

LATINLAWYER
ONLINE

Friday, 2nd March 2012
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Emerging from the shadows

BRAZIL BLOG: Anatel is widely seen as one of the least transparent of the Brazilian regulators, although there are some small signs that this is beginning to change. Clare Bolton reports



Protests against the secret vote in Brasília

Last October, hundreds of thousands of people in 25 cities across Brazil took to the streets to protest at the continuing high levels of corruption, which they see as ruining the country and its economic prospects. President Dilma Rousseff, shortly before the march (perhaps not completely coincidentally), launched an 'open government partnership' with the US, in which both she and Barack Obama committed to greater public access to government information, and the end to secret votes. Transparency might still be a huge problem in Brazil, but it is also high on the political agenda.

However, at telecoms regulator Anatel, central government rhetoric has been slow to trickle down. The agency conducts the vast majority of its meetings in secret, with very limited access to schedules, voting records by the commissioners, or documents relating to cases or processes, unless you have specific power of attorney for the case in hand. Indeed, as Fabio Kujawski of Barretto Ferreira, Kujawski e Brancher - Sociedade de Advogados notes, in fact a slow decline of the quality of information available has been noticeable over recent years: "you used to be able to search for the votes of the board members on any and all subjects on Anatel's website, but the tool

slowly became not as good as it was, and now is virtually useless.” Anecdotal evidence suggests that rather than reveal a lack of consensus among the commissioners, matters are simply never voted upon; Carol Elizabeth Conway, director of regulatory affairs at UOL, calls Anatel “one of the worst in the world. Everything is done behind closed doors, and you don't even know the motivation of their decisions. It is not at all democratic.”

Compare this to the comparative bastion of openness and transparency, the competition regulator CADE. There, sessions are not only open, but broadcast in real time on its website. Documents relating to ongoing cases are publicly available – “we have immediate access to all files in all cases,” as **Caio Pereira Neto** of **Pereira Neto, Galdino, Macedo Advogados** puts it. “Other parties can be updated along the way, in way which is both necessary and completely reasonable.” There has long been talk of opening Anatel more – “but we really need to see some concrete action – for years everyone has been looking forward.”

Much of that talk has been determinedly originated by Anatel Commissioner Emilia Ribeiro, who is the Trojan horse of the transparency movement. “I believe that transparency at the agency is fundamental for the security of the market and for credibility in the market, as well as to improve competition,” she says. “A response in real time, at a public meeting or open session, facilitates greatly the comprehension of the service and its role.” She eulogises CADE’s openness: “it greatly helps greatly a new company here, to know our rules and so on – it gives security to the market.” Ribeiro also walks the walk – she publicly publishes her diary, for example: “The state pays me, so I need to show what I am doing.”

Recent personnel changes within the agency have helped Ribeiro in her previously one-woman mission to sweep Anatel into the open – new commissioner Rodrigo Zerbone for example is seen by the market as embodying this new, open style. However, not everyone agrees with Ribeiro: “Of course, we have five commissioners, and each has their own opinion. Others think transparency will bring difficulties, delays, will bring problems for some companies or perhaps is not necessary as the decisions are so delicate.”

Of course, the reason many would say that Anatel is so closed is that in a heavily concentrated sector, some companies (and the small group of families that run them) have serious power, both economically and politically. Those campaigning against the secrecy in the regulation process use a simple, but powerful argument: if Anatel is regulating the sector fairly, considering the best interests of the users not the incumbents, what is the problem with showing that?

However, there is now “light at the end of the tunnel”, as Fabio Kujawski puts it. On 1 March, Anatel made a clear step forward towards a more open way of working, and cancelled Article 79 of its internal rules. This is the rule which states that sanctioning procedures should remain confidential and available only to parties’ lawyers. The decision follows a lawsuit filed by SindiTeleBrasil, an association of the main incumbent operators, to keep such procedures secret; after an injunction was granted to the association, Anatel took the step of cancelling the rule. “Therefore, the injunction shall likely be cancelled and those administrative proceedings shall remain accessible to the public in general - an excellent action by Anatel towards transparency,” says Kujawski.

Moreover, on 2 March, the Diário Oficial contained good news for transparency campaigners: a working group is being set up, of members of Anatel, the Ministry of Communications, Telebrás and more, to help Anatel comply with the Access to Public Information Act, which comes into effect in May. Among other things, the group is tasked with revising which documents are kept out of the public sphere, and organising information to be published online.

Ribeiro, speaking to *Latin Lawyer* late last year, saw progress being made even before these recent developments. “Many things have opened already, for example our schedule is available online with more information than previously. Our votes and opinions on new acts are available online....We’ve already had some experiences of open sessions and they were a success – we had no negative reaction in the market.”

She describes a slow, but irresistible force on Anatel to move with the times. “Whether [the other commissioners] want it or not, the agency is opening up very slowly.... The country is going in that direction. Our time of military dictatorship was about secrecy, today’s world is all about openness, the Wikileaks generation – you just can’t keep things a secret anymore.” The agency has a very long way to go before the fierce campaigners against closed and thus more easily corruptible governmental practices will be appeased - but these are encouraging signs.

Picture credit: Valter Campanato / Agência Brasil