services, which are exercised by such third parties through bidding.

That is, the Brazilian normative ordering does not provide for a specific legal or constitutional device that expressly determines the obligation to publicize the information – as the example of partners structure, shareholders composition and directive board – about the companies providing public services awarded – in which category fits the broadcasting of sounds and images.

However, one can invoke, in order to argue the right to access such information, the principle of "publicity" of the public administration, as provided for in the Federal Constitution (Art. 37), which gives basis for the direct and indirect public administration of any of the Government powers, the states, the Federal District and the municipalities. In this same device, the Federal Constitution determines, yet, the obedience to the principles of "legality, impersonality, morality [...] and efficiency ", which also should guide the bidding process and posterior monitoring of the awarded service's implementation. This rationale would fit, for example, in a possible request for information based on the Law of Access to Public Information (LAI, Law nº 12.527/2011).

It is precisely the principle of Publicity that supports, in § 1st, Item XXII, Art. 37 of CF-1988, the duty that the public administrations of all units of the Federation have to publicize "actions, programs, projects, services and campaigns of public bodies", what must be done with "educational, informative or social orientation character", being prevented any "authorities or public servants' personal promotion".

In addition, in Art. 5, which advocates the equality of all "before the law, without distinction of any nature" and "the inviolability of the right to life, freedom, equality, security and property". As it facilitates the access to the information of the procedural acts involving any Brazilian citizen or foreigners resident in the country, the same article provides for a single exception, which is laid out as follows, in Item LX, Art. 5 of CF: "the law may only restrict the publicization of procedural acts when the defense of intimacy or social interest so require".

The issue of the publicity of information still mobilizes the Principle of Public Interest, which is directly related to the principle of legality, although the CF hasn't brought it expressly in Art. 37. However, it can be affirmed that the CF itself, in Art. 19, item I, invokes the Public Interest when it opens an exception by preventing, to the Union, the States, the Federal District and the municipalities, to "establish religious cults or churches, subsidize them, embarrass their functioning or to keep with them or their representatives dependency relationships or alliance, with the exception of, in the form of law, the collaboration of public interest".

In relation to the availability of information on balance sheets, only the anonymous companies of open capital are required, by law, to submit annual financial statements. Globo Organizations, for example, only presents *spontaneously* because it has the (second) intention to raise funds in the international financial market, which requires a greater degree of transparency governance, even more, than the Brazilian legislation.

4.3.2 Government nominations: the example of the "revolving door"

There is a phenomenon which has as immediate cause and consequence the direct and objective contamination of public policies by specific private interests – apart from the “electronic rule of the coronels – or electronic coronelism”, marked by patronage and patrimonialism, features of the formation of the Brazilian State. In Spain, it is commonly called "*puerta giratoria*" the practice of keeping communicating vessels between the State instances and private companies and organizations that have activities and purposes that coincide at some point, although collaterally.

In may 2016, still as interim, Michel Temer appointed the lawyer Vanda Bonna Nogueira as Electronic Communications Services Secretary³⁸, which, in short, takes care of all matters related to broadcasting. Nogueira has made a career advising and defending the broadcasters' interests, including with numerous cases along with the Ministry of Communications which, in the Temer's administration, was merged with the Ministry of Science, Technology and Innovation, forming the current MCTIC.

38. BILENKY, Thais. Kassab nomeia advogada de TVs para supervisão de outorgas de emissoras. Folha de S. Paulo. Published in June 19th 2016. Available in: <http://www1.folha.uol.com.br/poder/2016/06/1783203-kassab-nomeia-advogada-de-tvs-para-supervisao-de-outorgas-de-emissoras.shtml>.

A month later, on June 24th, 2016, Temer signed a decree in which authorized the Globo Group to make an "indirect transfer of the concession", allowing the owners to promote corporate changes at the parent company of the group. Weeks before, on June 7th, Temer had received the chairman of the group, Roberto Irineu Marinho, at his house. According to the official Marinho's family demonstration, the application for authorization had the objective of updating the shareholding structure to prepare for the "next-generation management", which, in fact, ended up occurring days after.

In time: the whole processing (uncharacteristically fast) of the Ministry of Communications' decree took place still under the management of André Figueiredo (PDT-CE), in the first six months of 2016, still in the government of Dilma Rousseff (PT). The procedural information of the former Ministry of Communications (MC) points out that, when Rousseff was estranged, on May 12th, the final draft of the decree was already available to the president for signature and publication, which eventually ended up occurring under the leadership of Temer and Gilberto Kassab (PSD-SP), who became the leader of the "new" MCTIC.

In October 2016, Temer published a Provisory Measure (later converted into law) that Abert qualified as "the biggest victory in 50 years" of the entity³⁹. The changes weakened the control on broadcasters' shareholding changes, loosened rules for transfer of license and virtually granted amnesty to punishments in cases of delay in licenses renewal. In March 2017, after approval in the Chamber of Deputies and in the Senate, Temer and Kassab endorsed the law definitively.

In December 2016, new breath to broadcasters: via ordinance, the MCTIC modified the Regulation of Administrative Sanctions foreseen for the channels which breach the legislation in force in Brazil, easing possible punishments to the transgressor entrepreneurs⁴⁰.

There are some instances that can attest to the complicity and promiscuity between State and private interests. Henrique Meirelles held

39. INTERVOZES. O escárnio de Temer com as concessões de rádio e TV. Blog do Intervezes, Portal da Carta Capital. Publicado em 29 de março de 2017. Disponível em: <https://www.cartacapital.com.br/blogs/intervezes/o-escarnio-de-temer-com-as-concessoes-de-radio-e-tv>.

40. BARBOSA, Bia. Os presentes de Temer para os radiodifusores e operadoras de telecom. Blog do Intervezes, Portal da Carta Capital. Publicado em 22 de dezembro de 2016. Disponível em: <https://www.cartacapital.com.br/blogs/intervezes/os-presentes-de-temer-para-os-radiodifusores-e-operadoras-de-telecom>.

the presidency of the Central Bank in the two governments of Luiz Inácio Lula da Silva (from January 2003 to December 2010) and joined the Board of Directors of the J&F Group from March 2012 until May 2016, when he was appointed Minister of Finance of the Temer's government.

There are other links that well represent this feedback loop between public powers and private interests. After eleven years in various offices of the Federal Government (Minicom and Anatel), Marcelo Bechara was hired as Globo Group's director "of Regulation", to treat exclusively of legal and legislative issues. Bechara was MCTIC's executive secretary from 2005 to 2010, at the two governments of Luiz Inácio Lula da Silva, when the Ministry was commanded by Hélio Costa (PMDB-MG) and Anatel's advisor from 2011 to 2015, at the two administrations of Dilma Rousseff.

Before becoming the President of Petrobras in May 2016, Pedro Parente, former Minister of FHC (Planning, Civil House, Mines and Energy), composed the directory, then the administrative council of the RBS Group, one of the largest media conglomerates of Brazil, which controls several Rede Globo's affiliated stations in the south of the country.

4.3.3 Databases and provision of information

Reference databases for the provision of information on the broadcasting's grants are housed by the National Telecommunications Agency (Anatel), although the assignment of supervising compliance with rules on registration, property and social capital control, for example, is of the Ministry of Science, Technology, Innovation and Communications (MCTIC). To that end, the Anatel counts different systems – with questionable usability – that the agency classifies as "interactive".

The Corporate Control Monitoring System (Siacco) is available for specific queries on certain companies. For this, it is necessary to access the Siacco having already the CNPJ or business name. In addition, it is important to register, because some data only appears after being logged in. For example, based on the Rede Globo's affiliates list (the largest chain of broadcast TV in the country), it is possible to search by the corporate name of a particular station, and the Anatel's portal offers the tool "export" the data, but sometimes the procedure does not work, preventing the data's organization outside the limitations of the system's functionalities.

There is another Anatel's system, besides the Siacco, very useful for accessing information about broadcasting. It is the Mass Communications Information System (Siscom), which is a database managed by the Anatel

that contemplates the list of channels, available and granted, allocated to the various broadcasting services.

The Siscom presents even more detailed data, but also far more scattered and disorganized. In addition, the Anatel's control systems do not inform the "fantasy name" (brand) of broadcasts, a hurdle that seems simple, but shows itself difficult for external control and monitoring purposes, because, in most cases, the companies' business name (legal name) doesn't have anything to do with the brand/fantasy name, which is vastly known by the public.

Formally consulted, on the basis of the Information Access Law (Law 12.527/11), Anatel sent an official response about the supplying methods of these systems, in particular the Siacco, which is the most relevant for the purpose of mapping and ownership control of the electronic means of communication in Brazil. According to the agency, "the consultations are available in real time, being that the available data updates depend on the entity's request, performed via protocol or self-registration". This allows to infer, at least, two main conclusions and other derived: first, despite saying that the basis of the system is updated in "real time", but it is clear that this procedure is carried out according to the information provided by the entities granted.

Secondly, based on this element, it is possible to observe that granted companies and institutions are the ones that control the information publicized by Anatel's management systems. Moreover, the updates and accreditation of this information depend almost exclusively on the will and the good faith of the awarded enterprises. Objectively, in relation to the database's information, which isn't informed to the users during the consultations, the Anatel also confirmed that it doesn't track the time in which each record of the granted entity is updated in the systems.

These facts, in themselves, are already relevant phenomena enough to ratify the understanding that the most basic state control over the exploitation of a public service of collective interest, such as broadcasting, is marked by the excessive permissiveness. This is attested both by the official responses and to the data/information made available in the own Anatel's systems. Finally, it is concluded, therefore, that even in the everyday act of administration of the licensed records, the Brazilian State has little or almost no control over the timeliness or even about the trustworthiness of the declared information.

4.4 Other influences of the State

4.4.1 Electronic Coronelism

Since its founding, in 1991, the Media Democracy Coalition (FNDC), directly or indirectly, has devoted itself to the systematization of the information and the accusations of the politicians who, somehow, are profited by the country's communications systems. Even before the Forum's origin, still today, the main entity with the media democracy agenda, the journalist Daniel Herz, still in the midst of the Media Democracy Coalition policies, produced an unprecedented mapping in the country that was a foundational block for the activities of the Journalists National Federation (Fenaj) and of other entities in the following years, giving rise to the FNDC.

Also in 1991, Celia Stadnik produced a hypothesis guided around the electronic coronelism. In the initial study, she stipulated two categories of beneficiaries of this practice: the directly involved as partners or shareholders (or their families), which would have "personal interest"; another group would be composed by those professionals who gained public notoriety due to their professional activities in the mass media, with "other links". Three years later, this analysis gave rise to a monograph that demonstrated, clearly, the "national television networks' rooting in the communication systems, through their bonding with regional affiliate groups and the set of its media outlets" (Stadnik, 1994, p. 04).

Further, in 1998, Daniel Herz and other collaborators created the Institute for Studies and Research in Communication (Epcom), with the main objective of monitoring the media and the National Congress to help guiding the action of the various unions and social movements, agglutinated around the FNDC. Eight years later, in 2002, the Epcom updated Stadnik's work and condensed it in a digital basis called "Media Owners", which later – already after Herz's death, in 2006, – had the data updated into a website dedicated to the project and launched in 2008.

At that time, the civil society organizations had already understood the "electronic coronelism" not only as an academic concept, but as an urgent political matter which should be set as public agenda. Since the year 2000, with the strengthening of a wide range of entities besides the FNDC, has begun to emerge several fronts of public debates attacking the electronic coronelism in the country. For such, they have especially based themselves on the methodology already pointed at Herz and Stadnik's

studies, having as support the information's mapping and intersection of the parliamentary who benefited from the radio and television grants.

In a special report entitled "Grants are exchange currency at the electronic coronelism"⁴¹, in 2006, the FNDC traced an updated overview starting from the information mapped by EPCOM, with the evaluation of experts on the situation regarding the contamination of interests between political entities and broadcasting awards. The article reports, in addition to the case of former President José Sarney, the passage of the first government of Fernando Henrique Cardoso (1995-1998), when, until september 1996, 1.848 television relay licences were given. Of those, "268 were intended to entities or companies controlled by 87 politicians, all of them in favor of the re-election amendment approved in 1997" (FNDC, 2006, p. 17).

As exposed above, in the communication movement's reconfiguration and strengthening between the end of the 1990's and the beginning of the years 2000, several entities, collectives and networks also started to focus on the electronic coronelism's theme. The entities showed not only interest in the debates, but also wanted to intervene objectively on the issue to force a decision from the Attorney General's Office and the Judiciary Power, judicializing specific cases.

That's what made the Journalism's Development Institute (Projor)⁴², which, in 2005, filed a representation to the Attorney General's Office in a hearing which took place in Brasilia in october 2005. At the time, the Projor's direction, responsible for the Press Observatory, was composed by the journalists Alberto Dines, José Carlos Marão, Luiz Egypto and Mauro Malin. In order to search the Public Ministry, the Projor funded a research, developed by Arthur Venício Lima, of the UnB's Center for Media and Political Studies, starting from the data of the licensees' register of the Ministry of Communications. The study's report was attached to the representation. The data was restricted to the deputies, saving momentarily the senators.

According to the entity, the investigation "has gathered evidence that deputies and senators are licensees of radio and television" (Projor, 2005,

41. Article published in the magazine "MídiaComDemocracia", the main publication of the FNDC, in June 2006.

42. The Institute for the Journalism's Development (Projor) is an association formed in 2002 that aims to "stimulate debate around every means of communications, with a focus on the ethical aspects, on freedom of communication and social responsibility".

p. 2), confronting the Constitution, and that, "even more seriously", part of these parliamentarians attended the meetings of the Commission on Science, Technology, Communication and Informatics (CCTCI) of the Chamber of Deputies and the Federal Senate's Education Committee. These commissions deal exactly with the renovations and the approvals of radio and television concessions. The research identified that, in 2005, in the Chamber of Deputies, at least 51 of the 513 deputies are direct licensees of radio and television. The Projor accompanied the processing of 762 licensing and renovation processes of commercial broadcasting stations which entered the voting agenda. "The deputies Corauci Sobrinho (PFL-SP) and Nelson Proença (PPS-RS), respectively president and entitled member of the CCTCI, participated and voted favorably in the meetings in which were approved the renovations of their own radio concessions, respectively the Rádio Renascença OM, of Ribeirão Preto (SP), and the Emissoras Reunidas OM, of Alegrete (RS)" (Projor, 2005, p. 3).

According to the analysis, in this case, in addition to the Constitution and the CBT, weren't followed the § 6 of article 180 of the Chamber of Deputies' Internal Regulation and the article 306 of the Senate's Internal Regulation. Both predict that, "in the case of self-cause or subjects in which there are personal interests, the deputy must consider him/herself impeded and make communication in this sense to the Table, being his/her vote considered null, for the purposes of quorum" (*apud* Projor, 2005, p. 05).

Taking as reference the meetings' minutes of the Commission of Science, Technology, Communication and Informatics (CCTCI), was accompanied the processing of 639 lawsuits in 2003 and 123 in 2004, a total of 762 processes. Of 2003, 181 were transformed into Legislative Decrees (DL), being 118 renewals and 63 licenses. In 2004, only two grants have turned into DL. In the two periods the total was 183 (Projor, 2005, p. 07). The research found that the Constitution, the CBT and the Chamber of Deputies' Internal Regulation were being disrespected.

Common practice in the relationship between the federal government and the Parliament for decades, the public concession of radio and TV stations to parliamentarians hurts the Article 54⁴³ of the

43. According to Article 54 of the Federal Constitution, senators and federal deputies cannot, according to the Subparagraph I, Item "a", since the delivery of the diploma, "sign or maintain contract with legal entity of public law, autarch, public enterprise, or mixed economy society or licensed enterprise of public utility, unless the contract follows uniform clauses"; and, in accordance with Subparagraph II, Item "a", since the inauguration, "be owners, controllers or directors of company that enjoys favor due to contract with a legal entity of public law, or to exercise remunerated function in it".

Constitution. Applications for grants or renewal may be vetoed by the National Congress, if backed up by two-fifths of its members, in a roll-call vote. In addition to criminal and civil actions, those involved can be punished with the loss of the mandate. In the Public Civil Action, Federal Public Prosecution posits the declaration of invalidity of concessions for radio and television, because considers them "vicious" on the grounds of offense to the principle of impersonality, since "the own partners of such companies, as parliamentarians, participated in the votes".

For the MPF, the renewal of those licenses violated § 3 of Article 33 of the Law nº 4.117/62, which provides the following: "Paragraph Three - The deadlines for granting and authorization will be of 10 (ten) years to the broadcasting service and 15 (fifteen) years for television, and may be renewed for successive periods and equal if the licensees have had fulfilled all the obligations and contracts maintained the same technical, financial and moral probity, and attended the public interest".

In July 2007, the Federal Prosecutor in the Federal District (MPF/DF) proposed public civil actions to annul the renewal and/or granting of concession of five companies of radio and TV of federal deputies. For the MPF, there was personal favoritism in the concessions, since the parliamentarians, even though members of the concessionary companies, participated in the vote in which were analyzed and granted the requests for grants and renewal of these concessions.

The MPF analyzed all the CCTCI's minutes from January 2003 to December 2005 and found that several parliamentarians used the function exercised in the committee to benefit, directly or indirectly, personal interests relating to renovations or grants of broadcasting services. Were reported the deputy Nelson Proença (PPS-RS) and former deputies Corauci Sobrinho (ex-PFL, current DEM/SP), João Batista (PP/SP), João Mendes de Jesus (no party) and Wanderval Santos (PL-SP). They were partners, shareholders or directors of the concessionary companies of broadcasting service at the time when those same companies had their applications for renewal and/or grant approved in the committee. The cases examined gave rise to the following processes along with the Federal Regional Court – 1st Region (TRF-1):

- "1. Alagoas Rádio e Televisão (Maceió-AL); João Mendes (no party); managing-director - Process 2007.34.00.026698-1
2. Emissoras Reunidas (Caxias do Sul-RS); Nelson Proença (PPS-RS); partner - Process 2007.34.00.026697-8
3. Rádio Continental FM (Campinas-SP); Wanderval Santos (PL/SP);

partner - Process 2007.34.00.026700-0

4. Rádio Renascença (Ribeirão Preto-SP); Corauci Sobrinho (PFL/SP);

partner - Process 2007.34.00.026702-7

5. Sociedade Rádio Atalaia de Londrina (Londrina-PR); João Batista (PP/SP); partner - Process 2007.34.00.026699-5" (MPF, July 25, 2007)

The authors of the actions argued that the acts of concession violated "the principles of legality, morality and impersonality". Five public civil actions were proposed against the Union and the broadcasters benefited by the deputies' votes. The MPF asked, in the action, preliminary injunction immediately suspending the concessions and, on merit, requested the definitive annulment of the grant. According to prosecutors, moreover, would fit also the companies' condemnation to paying a fine for collective moral damage, and members could still be prosecuted for administrative misconduct.

Out of the five cases, at least one resulted in judgment at first instance. In ruling published on October 29th, 2013, the 6th Class of the Federal Regional Court of the 1st Region, following the rapporteur, judge Marcio Barbosa Maia kept, unanimously, the decision of federal judge Ivana Silva da Luz. In July 2010, she had determined the annulment of the session of the Chamber of Deputies in which had been renewed the concession of radio Atalaia, in Londrina (PR), linked to the then Congressman João Batista by the PP in São Paulo. The ruling was based on the understanding that the parliamentary participation in the session as a partner in the radio violated the principles of morality and impersonality.

According to the judge, which delivered the initial sentence, "the fact that parliamentarian partner of the requesting enterprise has had participated in the vote that renewed the concession compromises the principles of morality and impersonality. That's because the parliamentarian had a direct interest in the renewal, so that it is undoubtful that his vote was not marked by the public interest, but on his own benefit. The conduct in theory endorses on society the conviction that parliamentarians can practice administrative acts in their favor, and, ultimately, that the administrative machinery is not of the people, but it is intended to satisfy those in power" (TRF-1st REGION, Oct 29th, 2013).

The decision, unprecedented in the country, opened the precedent to the questioning of other licenses or renewals of concessions in voting sessions that had the direct participation of partners, shareholders or directors of licensed broadcasters. However, in addition to fitting appeal, the TRF's decision strikes only one of the flaws present in the

broadcasting licenses system and doesn't get even close of judging the main merit, that is the fact of politicians with mandates being broadcasting licensees, violating the Article 54 of the Constitution.

In the appeal presented to the Court, Radio Atalaia didn't even respond to the questions about the fact that a parliamentarian was a partner of the network, arguing that "the parliamentarian who participated in the session is a non-administrative shareholder of the Radio Atalaia". It further claimed that the participation of the deputy João Batista on the session wouldn't compromise the commission's judgment that approved the renewal of the lease. On the appeal, the defendant stated that were "presented documents and proved the correctness of the station in regard to tax issues, unions and labor", advocated that the "resolution process presents objective criteria" and stated "that the requirements provided in the legislation have been met". The TRF's interpretation shy away the actions of parliamentarians on their own benefit to access and maintain public broadcasting grants.

However, "the movement that fights for the communication's democratization, however, believes that the understanding needs to be more comprehensive. It is not just the problem of direct participation of a parliamentarian in a session that decides on a lease of which he/she is a partner. It is the fact that parliamentarians participate in sessions that grant concessions to parliamentarians and encourage their supporters. It is known how these concessions are used as a bargaining chip between politicians" (MARINONI, 19 Feb. 2014).

This is one more case that falls within the set of interferences (direct or indirect) that the Judiciary has produced in the course of the right to communication (Lima, 2011, p. 36). Are examples of "judicialization" of conflicts essentially political: the end of the requirement of high degree diploma for journalist, in 2009; the action of unconstitutionality against the Digital TV Decree, declared unfounded in 2010; the trial by the full unconstitutionality of the Press Law (5.290/67) – and the subsequent overthrow of the regulation of the right of reply, provided in Chapter IV of this legislation – and, more recently, the questioning of time-binding for indicative classification.

In 2007, social movements and civil society entities in media sector understood that the monitoring on the system of broadcasting granting should be expanded. The group went on to address the issue not only of politicians with radio and television concessions, but expanding the public agenda to their own regulatory procedures, given the dispute of interests

that were taken in the legislative houses and the gap of administrative measures against the grants that expired. To this end, the Coordination of Social Movements⁴⁴, in cooperation with movements of the communication's area – as the Collective Intervozes and the Campaign for the Ethics on TV⁴⁵ - initiated the campaign⁴⁶ for Democracy and Transparency in the Radio and TV Concessions (Intervozes, 2007a).

The action began on October 05th of that year, date when concessions of important Brazilian television stations expired. The aim of the campaign was "to sensitize society to the urgent need of changing the system for grant and renewal of broadcast licenses", which, according to the organizers, was explored by "privileged few" although the frequency spectrum is a public good. The movement highlighted the centrality of the radio and television as sources of cultural consumption in the country and stated that it is no way "how to think of democracy without the creation of mechanisms that make the grants and the renewal of these concessions transparent" (Intervozes, 2007, p. 02)

"When you examine the current grant model – concessions, permissions and authorizations – of radio and television in Brazil, what is found is a picture worse than the most pessimistic person could expect. The businessmen and politicians who represent the elites reign alone, dictate the rules and do not obey even the little that the law provides. [...] Supported by legislation full of loopholes, the "party" of the concessions took different faces over the last few decades, respecting, however, the same criteria since the 1950's: the supremacy of private interests of companies and politicians" (Intervozes, 2007, p. 03 and 05, resp.).

To justify the need for stricter rules and require more transparency in the awarding process, the campaign's promotional documents did, too, a compilation of the misuse of the concession distribution of radios and

44. The Coordination of Social Movements is an articulation that brings together entities like the Worker's Single Central (CUT), Movement of the Rural Landless Workers (MST), National Students' Union of Students (UNE), World Women's March, among others.

45. The campaign, called "Who funds the low play is against citizenship", was led by the Human Rights Committee of the Chamber of Deputies and by the Federal Council of Psychology (CFP), among other organizations.

46. Were part of the campaign's organization: Coordination of Social Movements (CUT, MST, CMP, UNE, ABI, CNBB, Cry of the Excluded, World Women's March, UBM, UBES, CONEM, MTD, MTST, CONAM, UNMP Citizenship Action, CEBRAPAZ, Hug, CGTB, Conaq, ABGLT, Abong, Intervozes, Enecos, Campaign for the Ethics on TV, Joint Women&Media, Women's Observatory, National Forum for the Democratization of Communication, Comunicativistas, Collective Epidemic and Article 19.

televisions, focusing on the educational broadcasters' case. According to the special booklet produced by the Collective Intervozes, in August 2002, the reporter Elvira Lobato, from the newspaper "Folha de São Paulo", published a series of stories which revealed how the government of former President Fernando Henrique Cardoso had maintained the practice of distribution of broadcast concessions to political allies.

Lobato, in a news story titled "FHC distributed educational radios and TVs to politicians", reported that, "in seven and a half years of government, in addition to the 539 commercial broadcasters sold by bidding, FHC authorized 357 educational concessions without competitive bidding". A large part of these networks was in Minas Gerais, a political stronghold of the then Minister of communications of FHC, Pimenta da Veiga (PSDB). In 2006, a reporter published another story, this time about the grants made in three and a half years of the first government of Luiz Inácio Lula da Silva (PT) "Lula approved 110 educational stations, being 29 televisions and 81 radios. Taking into account only the concessions to politicians, it means that at least one in every three radios went to, directly or indirectly, their hands "(Lobato, 2006 *apud* Intervozes, 2007b, p. 07).

To give political support to the campaign, the entities leaned themselves on other processes which gave *pari passu* to the demonstrations against communication companies with expired licenses, specialized publications, dissemination of accusations on the Internet. Also in 2007, the work of the Special Subcommittee for Licenses and Renewals of Broadcasting Concessions installed by the Commission of Science and Technology, Communication and Informatics (SITC), at the Deputies' Chamber, which was chaired by Luiza Erundina (PSB-SP) and reported by Maria do Carmo Lara, were in course.

Systematized information by the subcommittee revealed, for example, that there is a much larger percentage of educational licenses without bidding than commercial licenses. This is because, in 1995 and in 1996, federal decrees altered the regulation of concessions to commercial stations, establishing the requirement for bids for these processes. However, the educational broadcasting licenses were dispensed from the obligation. "From there, the federal government, which previously distributed commercial licenses in exchange to political favors, started to use the educational licenses as exchange currencies" (Intervozes, 2007b).

The movement accused that the "broadcasters use their grants to promote the criminalization of social movements and impose a political

agenda of their own. There is no room for the plurality of ideas and for the diversity of cultures. There is no respect even for the Federal Constitution. More than that: there is no participation of society in the debate on granting and renewal of the licenses, which happen without respect to the public criteria. The processes are slow, little transparent and there is no supervision by the public authorities. Combined, these ingredients support monopolies and oligopolies, making possible the operation of broadcasters with licenses due for almost 20 years." (Intervozes, 2007, p. 28).

The campaign was based in academic research that pointed the binding of the national affiliates' system, such as Rede Globo, with regional politicians⁴⁷. The immediate demands of the Campaign for Democracy and Transparency in the Radio and Television Concessions were the following:

"- immediate actions against irregularities in the use of concessions, such as excessive advertising, broadcast licenses due and stations in the hands of deputies and senators.

- end of the automatic renewal: for transparent and democratic renewal criteria, based on what the Constitution establishes.

- installation of a monitoring committee for the renovations, with effective participation of the organized civil society.

- convening of a National Conference of Communication broad and democratic, for the construction of public policies and a new regulatory framework for communications" (Intervozes, 2007b, p. 27).

The campaign for transparency in broadcasting concessions helped to build the political legitimacy of the report by the special Subcommittee chaired by Mrs. Luiza Erundina.

4.4.2 Broadcasting programming time rentals: a recidivist illegal practice

Also interests, in order to understand the legislative and regulatory mechanisms governing the ownership of the media in Brazil, to present a recurring phenomenon in the country's broadcasting scenario: the "lease" (rental) of timetables in the programming grid, markedly from broadcast

47. As example of the article "Coronelism, broadcasting and vote: the new face of an old concept", by Suzy dos Santos and Sergio Capparelli (2005).

television, as a way to obtain resources.

This is a shortcut, not nestled in the communications regulatory framework, of which entrepreneurs grasp to ease the tightening or even the decrease of revenue and audience that has happened to the sector. The illegality can be identified in the act of timetables' rental, by third parties, of relevant portions of the programming grid, which are "rented", in large part, by churches for purposes of religious proselytism.

The Public Civil Action filed by the Attorney General's Office in São Paulo (MPF-SP) – against Rede CNT, the Universal Church of the Kingdom of God (Iurd) and others – brings, in an articulated way, numerous legal arguments that substantiate the clear impediment of this type of practice, commonly referred to as "rental" or "lease" of schedules ("subcontracting") on radio and TV. The Administrative Procedure (No. 1.34.001.004782/2012-54) was opened by the Regional Prosecutor of Citizen's Rights (PFDC), instance of the MPF which has directed special attention to the theme of communication.

The CNT, still today, sells more than 90% of the programming grid, while the Universal Church (Iurd), besides buying spaces on several television networks, holds, indirectly, the control of Record TV. The phenomenon persists, although the radio and television services are exclusive exploitation by the State, only accessed by third parties through grant concessions, permission or consent.

Moreover, the Federal Constitution of 1988, in Art. 19, Subparagraph I, stipulates that it is forbidden to the Union, the states, the Federal District and the municipalities "to establish religious cults or churches, subsidize them, embarrass them or keep with them or their representatives dependency relationships or alliance, with the exception, in the form of the law, the collaboration of public interest". By breaching, by connivance or tacit support, basic principles of the largest norm in the country, the different governments of the Federal Executive, in association with the Parliament, have been violating not only the secular character of the State, as provided for in this article, but several other devices of the Constitution relating to the Public Administration and, specifically, to the Social Communication.

As exposes the MPF's piece, the Law nº 4.117/62 (Brazilian Telecommunications Code), for its turn, does not authorize any sublease (or "subpermission", "subauthorization", in the case of the remaining types of grants). In other words, it forbids, objectively, the outsourcing of the operation of granting of broadcasting services (radio and

television). The impossibility of the concessionary to transfer the broadcast license to third parties follows public and personal nature of broadcasting services, whose implementation by the private sector can only occur after bidding procedure that guarantees equality in competition, according to which provides the Art. 34 of the Law n° 4.117/62 and the Art. 10 of Decree No. 52.795/63.

Although the Law No. 8.987/95, Art. 26, allows the subconcession of public services in general – since assuming competition, limits and obligations –, such standard does not apply to the delegation of the broadcasting service, for express reservation of its article. Moreover, Law No. 8.987/95: “Art. 41. The provisions of this Law shall not apply to the granting, permission and authorization to the broadcasting service of sounds and of sounds and images”. Although admitting the occurrence of art. 26 of the Law No. 8.987/95 to broadcasting, any "subconcession" should follow the legal requirements laid down: a) contractual provision; b) prior authorization of the granting authority; and c) realization of bidding in competition mode.

4.4.3 Educational Radios

As a rule, in the commercial radios, one can speculate the reasonableness of the justification that the leases are not subconcession, but a kind of advertising insertion that would be long, in big part, continuous. It would be sufficient, therefore, that the time leased didn't exceed 25% of the total, according to the current legislation. As do many awarded who wish to keep the practice of grants' outsourcing for the purpose of revenue production. However, the educational radio stations don't admit the insertion of conventional advertising, but only mentions of cultural support, without the presentation of rates or purchase conditions for products or services.

Hence it is understood, a priori, that are nonexistent breaches or even regulatory vacuums that justify, even rhetorically, the "sale" or "lease" of timetables in the educational broadcasters' programming. And, even if there were, given the impediment reasoned for commercial advertising, the simple outsourcing of content aired against financial gain would configure the advertising act, also forbidden by law. Therefore, it is possible to conclude, deductively, that equally there would be no differentiation in case the licensed with an educational grant proceeded the "subconcession", with revenue capture, of 5%, 10% or 50% of the programming.

4.4.4 Tax benefits

The Decree 7.791/2012 regulates the fiscal compensation in determining the Income Tax of Legal Entities (IRPF) to broadcasters as remuneration for the free dissemination of partisan and electoral propaganda, of plebiscites and referendums. This is called "right of antenna" of political parties and opposition groups in controversies object to referendum or plebiscite.

This right, which is laid down in Art. 52 of the Law No. 9.096/1995 (Law of Political Parties) and in the Art. 99 of the Law 9.504/1997 (Election Law), that in 2017 underwent significant changes after approval, by the Parliament, of another electoral reform. According to the Federal Revenue, in election years (evens), are intended for the right to electoral antenna around R\$ 850 million. In the remaining years, there are approximately R\$ 560 million in tax exemption benefit of open television and radio companies.

4.5 Inefficiency of the legal framework and regulatory instruments

In relation to the communications in Brazil, there have been different diagnoses that attest to the ineffectiveness of the instruments that prevent the concentration of media ownership in Brazil. A relevant example is the 2015's Report of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights of the OAS, in which the institution sees "with concern the information that in Brazil, Rede Globo holds 70% of the commercial advertising's market and 40% of the national audience".

In the sequence, the document of the Special Rapporteur points out that "there are in Brazil few television stations with national reach, which would result in an oligopolization in the industry". The report still mentions structural problems in the electronic communications of Brazil, such as the control of broadcasting licenses by politicians.

Finally, the report confirms what provides the Principle 12 of the Declaration of Principles on Freedom of Expression of the CIDH, which establishes the need to institute antitrust laws to ensure diversity and plurality in the communications⁴⁸.

48. Available at: <https://www.oas.org/pt/cidh/expressao/docs/publicaciones/brasillibertadexpresion2016.pdf>

CONCLUSIONS

Along the document – in a more synthetic way in its beginning and more detailed in its second part – the intent was to present the legal framework of the Brazilian media system combining the descriptive and analytical dimensions. Throughout the text, the concerns with the media control, concentration and mechanisms of transparency have been a constant, following the principles that lay ground to the realization of the MOM project.

The document presented the fragmented legal framework and the scarce and weak mechanisms regarding the mentioned aspects. This scenario is worsened by the difficulties in the implementation, also linked to the lack of the regulators' political will to ensure that the law is complied with. On the contrary, the recent period has been marked by the softening of the few existing requirements.

This weak framework makes room for gaps that are exploited by the economic agents in the sector. In addition to actively guide the changes in the legislation, the business groups cheat on the few existent obligations in their benefit, making the broadcasting stations' shareholding control a heavily permissive ground.

Perhaps the greatest example of the exploitation of these breaches is the networking model that has been erected since the birth of the commercial Brazilian media. There is no need for a corporate group to control all the broadcasters, it is enough to provide a network through affiliation contracts. The total absence of supervision or even concern from the regulators with that deepens this scenario.

On pay TV, the SeAC Law brought limitation mechanisms to the vertical concentration but such change also comes as a kind of tacit agreement to demarcate the areas of operation of two business segments whose relationship has been marked by tensions and partnerships in recent years: the broadcasting stations and programmers, on one hand, and the telecommunications carriers, on the other.

If in the broadcasting the picture is problematic, in print media and online websites and websites it is even more dramatic due to the complete inexistence of mechanisms created to curb the concentration of property and to promote plurality and diversity. This situation is extremely worrying with the rise of the Internet giants, not only in the apps' area, but especially in the content area (it is worth reminding that Google

controls the world's largest repository of audiovisual, Youtube, Apple and Amazon already have a video service, market which will also feature the presence of Facebook).

In this sense, the implementation of the MOM project in Brazil comes in an important time to place back the debate of the media concentration in the country and raise the reflection on the need to reform the legislation so that the country can follow the footsteps of other consolidated democracies, which, even in the cases of the liberals, count with restrictions aimed at preventing the formation of monopolies and oligopolies.

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