Reversibility of assets in telecommunications concessions: the path towards legal certainty*

Reversibilidade de bens nas concessões de telecomunicações: o caminho em direção à segurança jurídica

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ABSTRACT

This article discusses the evolution of the treatment of reversal of assets in the concession contracts of fixed switched telephone service, considering the existence of assets that support the provision of other telecommunications services. Considering the sectorial particularities and the applicable legal, regulatory and contractual provisions, the article points out that the reversion of assets of shared use among different

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services should not be carried out from the transfer of ownership in favour of the Federal Government or a new concessionaire. The article also argues that the concept of reversion of possession used by the legislation makes room for the adoption of contractual mechanisms aimed at ensuring the continuity of services.

KEYWORDS

concession contracts — telecommunications — assets reversibility — shared use assets — contractual reversion

RESUMO

O artigo discute a evolução do tratamento dado ao instituto da reversão de bens nos contratos de concessão do serviço telefônico fixo comutado (STFC), considerando a existência de bens que servem de suporte para a exploração de outros serviços de telecomunicações. Considerando as particularidades setoriais e as previsões legais, regulamentares e contratuais aplicáveis, o artigo aponta que a reversão dos bens de uso compartilhado entre serviços não deve ser realizada a partir da transferência de propriedade em favor da União ou de novo concessionário. O artigo sustenta, ainda, que o conceito de reversão da posse utilizado pela legislação abre espaço para a adoção de mecanismos contratuais voltados a assegurar a continuidade dos serviços.

PALAVRAS-CHAVE

contratos de concessão — telecomunicações — reversibilidade de bens — uso compartilhado — reversão contratual

This article will discuss and detail the legal regime of Law 9.472, July 16, 1997 ("Law 9.472/1997" or *Lei Geral de Telecomunicações* — "LGT"), concerning the reversibility of shared assets linked to the *Serviço Telefônico Fixo Comutado* contracts ("STFC"), especially after the changes made in Law No. 13.879, October 3, 2019.

This definition is relevant because, unlike other regulatory sectors, STFC concessions are not (and never were) purpose-built enterprises, and may other telecommunications services may operate under the authorization — such as the *Serviço Móvel Pessoal* ("SMP"), the *Comunicação Multimídia* ("SCM"), and

Serviço de Acesso Condicionado ("SeAC"). This peculiarity means these companies operate multiservice networks, with assets simultaneously dedicated to a range of services, many due to technological evolution and the convergence that occurs, in practice, in relation to them: networks are currently digital and the allocation to services corresponds to the capacity effectively demanded by each.

This obviously places limits on the instrument of reversibility in the sector, given it will only affect a portion of its assets. For purposes of objectivity, we would like to highlight our understanding of the subject — to precisely reflect our public position, expressed on more than one opportunity, that we will summaries here:[1] (i) the reversal does not have any effect on assets dedicated exclusively to other services or activities exercised by the concessionaire and its economic group (e.g. cancelled materials); (ii) in relation to multi-service assets, the reversal takes place through remunerated assignment of the necessary capacity to maintain the STFC exercised, in favour of the Union, as defined currently — i.e., 64 kbps, subject to the rules of the *Plano Geral de Outorgas* ("PGO") and the *Plano Geral de Metas de Universalização* ("PGMU"); and (iii) reversion for this purpose occurs through a contractual arrangement, providing a new concessionaire, or directly with the Union, with the capacity and resources necessary to ensure continuity of service.

For clearer understanding, this article is divided into four sections, besides the introduction: (i) Section I circumscribes the debate on the concept and extent of reversibility in the LGT; (ii) Section II addresses the case of Sercomtel, with an initial test for the reversibility modality; (iii) Section III deals with the approval of Law no. 13.879, October 3, 2019 and; (iv) Section IV deals with Anatel's new *Regulamento de Continuidade* (*Resolução* no. 744, April 8, 2021).

1. The instrument of reversal in Lei Geral de Telecomunicações

Initially, it is important to highlight the purpose of the instrument that we are dealing with, the reversal of assets linked to a concession to operate

[1] See PEREIRA NETO, Caio Mario S.; ADAMI, Mateus Piva; CARVALHO, Felipe Moreira de. Reversibilidade de bens em concessões de telecomunicações. *Revista de Direito Público da Economia*, v. 55, p. 73-110, 2016. Also, PRADO FILHO, José Inácio Ferraz de Almeida; ADAMI, Mateus Piva; PEREIRA NETO, Caio Mario S. Notas sobre a disciplina infralegal da reversibilidade dos bens afetados aos serviços públicos de telecomunicações: inovações e ilegalidades da Resolução Anatel nº 447/2006. *Revista de Direito de Informática e Telecomunicações*, v. 6, p. 89-109, 2009.

public services. In general, it goes beyond the telecommunications sector, guaranteeing an element that justifies an activity qualified as a "public service": the continuity of the activity itself, considered essential for the collective.[2]

Thus, this should guide the interpretation of any provisions related to the subject, from the *Lei Geral de Telecomunicações* to sectoral regulation. In that sense, we noted earlier that this purpose guides the delimitation of the assets to which the granting authority will have access on termination of the contractual relationship. As we see:

> It should be noted that the discipline of reversibility, basically, ensures the **continuity of the service**, granted at the end of the concession period. As the concession transfers to the private only the exercise of the public service, the ownership of which remains with the Granting Power, reversibility is necessary to ensure the activity continues to be provided after the end of the contractual term, by the Government or by a private entity, via a new public service concession relationship.

Bearing in mind reversibility obligations, **only assets strictly necessary for the provision of the service are reversible.** Furthermore, reversibility does not give the Granting Authority any right or claim to the assets used in the concession (in the sense of guaranteeing a certain value to which the Granting Authority would be entitled), but only ensures the service holder access to the assets and legal positions required for the maintenance of the activity.[3]

Within this context, to ensure continuity of the service granted, and in view of the particularities of the telecommunications sector, the *Lei Geral de Telecomunicações* provided, in its original wording, mechanisms for achieving this objective.

In art. 93, item XI, the LGT delegates to the concession contracts the definition of rules that will guide the reversal of assets, where they exist. Such an opening does not represent a legislative failure. On the contrary: the open

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[2] See, for example: MELLO, Celso Antônio Bandeira de. *Curso de direito administrativo*. 30. ed. São Paulo: Malheiros Editores, 2013. p. 770. JUSTEN FILHO, Marçal. *Teoria geral das concessões de serviço público*. São Paulo: Dialética, 2003. p. 329-331; DI PIETRO, Maria Sylvia Zanella. *Parcerias na administração pública*. 6. ed. São Paulo: Atlas, 2008. p. 90. At the legislative level, this link is recognized by the legislation itself — for example, article 36 of Lei Geral de Concessões.

[3] José Inácio Ferraz de Almeida Prado Filho, Mateus Piva Adami e Caio Mario S. Pereira Neto, Notas sobre a disciplina infralegal da reversibilidade dos bens afetados aos serviços públicos de telecomunicações, op. cit., p. 93.

forecast protects public interest, ensuring that the Union can contractually define that certain assets, as they are useless for the continuity of the service, for example, are not the object of reversal — an aspect highlighted by the *Exposição de Motivos* of LGT.[4-5] But in the telecommunications sector there is another justification for this prediction: the fact that, with the advent of *Lei Geral de Telecomunicações*, converged networks were anticipated, served more than one activity, making use of "multi-service assets" or "shared use".

In fact, art. 207, § 3, of the *Lei Geral de Telecomunicações* provided for the exercise of other services simultaneously by the concessionaires of the STFC arising from the privatisation process.[6] In this case, the authorizations referred to were necessary to enable the use of data services through the *Serviço de Rede de Transporte de Telecomunicações* ("SRTT"), later converted into the current SCM.

This is why we can say that the STFC concessionaires were never special purpose companies, even before the amendment legislation that explicitly allowed the use of other telecommunications services through the same company that holds the concession.[7]

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4 "In the case of a service of collective interest, whose existence and continuity the Union itself undertakes to ensure, the assets that are applied to it may (**and should not**) be reverted to the granting authority, to allow the continuity of the public service. **But the principle of continuity of the public service does not always suppose the reversion of the goods that are affected**. **When the concessionaire's assets are not essential to its provision, either due to technological obsolescence or expiry, the reversion shall not occur, and the assets do not need to be reintegrated into the equity of the granting authority, at the end of the concession**. Unless, of course, for reasons duly justified, public interest requires such a reversal. Hence, the optionality of the instrument, which the Project presented, by letting the contract define what these assets are, to avoid unnecessary financial burden for the grantor" (MINISTÉRIO DAS COMUNICAÇÕES. *Exposição de Motivos* nº 231, de 10 de dezembro de 1996).

5 Professors Carlos Ari Sundfeld and Jacintho Arruda Câmara clarify the content of the provision, which establishes a "more open regime for the management of assets linked to the provision of public service". In this regime, the institution of reversibility obligations in a given concession contract is subject to a judgment of convenience and opportunity by the granting power. And this does not threaten the continuity of the public service provided, as the Law starts from the premise that the right of ownership of an asset is not considered the defining element for its management. In this sense, see SUNDFELD, Carlos Ari e CÂMARA, Jacintho Arruda. O serviço telefônico fixo e a reversão de bens. In: GUERRA, Sérgio (Coord.). *Temas de direito regulatório*. Rio: Freitas Bastos Editora, 2004. p. 144-145.

6 "Art. 207. Within a maximum period of sixty days from the publication of this Law, the current providers of the switched fixed telephone service intended for use by the general public, including those referred to in art. 187 of this Law, as well as the trunk service and its international connections, must apply for the execution of a concession agreement, which will be effective within twenty-five four months after the publication of this Law. […]
§ 3 *In relation to the other services provided by the entities referred to in the head paragraph, the respective authorizations or, if applicable, concessions have been issued, subject to the provisions in this article, where applicable, and in art. 208 of this Law.*

7 See art. 86 of the LGT, with wording given by Law No. 12.845, of September 12, 2011.

The current STFC concessions are provided for by art. 18, items I, II and III, as well as art. 64, sole paragraph, both LGT — the latter has already been revoked, as we will discuss later. Based on this legislative authorization, the Executive Power issued the *Plano Geral de Outorgas* ("PGO")[8] and the *Plano Geral de Metas de Universalização* ("PGMU").[9] In turn, within the scope of the *Agência Nacional de Telecomunicações* ("Anatel"), the service is defined according to the concept of telephonic processes.

The specification of this concept is designated by *Anatel* in *Resolução* 426, of December 9, 2005 ("*Resolução* 426/2005" or "RSTFC"), the current rule that governs the provision of the STFC, in the following terms (article 3, XVIII):

> Telephonic processes: those that allow communication between fixed points, voice and other signals, using a transmission technique in 3.1 kHz-voice or 7 kHz-audio modes or up to 64 kbit/s, unrestricted, by wire, radio electricity or optical means or any other electromagnetic process;

By definition of its scope, STFC services are provided using telephony processes, which are necessarily developed with a technical limitation that does not allow, for example, the provision of broadband services (exploited through SCM). Thus, the object of STFC is quite restricted in relation to the capacity of networks owned by current concessionaires, observing the territorial scope defined by the PGO and PGMU.

From the contractual point of view, there is no innovation in relation to the foregoing — and neither could there be, as it is extracted from its Clause I. In addition, concession contracts include the possibility of using other services, exactly on the basis of art. 207, § 3, of the LGT (Clause 18.1).[10]

This normative and contractual set delimits and circumscribes the service granted, to which reversibility should apply — always with the aim of ensuring its continuity. The conclusion here is simple: the concession link resulting

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[8] Currently under Decree No. 6.654, of November 20, 2008.

[9] Currently under Decree No. 10.610, of January 27, 2021.

[10] We refer here to the Concession Agreements approved by Resolution No. 552, of 10 December 2010. It is worth noting that Anatel approved new drafts through Resolution nº 678, of June 6, 2017, later replaced by the models approved through Resolution No. 737, of November 27, 2020. Such drafts, however, were not signed by the current concessionaires. In any case, for the purposes of reversibility, to the extent dealt with here, there is no substantial difference between the two texts.

from the restructuring and privatization processes of the telecommunications sector, applicable to telecommunications concessionaires, *covers only a portion of the services provided by these operators*.[11]

Precisely for this reason, art. 102 makes explicit reference to the reversal of ownership, as a premise for the reversal to be operationalized, in cases where there are assets to be reversed. Full citation is useful, given its clarity: "Art. 102. The termination of the concession will transfer automatically to the Union the possession of the reversible assets".

Considering concessionaires arising from the privatization process continue to develop other telecommunications services, which, with time, may surpass in importance the object of the concessions, the reversal of ownership was seen as the way to avoid undue expansion of the scope of the service granted. This much is plain.

If it were admitted that the reversal would affect, in any form, assets non-essential to the object of the public service granted, there would necessarily be an expansion of the service provided with the termination of each concession. This would not only subvert the objective that protects the instrument of asset reversal — continuity —, but would have other consequences. It would: (i) exceed the delimitation of service regulations; (ii) generate insecurity regarding investments carried out by the entity that holds the concession, especially in terms of adding capacity to provide a service other than the STFC; and (iii) put in doubt the privatization process that was guided by the sale of shares of *Telebras* System companies at auction, without limiting the services they could provide.

This position, which restricts reversion to the portion of assets essential to continuity of STFC, called *functionalist*, was defended in the scope of *Anatel*

[11] "According to the historical report that I set out in Analysis No. 5/2015-GCIF, of 3/6/2015, the events of the concession of the provision of the STFC and the privatization of the state companies that exploited this service. On that occasion, it was possible to clarify that the networks then used by the STFC providers were the patrimony of these companies, which, on the signing of the concession contracts, agreed to allocate this infrastructure to the provision of the service in the public regime and, consequently, to the reversal institute. As equity of the company, therefore, the network can be freely used by other telecommunications services, under the terms of the respective granting acts, respecting the legal, regulatory and contractual obligations arising from the provision of STFC." (ANATEL. *Voto No. 85/2015-GCIF*, of 6.5.2015, p. 35). In fact, the network used by the STFC concessionaires is the object of industrial usage contracts with other provider services of collective interest (i.e., in addition to those provided under the public regime), as provided for in clauses 16.3 and 16.14 of the Concession Agreement approved by Resolution No. 552, of December 10, 2010.

initially by counsellor Igor de Freitas, in the *Análise* no. 05/2015,[12] a view that, over the years, prevailed in the regulatory body, as seen, for example, in *Análise* no. 292/2019/ D.[13] On that occasion, counsellor Aníbal Diniz highlighted that:

> *4.11. It is extremely important to point out that prior to privatization, the assets necessary to provide the service belonged to the companies of the Telebras Group, Therefore, one cannot speak of transfer or assignment of Union assets to private companies — they are not and have never been part of the Federal patrimony, but of public service providers. Although possession is reversible to the Union at the end of the concession, if used for the provision of fixed telephone services, the asset never, does not and will never belong to the Union. [...]*
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> *4.12.* ***There is no legal provision for the transfer of asset ownership, only possession, in case the Federal Public Administration Federal is facing the principle of legality provided for in the Federal Constitution****. [...]*
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> *4.22. It should be noted that the asset is owned by the concessionaire and that only possession reverts to the Union at the end of the concession so that continuity of the provision of the STFC is guaranteed[...].*
>
> *4.29.* ***The reversible assets do not correspond to the totality of concessionaire assets, only those which are indispensable to the continuity of the provision of the public service granted.***
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> *4.30. LGT did not adhere to a patrimonial project of making telecommunications a huge source of public assets, so much so that it instituted prevention of provision, in which there is no reversibility of assets.*[14]

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[12] "4.2.62. **The reversion, therefore, only affects the assets effectively necessary and directly employed in the technical operation of the service granted**. This binding of the reversible assets with the provision of the service must still be current, or at least suitable for the future. In other words, they must revert to assets that are currently directly employed in the operation of the service or that prove to be indispensable to it, considering their needs for qualitative and quantitative expansion. […] 4.2.65. **Reversibility, therefore, is associated with the effective indispensability of the asset to the operation of the service granted**, which translates into its current and immediate application in that activity, or even in case of duly proven need for future use. Assets that are out of use or that are applied in activities outside the service granted must not be considered reversible property. As highlighted in the foregoing. What is deactivated and out of use is not essential to any service" (ANATEL. Processo No. 53500.025781/2011-31. *Análise* No. 05/2015-GCIF, counselor Igor Vilas Boas de Freitas, 6.3.2015).

[13] Processo nº 53500.037015/2019-77.

[14] In the same sense: "4.2.29. The privatization event, therefore, has no direct relationship with the reversal. This was already provided for in the Concession Contracts to which the new controllers expressly adhered upon acceptance of the terms of Tender Notice No. 1/1998-MC/BNDES, of 6/10/1998, and consequent participation in the event. Nor is there any valid argument that links the reversal to the mere recovery of the public property disposed of in 1998, given that only a fifth of the assets belonged, at that time, to the Union. 4.2.30.

The concept of reversal of possession, thus, also entails a delimitation. This is because it necessarily obliges the use of a proportionality criterion to operationalize the reversal of the possession of shared assets, whatever the legal instrument used to realize it, Possession, as set out in art. 102 of the LGT, does not signify a "Midas touch", drawing into the scope of the concession the full capacity of assets, even when such assets support, in a negligible way, the service granted. On the contrary, it is limited precisely to the scope of the public service defined by the concession contract, at the time it is granted. This implies the opposite: only the capacity essential to the continuity of the service should be the object of the reversal.

It is in this context that the provisions on reversal of the concession contract must be analyzed.[15] In brief, the Concession Agreement provides for the general criterion for the incidence of the reversibility rule for private assets expended for the provision of the service granted. It also provides for the possible use of third-party assets, provided there is no commitment to the continuity of the public service — with the possibility of avoiding this risk

In summary, the reversal has as its legal basis the principle of continuity and its concrete application to the STFC stems from the conformation given to it in the respective Contract grant. The LGT established that the Concession is the grant instrument to be used in the public regime, which must be applied to services that, due to their essential nature, have their provision conditioned to the fulfilment of universalization and continuity obligations.
Especially with regard to the latter, it provided for the possibility of using the instrument of reversal, without, however, setting any contours, which were delegated to the granting of the Contract. 4.2.31. It is in this legal document therefore — the Concession Agreement — that must seek the discipline to be applied to the reversion of the assets of the STFC concessionaires. It was at the time of conclusion of this adjustment that the then STFC providers expressed their acquiescence to the legal regime established therein and agreed to submit to the reversal of its assets and future investments, under the terms established in the Agreement.
The reversal, therefore, is anchored, on the one hand, in the principle of continuity applicable to services provided under the public regime and, on the other hand, in the discipline and scope that the Concession contract." (ANATEL. *Análise No. 5/2015*, Igor Vilas Boas de Freitas, of 3.6.2015).
It is also worth mentioning the report of the Regulatory Impact Analysis of the Continuity Regulation (discussed below): "It is worth noting, finally, that, within the scope of the Strategic Project on reassessment of the regime and scope of telecommunications services, contained in item 2 of Anatel's Regulatory Agenda for the second half of 2015 and the year 2016, object of the SEI Process No. 53500.015702/2016-99, the proposal for a General Plan for Telecommunications Service Grants provided in the public regime adopts the functional vision available, in article 13, which considers reversible assets the essential and effectively employed assets in the provision of the service under the public regime, in proportion to its use when shared for the provision of other telecommunications services." (ANATEL. *Análise de impacto regulatório*: reavaliação da regulamentação sobre bens reversíveis. feb. 2019. p. 14).

[15] For a more detailed analysis of the contractual discipline, see Caio Mario S. Pereira Neto, Mateus Piva Adami e Felipe Moreira de Carvalho, Reversibilidade de bens em concessões de telecomunicações, op. cit., p. 96 e ss.

with the adoption of a contractual subrogation clause. Finally, it provides six categories of assets that may be subject to the reversal rule, provided they are "indispensable to the provision of the service [granted]", as seen in Annex I.[16]

Thus, as observed, from the legal, regulatory and contractual discipline on reversibility of assets in the telecommunications sector, from a material point of view, the following criteria is relevant, to identify the assets on which the instrument will focus rollback as well as its extension:

> (i) Listing the categories of assets that may be subject to reversibility pursuant to Clause 22.1 (indispensability) and Annex 1 of the Concession Agreements. If the asset is not in these categories the analysis may be interrupted;
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> (ii) Once the asses included in the previous category have been identified, the functional link to the STFC provided under the public — if the asset is functionally linked to the provision of the STFC under the public regime, may be reversed;
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> (iii) In this subset of assets, one must identify those used only for the STFC and those that support multiple services provided/utilized by the concession-holding companies — evaluation of the configuration or not of an asset multiservice; and
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> (iv) Among the multi-service assets, the portion must be identified and separated effectively for the provision of STFC in the public regime — the separation of ownership of a portion of the asset must be possible in legal and operational terms. Otherwise, it cannot affect the reversion rule (as one would be facing expropriation, which is different hypothesis).[17]

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[16] Annex I — Qualification of the reversible assets of the provision of the local switched fixed telephone service:
"a) Switching and transmission infrastructure and equipment, including terminals for public use;
b) Infrastructure and external network equipment;
c) Infrastructure and energy and air conditioning equipment;
d) Infrastructure and equipment of call centres and service provision;
e) Operation support system infrastructure and equipment;
f) Infrastructure and equipment installed by virtue of universalization obligations provided for in the Plano Geral de Metas de Universalização, approved under the terms of art. 18, item III, of Law No. 9,472, of July 16, 1997;
g) Others indispensable to the provision of the service".

[17] Caio Mario S. Pereira Neto, Mateus Piva Adami e Felipe Moreira de Carvalho, Reversibilidade de bens em concessões de telecomunicações, op. cit., p. 107.

These criteria materially circumscribe the incidence of the instrument of reversal, before any legislative change, from which it is inferred that: (i) asses used exclusively for other telecommunications services, such as SCM, SeAC and SMP, as well as network elements not dedicated to any service (e.g., erased fibers), are excluded from rollback; (ii) assets dedicated exclusively to the STFC, operated under the public regime, will have their possession reversed - with freedom for the parties to define, in common agreement, another way to operationalize the reversal; and (iii) multi-service assets must have access to the portion dedicated to the STFC under the public regime.

It is clear, therefore, that art. 102 of the LGT already explicitly established a mechanism aimed at reversing the possession of assets necessary for the continuity of the service operated under the public regime. Likewise, the fact that a portion of asses in the telecommunications sector have shared use, combined with the impossibility of expanding the scope of the service provided vis-a-vis the reversion instrument, means that the reversion of possession operates only in relation to the proportion of the assets dedicated to the object of the concession contract. These two elements, transfer of ownership and proportionality, define the contours of reversal in the telecommunications area.

There is no other way to operationalize the reversal of ownership other than contractually, which is the only possible solution to avoid expropriation, notably in the case of multi-service assets, corresponding to the undue expansion of the service operated under the public regime.[18] The reversal of ownership through a contract involving the provision of wholesale capacity, as well as other resources and services necessary for the provision of the STFC under the public regime, would meet, simultaneously, proportionality and continuity, to the strictest extent necessary, the demands of public interest. Contractual forms well known in the sector may be utilized, such as contracts of wholesale, industrial use and capacity assignment, in order to comply with legal provisions.

In turn, there is (or was, until that point, as we will discuss) no formal instrument to operationalize the continuity of the service after the termination of the concession contract. This does not mean, obviously, that it is impossible to adopt reversal of possession within the proportionality as defined above. On the contrary, there is room for different solutions, as long as they start from the shared use of multiservice assets, limited to the contours of the current concessions (i.e.,64 kbit/s capacity and length determined by the PGO and PGMU).

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[18] 18 Ibid., p. 105.

2. Brief note on the *Sercomtel* case: a first test for reversal in LGT

As pointed out, the original wording of the LGT, combined with the interpretation of the regulation and the concession contract itself, already allows establishment of signposts for the definition of the extension and form of application of the reversibility instrument in the sector. Reference should be made to the discussion relating to *Sercomtel* S.A., a concessionaire facing expiry of its concession contract, because it anticipated a proportion of the debates resulting from the termination of the contract.[19]

This observation is relevant on two fronts: judicial and administrative, for Anatel itself.

On the judicial front, *Sercomtel* filed a lawsuit aimed at guaranteeing the maintenance of shared-use assets in the event of a decree of expiry and the granting of the concession to another agent. This was a test, although limited to a specific court decision in the first instance, which demonstrates the application of the considerations made above, *in verbis*.[20]

> In fact, it is well known that, with the **convergence of services and infrastructure, it is increasingly common that concessionaire equipment furnishes provision of multiple services**, more especially in the case of telecommunications networks used simultaneously for the provision of STFC and for the Serviço de Comunicação Multimídia (broadband). [...] As seen, **only the rights to assets essential to the provision of the service granted must be reversed. In this field, it is disproportionate to apply a sophisticated and powerful infrastructure network to a service used to a lesser extent**. Hence, the logical and rational approach is to ensure what is necessary for the provision of

[19] The forfeiture process was filed due to the transfer of the corporate control of the concessionaire, a move that, in Anatel's view, removed concerns about its economic-financial situation. (ver ANATEL. Análise nº 63/2021/VA, conselheiro Vicente Bandeira de Aquino, de 21.10.2021).

[20] The sentence recognized the dismissal of Sercomtel's claim, due to one of the requests inserted in the initial petition, aimed at declaring the nullity of the clauses of the concession agreement relating to the discipline of the reversibility of assets (2nd Federal Court of Federal District Judiciary Section, Federal Judge Charles Renaud Frazão de Morais, Process No. 1014965-53.2018.4.01.3400, j. on 10.21.2020), not having evaluated the arguments brought in the assessment of the preliminary injunction. The outcome of the case, however, does not change the considerations of merit exposed in this article, given that there is no contradiction between the discipline of the contractual agreement and the form of operationalization of the legally foreseen reversal.

> the service under the public regime, not to absorb a superior structure. In such a situation, **it appears sufficient and reasonable to transfer to the granting authority or the new concessionary company (when applicable) only the right to use part of this network: the network will continue to be linked to the company that created it, serving as a support to the services offered by the provider**, such as the aforementioned SCM and SeAC. **The reversal must apply only to the part essential to the provision of public service (STFC), constituting a right to partial use of the network, in the capacity necessary to ensure the continuity of the public service.** [3rd Vara Federal de Londrina, Federal Judge Décio José da Silva, Processo no. 013884-15.2017.4.04.7001/PR, j., 29/9/2017]

This judicial decision is fully in line with what has been shown above, recognizing multiservice assets have specificities that justify the adoption of their own mechanism to ensure continuity of the service in the event of concession termination, based on transfer of possession and in proportion to what is necessary for that purpose.

Furthermore, on the second front, we can highlight the way in which the *Anatel* led process aimed at disciplining a possible new concession bid, notably in relation to the use of multiservice. Thus:

> 4.54. **As for the price paid for possession of the assets**, the technical area expressed its position in Report No. 34/2019, with which I agree, **in the sense that it should be the object of negotiation between *Sercomtel* and the winning Bidder, with no amount paid to the Union, considering that *Sercomtel* still** owns the assets. Any conflict that may arise over the value for the use of said assets may be brought to Anatel, in accordance with the provisions of art. 19, item XVII, of Law
> no. 9.472, of July 16, 1997, Lei Geral de Telecomunicações (LGT). Regardless of any disagreement about the amount to be charged by *Sercomtel*, the use of the assets by the winning bidder will not be prevented, as it would jeopardise continuity of the service.
> 4.55. In response to the PFE suggestion, the technical area recommended that the possibility of waiving the right of possession of certain assets owned by *Sercomtel* should be provided for. Such a hypothesis may occur in cases where the winning bidder is already

> a telecommunications service provider and possesses the means to provide the services granted. The proposal was materialised with the inclusion of the following items in the notice: [...]. [ANATEL, Análise no. 209/2019/EC, counsellor Emmanoel Campelo, 28.4.2020, in Processo no. 53500.084866/2017-47]

Anatel, therefore, clearly and unequivocally considered ownership of the shared assets would remain with *Sercomtel*, without setting a prior value for use by a future concessionaire — it is up to the parties to agree on a value. The institution only noted that, in case of need to use the aforementioned assets and impossibility of agreement between the parties, intervention could take place, in favour of continuity of the service.

It is, therefore, a case in which both the Judiciary and *Anatel* have demonstrated alignment with the functional vision of reversibility of shared-use goods in the telecommunications sector, based on transfer of possession in the proportion necessary for the continuity of the STFC.

3. Impacts of Law no. 13.879/2019: legislative clarification needed

Although conditions for reversibility of the concessionaire assets are prescribed by legislation and given *Anatel* has evolved substantially, adapting its understanding to such contours, a patrimonial bias seems to persist, as is the case with the position established by the *Tribunal de Contas da União* (Federal Court of Auditors) (TCU) in Judgement no. 2.142/2019.[21]

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[21] In Judgment No. 2,142/2019, the TCU indicated that the value associated with reversibility would apply to all legacy assets of the Telebras System and those acquired with funds from the its sale, and would correspond to an estimate of R$ 121.6 billion: "Contrary to what the agency intends to believe, it is not enough that values equivalent to those calculated with the disposal of reversible assets have been invested in the provision of the service granted. It is necessary that the acquired assets have the qualification of reversible assets at the end of the contract. Assets acquired with proceeds derived from reversible assets are reversible assets. If not, they will not be incorporated into the concession's acquis and will, instead, remain under the ownership of the operator, after the termination of the concession contract, characterizing undue gain of the concessionaires, at the expense of the Treasury. […] Even if the public service of fixed telephony has been granted to the private sector, without the intention of accumulating equity, as expressly defended by Anatel, it is certain that the Granting Authority never renounced the assets used before the conclusion of the STFC concession contracts, in 1998, nor those that would be acquired later, and has the subjective public right to the correct contractual provision" (TCU. Plenário. *Acórdão* nº 2142/2019, relator Walton Alencar Rodrigues, Processo Relatório de Auditoria nº 024.646/2014-8: 9.11.2019).

However, this position was superseded by Law no. 13.879/2019, updating certain points of the LGT. Among them, what matters for the present analysis is the incorporation, definitively, of clarifications in legislation related to recognition that: (i) reversibility does not affect all concessionaire assets, but only assets essential to the object of the contract granted; and (ii) multi-service assets must be valued in proportion to use for the service granted. This emerges from the literal interpretation of art. 144-C of the LGT:

> Art. 144-C. For the purpose of calculating the economic value mentioned in art. 144-B, assets essential and effectively employed in the provision of the service granted will be considered reversible.
>
> Single paragraph. Reversible goods used for the provision of other telecommunication services operated under the private regime will be valued in proportion to their use for the service provided.

The literal interpretation of the device clearly demonstrates acceptance, by the Legislative Power, of what had long been built into the regulatory framework of the sector, already considered by *Anatel's* precedents.

So, there is no doubt about the scope of the legal provision, it is worth referencing some elements presented by the legislative process. For example, note an excerpt from the opinion of senator Daniella Ribeiro, that rejects amendments aimed at increasing the scope of the reversal instrument in addition to what is already provided for in the legislation and in the concession contracts, on the following grounds: [22]

> The Amendment in the 6-Plen, by expanding the scope of the concept of reversible assets, extrapolates the definition established in the concession contracts and in the *Regulamento de Controle de Bens Reversíveis* approved by Anatel, validated by the Federal Audit Court (TCU) through *Acórdão* no. 1.809/2016-TCU-Plenary, July 13, 2016. Similarly, the deletion of the rule providing for proportional calculation of the value of reversible assets used in the provision of other telecommunications services would violate contractual clauses in force. Therefore, the amendment should not be accepted.

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[22] See Opinion nº 94, de 11.9.2019. Available at: https://legis.senado.leg.br/sdleg-getter/documento?dm=8005905&ts=1571225443738&disposition=inline. Accessed: 17 May 2020.

In addition, it is worth mentioning the efforts *Anatel* itself made in the approval of PLC 79/2016, including publication of documents with clarifications to legislators and the population in general. Through these documents, *Anatel* explicitly acknowledged that reversal was already, before the approval of PLC 79/2016, limited to possession of assets essential to the provision of the service operated under the public regime,[23] owing to the focus on the proportion dedicated to that service.[24]

Finally, it is important to highlight one more point in relation to the rule provided in art. 144-C of the LGT. As the legislative change sought to discipline the adaptation of concession contracts currently in force for authorizations operated under the private regime, it is evident that this rule must be the same applied in case of termination of the concession for any other reason.

Note, as explained above, the reversal of possession of shared assets essential to the continuity of the STFC used in the public service must be made in proportion to its use by the said service, even if the concessionaire does not opt for the migration regime. There is no sense in valuing goods differently, even more so in a context in which there was only clarification of the interpretation of sector reversal rules.

This eliminates room for misinterpretations, such as those conducted by the TCU in cases prior to Law no. 13,879/2019, regarding the extension and

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[23] "The assets used by the fixed telephony concessionaires never belonged to the Union, but rather were part of the equity of Telebras, a mixed capital company of which the Union was controlling shareholder. In the 1990s, with the privatization of Telebras, the Union withdrew from the group of shareholders of the companies, which until today are responsible for the provision of fixed telephony service. **The provision of reversibility of the possession of such assets to the Union is due only to the current legal provision that there is guarantee of the continuity of the provision of the fixed telephony service, by the Federal Government or other(s) concessionaire company(ies), in the event of termination of the concession contract by the current operators."** (ANATEL. PLC 79: Perguntas Frequentes. item 3).

[24] "3.39. It should also be noted that some of this equipment is used in a shared way by services provided in the public and private regime. **As provided for in PLC No. 79/2019 itself, shared-use assets would only be considered according to the proportionality of use for the provision of STFC in the public regime**. Due to technological convergence in the last decades in the telecommunications sector, the networks have become multiservice, which means that the same structure is used to provide various telecommunications services. **In this way, part of the network of STFC concessionaires is used not only for the provision of STFC under the public regime, but also of other services, bringing additional complexity to the debate on reversibility. This is because we are facing the provision of telecommunications services under different legal regimes (public regime and private regime), through the same network of telecommunications. It is for no other reason that the legislative proposal deals with these elements of the network according to proportionality with respect to its use for each service of telecommunications provided"** (ANATEL. Report No. 27/2019/PRRE/SPR, of 5.3.2019).

limits of the instrument of reversibility of assets in the telecommunication sector. The task for defining the operation of reversal was in the hands of *Anatel* — already adopting the necessary measures, as discussed below.

4. *Anatel's* continuity regulation: path to operationalize reversal in the sector

In the same vein as Law 13.879/2019, *Anatel* presented *Acórdão* No. 19/2020, with a proposal for "Regulation of the Continuity of Provision of Fixed Switched Telephone Service for Public Use in General" ("Continuity Regulation"), finally approved by the *Resolução* no. 744, April 8, 2021. This rule replaced the controversial Regulation for the Control of Reversible Goods, approved by *Resolução* 447, October 19, 2006, which until then disciplined the control of *Anatel* for assets considered reversible.

The processing of the *Regulamento de Continuidade* brought, again, a clash of conceptions about the reversal instrument in the sector.[25] On the other hand, the Agency's technical area argued that, at the end of the concession, the multiservice assets had their right of use assigned to the granting authority, or to the third party appointed by it.[26] On the other hand, the *Procuradoria Federal Especializada* (Special Federal Public Attorney*)* upheld the need for reversion of possession of any assets that were employed, even if in very small part, for the provision of the STFC in public regime.[27]

This clash continued during the vote within the Directorial Council of *Anatel*, in view of the divergence between the counsellors Carlos Baigorri and Emmanoel Campelo. While the first defended approval of the Continuity Regulation in the form of the area mechanism, which provided for a contract for the assignment of the right to use multi-services at the end of the concession,[28] the second aligned with PFE, voting for the reversal of possession of any asset employed, even partially, in the provision of STFC under the public regime.[29]

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[25] See Processo No. 53500.056388/2017-85, which began on 5.8.2017 and was concluded only on 5.10.2021, after the publication of Regulamento de Continuidade. Within its scope, Consulta Pública No. 19/2020 was conducted, between 3.11.2020 and 4.27.2020, and manifestations from the technical area of Anatel and Procuradoria Federal Especializada followed, until final deliberation by the Agency's Board of Directors

[26] ANATEL. Parecer nº 694/2020/PFE-ANATEL/PGF/AGU, de 12.11.2020.

[27] ANATEL. Informe nº 102/2020/PRRE/SPR, de 7.8.2020.

[28] ANATEL. Análise nº 16/2021, conselheiro Carlos Baigorri, de 5.4.2021

[29] ANATEL. Voto nº 8/2021, conselheiro Emmanoel Campelo, de 7.4.2021.

The position of counsellor Carlos Baigorri prevailed, recognizing the need to operationalize the reversal through the assignment tenure.[30] Although the Continuity Regulation deals with several topics relevant to the discipline of reversible goods, one point in particular should be highlighted: operationalization of the reversion of assets for shared use. See its text:

> Art. 25. At the end of the concession contracts or terms of permission, **the assignment of the right to use the assets may be shared under fair and reasonable economic conditions, if the Granting Authority or the company that succeeds the Provider wishes to make use of such assets** to maintain the continuity of the provision of the STFC in the public regime.

Note, the adherence to what has been presented in this article. It is important, then, to draw attention to some aspects indicated therein. First, the regulation recognizes the existence of shared-use assets, in line with the Agency's own precedents and the most appropriate interpretation of the regulations.

Secondly, it is established that the reversal of possession will occur as a rule by means of "assignment of right of use" — i.e., by a contractual instrument.[31]

Thirdly, it was established that this assignment will take place under fair and reasonable economic conditions, i.e., the former concessionaire will be remunerated, with the right to use its network and other shared assets affected by the reversal, on bases yet to be defined. This prediction is in line with the previously mentioned solution to the case involving *Sercomtel*. It is

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[30] "5.62. Thus, it is imperative to conclude that there is no functionalist view without proportionality and there cannot be proportionality with property reversal. For this reason, to operationalize the reversal through the transfer of ownership of the affected assets, as traditionally conceived in other infrastructure sectors, would be absolutely unfeasible in the telecommunications sector. […] 5.70. So, it is clear to me that the reversal is more adherent to the existing legal system, not only because of that expressed in art. 102 of the LGT, but also because it generates a result of less intervention in the private domain, thus generating less costs for the State and for the public treasury, in addition to having less potential for litigation" (ANATEL. *Analysis* nº 16/2021, counsellor Carlos Baigorri, of 4.5.2021).

[31] Continuity Regulation: "Art. 26. Operating procedures for reversing the possession, pursuant to art. 102 of Law No. 9,472 of July 16, 1997, on Reversible Assets and the use of shared assets will be established in an Operational Manual defined by the Anatel Superintendence responsible for monitoring and controlling Reversible Assets, observing the provisions of the concession contracts, and must contain, at least: […]."

worth noting, at the same time, that although there is no clear definition for the valuation criterion of the assignment, considering it will apply to a limited share of asset capacity,[32] its impact tends to be of little relevance for operation of current concessionaires.

Fourth, also in line with the case of *Sercomtel*, contracting of capacity and resources with the former concessionaire is not mandatory, i.e., this obligation may not be manifest. Two scenarios can be used to exemplify this hypothesis: (i) the Union no longer considers the STFC as a service operated under the public regime— releasing its continuity; or (ii) the new concessionaire decides to execute the activity using other networks, their own or third parties, other than those held by the former concessionaire.

Finally, considering the applicable legal provisions, the reversal will focus only on capacity and resources of the ex-concessionaires strictly necessary for the continuity of the STFC operated under the public regime, considering its current features. This should guide the definition of the object of the contracts entered into by the former concessionaires upon termination of their respective concession contracts — with the caution that the burden resulting from the reversal should not be unduly increased.

On this point, it is worth noting that the form of operationalization of the reversal, irrespective of the function of the asset in question (i.e., shared use or not), may be carried out by contractual means — as inferred from art. 102 of the LGT and art. 26 of the Continuity Regulation. As mentioned, the correct path is conclusion of wholesale contracts and others necessary for the provision of resources and services indispensable to execution of the STFC in the public regime, in line with sector practices.

We conclude, therefore, that *Anatel* regulated the operation of asset reversal, affected to some extent by reversibility in the contract, according to the only possible interpretation of art. 102 of the LGT, as detailed. It remains now to operationalize the reversal in a manner compatible with legal

[32] This statement is supplemented by the fact that Anatel's Planning and Regulation Superintendence, when responding to a question by counselor Vicente Aquino (rapporteur on the matter) about the possibility of approval of the regulation impacting the public coffers, pondered that: "**the proposal greatly reduces the scope of the instrument of reversibility of assets, reducing the risk of impact on public coffers, since only with the reversal would there be the possibility of indemnification of the assets**, which, as proposed in art. 15 of the draft of the regulation, would be owed by the Union or by the company that succeeds the Concessionaire. As for the continuity of the service, there would be no risk of spending public resources, as it would be guaranteed by obligations to comply with SMP." (ANATEL. *Análise* nº 23/2019/VA, conselheiro Vicente Bandeira de Aquino, de 12.7.2019).

provisions and regulations, through the definition of the most appropriate contractual terms for this purpose.

5. Conclusion

The subject of the reversibility of assets in the telecommunication sector is an old one, already explored by some authors who position themselves according to the above — albeit with some variation as to the way in which the reversal of possession is operationalized.[33] After years of discussion, this line of thought was progressively incorporated by *Anatel* and, more recently, confirmed and reflected in the Legislative itself through the approval of PLC 79/2016, transformed into Law no. 13.879/2019.

From the above, the concrete incidence of the applicable reversibility rule to STFC concession contracts will be limited by their effective use for the object of the concession, under the following terms:

> i. there will be no application of the reversal rule for assets not under the purview of the STFC, such as erased fibers;
>
> ii. there will be application of the reversion rule for assets prescribed by the STFC — and the operationalization of reversal, in this case, may be adjusted by mutual agreement between the parties;
>
> iii. there will be no application of the reversion rule for partial capacities of multiservice assets not linked to the STFC;
>
> iv. the rule of reversal of possession will be applied for partial multiservice asset capacities used for the provision of STFC;
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> v. there is no currently established way to operationalize the reversal of asset possession, multiservice or not, although this may occur through contractual instruments that guarantee assignment of the capacity necessary for the continuity of the service;

[33] See MATTOS, Paulo Todescan Lessa. Desafios da regulação de telecomunicações no Brasil. RDPE, Belo Horizonte, n. 40, out./dez. 2012; MARQUES NETO, Floriano de Azevedo. Bens reversíveis nas concessões do setor de telecomunicações. *Revista de Direito Público da Economia*, Belo Horizonte, n. 8, out./dez. 2004; and OLIVEIRA, Rodrigo Macias de. O modelo contratual de reversibilidade no fim das concessões do STFC. *Consultor Jurídico*. Available at: http://www.conjur.com.br/2021-out-18/macias-modelo-reversibilidade-fim-concessoes-stfc. Accessed on: 23 Oct. 2021.

vi. a contractual arrangement may be devised, based on sectorial practices involving wholesale contracts, which meets simultaneously the objectives of continuity and proportionality provided for by legislation; and

vii. according to the Continuity Regulation, the reversal of the partial capacities of the multiservice assets will be operationalized by means of an assignment contract, involving the capacity and resources necessary for the continuity of the service operated under the public regime, considering its current contours, remunerated on a fair and reasonable basis.

Clarity on these aspects of the telecom reversibility regime is essential to ensure an orderly transition at the end of the concession, whether through migration to the authorization regime in terms of Law 13.879/2019, or termination of current contracts. That guarantee helps not only avoid exhausting and unnecessary disputes, but avoids interruption to the flow of investments from the sector. This is an important step, albeit a late one, to ensure the legal certainty necessary for investments made by the concessionaires.

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