Are online applications users of a telecommunications service provided by their customers' ISPs? A legal analysis

White Paper submitted to the Anatel Consultation on the Regulation of Users' Duties

Barbara van Schewick[1]

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[1] Professor of Law, and by courtesy, Electrical Engineering at Stanford Law School and Director of Stanford Law School's Center for Internet and Society. I am funded solely through the general budget of Stanford Law School and receive no direct or indirect corporate funding for my work. Additional information on my funding is available here: https://cyberlaw.stanford.edu/about/people/barbara-van-schewick.

Introduction

Anatel's consultation document asks whether there is a need for Anatel to regulate the duties of users of telecommunications services pursuant to article 4, I, of the General Telecommunications Law - LGT (Law No. 9,472, of July 16, 1997) beyond the duties of users of telecommunications services laid out in the Regulation on the General Rights of Consumers of Telecommunications Services, Resolution 632/2014.[2]

Among other questions, the document asks whether there is a need to adopt specific rules for certain popular internet content, applications, and services to account for the fact that a large percentage of traffic on Brazilian internet access networks is associated with them.

In general, Anatel does not have authority to regulate internet applications, content, and services ("applications"). Internet applications are value-added services, and value-added services are not telecommunications services (Art. 61, paragraph 1 LGT).

Discussing a number of Anatel's regulatory actions, the consultation document suggests that Anatel might nevertheless be able to regulate internet applications because (1) value-added services are users of the telecommunications service that supports them (Art. 61, paragraph 1 LGT), (2) users of telecommunications services have the duty to use telecommunications services in an appropriate manner (Art. 4, I LGT), and (3) Anatel has some authority to define the contours of that duty.

In addition, the consultation document suggests that Anatel might be able to regulate the relationships between internet applications and Brazilian providers of internet access service (ISPs) because (1) as value-added services, applications are users of a telecommunications service, (2) ISPs are providers of telecommunications services, and (3) Anatel has some authority to regulate the relationship between users and providers of telecommunications services, including between value-added services and the providers of telecommunications services (Art. 61, paragraph 2 LGT).

However, forcing internet applications to pay Brazilian ISPs would go beyond the scope of these provisions.

First, the Orders discussed in the consultation document regulated different kinds of relationships. Both the Robocall Order and the Order on Corporate SMS Messages concerned the relationship between the user of a telecommunications service and *its own* provider of that service.

By contrast, internet applications are not users of a telecommunications service provided by their customers' ISPs. Instead, Brazilians who use these applications are users of a telecommunications service provided by *their* ISP; internet applications are users of a telecommunications service provided by *each application's* ISP. Thus, regulating the

[2] Anatel Consultation Document, available at https://apps.anatel.gov.br/ParticipaAnatel/VisualizarTextoConsulta.aspx?TelaDeOrigem=2&ConsultaId=10120; Anatel Resolution No. 632/2014, available at https://informacoes.anatel.gov.br/legislacao/resolucoes/2014/750-resolucao-632.

relationship between internet applications and Brazilians' ISPs would require Anatel to regulate the relationship between the user of *one provider's* telecommunications service and the provider of *another user's* telecommunications service, going beyond the scenarios addressed in existing orders.

Second, the Robocall Order found that telemarketer's use of their *own* telecommunications service violated their duty under Art. 4 LGT, I to use that service in an appropriate manner. By contrast, the purported "problem" Anatel wants to address – data suggesting that a large share of traffic on internet access networks is associated with internet content, applications, and services by a small group of providers – exists on the networks of the Brazilian ISPs and is created by the users of these ISPs' telecommunications services – the ISPs' internet service customers who use these applications. Treating this effect as a violation of the *internet applications*' duty to use their telecommunications service in an appropriate manner would make the users of *one provider's* telecommunications service (the applications) responsible for the impact created by the users of *another* provider's telecommunications service on *that* provider's network. This seems to go beyond a reasonable interpretation of Art. 4, I LGT. Moreover, neither the ISPs' customers nor the applications are using their own telecommunications service in an inappropriate manner. Both are using their own telecommunications service exactly in the manner intended by the LGT and the Marco Civil – sending and receiving data over the internet to do what they want online. The Marco Civil protects Brazilians' right to use the applications of their choice. That includes the right to use popular applications that many people want to use, and there is nothing wrong with being a successful internet application that sends data to its customers that these customers requested.

Internet applications are not users of a telecommunications service provided by their customers' ISPs.

Treating internet applications as users of a telecommunications service provided by their customers' ISPs would be a radical departure from how the internet has operated for the past thirty years and contradicts the legal framework established by the LTG.

On the internet, each party contracts with their own ISP for access to the entire internet – whether they are individual Brazilians, Brazilian companies, or internet applications. Each party's ISP then connects with other networks so its internet service customers can reach not just the subscribers of their own ISP, but the rest of the internet as well.

This model allows everyone with an internet connection to interact with everyone else attached to the global internet.

This model has been at the core of the internet's success. Once a business, website, or application connects to the internet through its own ISP, it can reach customers all over the world. It has no relationship with its customers' ISPs. Typically, it will not even know the identity of its customers' ISPs. This allows companies and speakers without deep pockets to share their products and ideas with people around the world; they do not have to negotiate with ISPs around the world just to be accessible to these ISPs' subscribers.

This model, and its positive impact on innovation, access to information, and freedom of speech, is the model that the Marco Civil was designed to protect (Art. 2, 3, 4 Marco Civil).

It is also the model embodied in the LGT. Under that model, each party in a communication is the user of the telecommunications service provided by their own provider; the two providers then interconnect with each other to allow their users to communicate with each other.

For example, when a student at the University of São Paulo calls his parents at home from his mobile phone, he is using a telecommunications service (Personal Mobile Service) by his own mobile phone provider. In receiving the call, his parents are using the telecommunications service (Switched Fixed Telephone Service) provided by their own phone provider. Even though his parents' phone provider terminates the call, the student is not a user of any telecommunications service provided by his parents' phone provider.

Similarly, under the existing model Brazilians are users of a telecommunications service provided by their own ISP – a Multimedia Communication Service (SCM) for fixed broadband or a Personal Mobile Service (SMP) for mobile broadband. As Anatel's regulations establish, this service allows the customer to "*send and receive* data packets over the internet."[3]

When a Brazilian student requests a video from an online video provider, the student's ISP transports the data packets with the student's video request over its own network and hands them off to another network provider at an interconnection point. If that other provider is the online video service's internet service provider, it delivers the request over its network to the online video service. Otherwise, the request is transported from network provider to network provider until it reaches the online video service's ISP, which delivers it to the online video service.

The online video service then uses its own ISP to send the video back to the student who requested it. To do so, the video service's ISP transports the data packets carrying the video over its own network and hands them off to another network provider at an interconnection point. If that other provider is the student's ISP, it delivers the video over its network to the student who requested it. Otherwise, the request is transported from network provider to network provider until it reaches the student's ISP, which delivers it to the student.

In transporting the student's video request and the actual video to and from the internet, the student's ISP fulfills its obligations *to that student* under the student's telecommunications service (SCM or SMP). The ISP is compensated for these actions by the student; that's what the student's internet subscription fees pay for.

As value-added services, internet applications are also users of a telecommunications service (Art. 61, paragraph 1 LGT). However, they are users of a telecommunications service provided by *their* ISP, or they provide this service to themselves; they are not users of a

[3] Art. 4, V SCM Regulation, Resolution No. 614/2013 (emphasis added), available at https://informacoes.anatel.gov.br/legislacao/resolucoes/2013/465-resolucao-614. According to the SCM regulation, the "SCM is a service that enables the provision of a capability for transmitting, sending, and receiving multimedia information, including the provision of internet access (conexão à internet)" (Art 3 SCM Regulation). Internet access (conexão à internet), in turn, is defined as "enabling a terminal to send and receive data packets over the internet" (Art. 4, V SCM Regulation).

telecommunications service provided by *their customers'* ISPs.[4] Again, the service provided to them by *their* ISP includes the ability to send and receive data packets over the internet. For the above online video service, the service provided to it by its ISP thus includes both (1) accepting the student's video request from another network provider and delivering it to the online video service, and (2) transporting the video back to the customer's ISP, either directly or indirectly, and the online video service's ISP is compensated for all of this work by the online video service.[5]

In sum, under the LGT, each user is a user only of the telecommunications service provided by its own telecommunications service provider. The telecommunications service of the *second* user (e.g., the call recipient or the receiver of data packets) does not also provide a telecommunications service to the *first* user (e.g., the caller or the sender of data packets) even though it participates in enabling the communication between the two.

Instead, under the LGT, the mechanism that allows users of a telecommunications service by one provider to communicate with users of a telecommunications service by another provider is *interconnection*. According to Art. 146, single paragraph LGT, "interconnection is the connection between functionally compatible telecommunications networks, so that users of services on *one* network can communicate with users of services on the *other*, or access services available in it." (emphasis added)

In other words, interconnection between the network of the student's mobile phone provider and the network of the parents' fixed phone company allows the student, who is a user of the Personal Mobile Service on his mobile phone company's network, to communicate with his parents, who are users of the Switched Fixed Telephone Service on their phone company's network. The student does not become a user of any telecommunications service provided by his parents' fixed telephone company in the process, nor do his parents become users of their son's mobile telecommunications service.

By contrast, treating applications as users of a telecommunications service by their customers' ISPs would make every website and online service in the world a "user" of every Brazilian ISP, simply because Brazilians access it. Applied to telephone services, this would mean that Brazilians would become users of a telecommunications service provided by the provider of anyone they call.

[4] The fact that the ISP's customer is communicating with a value-added service does not change the relationship of the customer's ISP to the application provider in any way. While a value-added service is a "user of the telecommunications service that supports it" (Art. 61, paragraph 1 LGT), the ISP through which an application's customer accesses the application is not a "telecommunications service that supports [the application]." There is nothing special about transporting data packets between a customer and an application that the customer is using. The customer's ISP does not participate in the provision of the application itself (the value-added service) in any way; its only role is providing a telecommunications service to its *own* internet service customer by transporting the data packets necessary for the customer's use of the application to and from the internet. This is no different than transporting the data packets for the communication between the ISP's customer and any other internet user.

[5] The online video service's ISP can deliver the video to the ISP of the customer who requested it either directly or indirectly, by handing it off to another provider.

Treating internet applications as users of a telecommunications service provided by their customers' ISPs is inconsistent with the LGT.

This interpretation would be a radical departure from the existing understanding of the user-provider relationship under the LGT. Most importantly, it is inconsistent with the LGT itself.

For example, according to Art. 3, II LGT, the rights of a user of telecommunications services include the "freedom to choose their service provider." This freedom requires that users choose their telecommunications service providers. But treating applications as users of a telecommunications service provided by their customers' ISP would violate this right.

That's because under this interpretation, a student who answers a call from his friend would become a user of a telecommunications service provided by his friend's phone company. But the student does not choose the friend's phone company; in most cases, he will not even know the identity of the friend's telephone provider. The only telecommunications service provider the student chooses is the student's own phone company.

Similarly, under this interpretation, when a Brazilian visits a website, that website would also become a user of a telecommunications service provided by the Brazilian's ISP. But websites do not choose their visitors' ISPs; that's their visitors' choice. If that were the case, that violates the site's freedom to choose under Art. 3, II LGT.

Anatel itself has recognized that internet applications do not have a relationship with their customers' ISPs.

Treating internet applications as users of a telecommunications service provided by their customers' ISP would also be inconsistent with Anatel's decision regarding the classification of online video subscription services in the Claro v. Fox/Topsports proceeding.[6] The decision classified online video subscription services as value-added services under Art. 61 LGT.

According to paragraph 4.27 of Vote No. 22/2020 EC, which the judgment references as the basis for the majority vote adopting the judgment,[7] "there is *no relationship* between the applications under analysis [i.e. the online video applications] and the providers of *telecommunications service that users are using to access these applications.*"[8]

In other words, there is no relationship between the online video applications and the fixed or mobile internet access services (SCM or SMP) that Brazilians are using to access these

[6] Anatel Judgment No. 472/2020, available at https://sei.anatel.gov.br/sei/publicacoes/controlador_publicacoes.php?acao=publicacao_visualizar&id_documento=6726727&id_orgao_publicacao=0.

[7] Anatel Judgment No. 472/2020 ("Vistos, relatados e discutidos os presentes autos, acordam os membros do Conselho Diretor da Anatel, por maioria de três votos, nos termos propostos pelo Conselheiro Emmanoel Campelo de Souza Pereira por meio do Voto nº 22/2020/EC (SEI nº 5950122), integrante deste acórdão, reconhecer que as Ofertas de Conteúdo Audiovisual Programado via Internet por meio de Subscrição (sVOD) não se enquadram como Serviço de Acesso Condicionado (SeAC).").

[8] (emphasis added). Vote No. 22/2020/EC (SEI nº 5950122), available at https://sei.anatel.gov.br/sei/publicacoes/controlador_publicacoes.php?acao=publicacao_visualizar&id_documento=6721952&id_orgao_publicacao=0.

applications. Treating applications as users of their customer's ISPs would directly contradict this finding.

The explanation leaves no doubt that buying a telecommunications service that provides access to the internet (SCM or SMP) is the responsibility of the Brazilian who wants to use the online video service – not of the online video service itself.

According to paragraph 4.28, accessing these online video applications requires an SCM or SMP provider "that the *customer* [of the online video service] has contracted."[9] According to Paragraph 4.29, the *user of the value-added service* [i.e. the user of the online video service] buys two different services from two different providers: (1) they have to buy fixed or mobile internet access (SCM or SMP) from an ISP, and (2) they have to buy a subscription to the online video service itself. Thus, under the LTG the customer of an online video subscription service is both the user of a telecommunications service (the SCM or SMP) provided by its own ISP and the user of a value-added service (the online video service).

The Robocall Order does not suggest otherwise.

The consultation document suggests that there is precedent for regulating internet applications as "large users of telecommunications services."

In particular, the document suggests that Anatel's recent measures regarding robocalls show that it has authority to ensure that "large users of telecommunications services comply with their duty to use the telecommunications services, equipment and networks in an appropriate manner (Art. 4, I, LTG)."[10]

According to the Robocall Order, telemarketing companies that use their telephone service to place more than a certain number of very short calls (calls lasting less than 3 seconds) misuse their telephone service and violate the duty of users of a telecommunications service to "use the telecommunications services, equipment, and networks in an appropriate manner" under Art. 4, I LGT. If a telemarketer violates that duty, the Order requires the telemarketer's telephone provider to block the marketer's ability to originate calls for fifteen days.[11]

However, the measures in the Robocall Order are not comparable to the measures contemplated in this proceeding.

First, the Robocall Order limits the ability of a user of a telecommunications service to use *its own* service and regulates the relationship between a user of a telecommunications service and *its own* provider of that service. The telemarketers are users of a telecommunications service – switched fixed telephone service (STFC) or personal mobile service (SMP). The regulation

[9] Ibid., paragraph 4.28.
[10] See the discussion in Section 2.3.4 of the consultation document.
[11] Anatel Order No. 250/2022/COGE/SCO (SEI No. 9294884), available at https://sei.anatel.gov.br/sei/publicacoes/controlador_publicacoes.php?acao=publicacao_visualizar&id_documento=10499819&id_orgao_publicacao=0.

defines certain uses of that service (the placing of certain calls) as a misuse of that service and imposes a requirement on the offender's provider of that service.

By contrast, internet applications are not users of a telecommunications service by their customers' ISPs; they are users of a telecommunications service by their own ISP. Thus, forcing internet applications to pay their customers' ISPs would regulate neither the use of a user's *own* telecommunications service nor the relationship between a user of a telecommunications service and the provider of *that* service. Instead, it would regulate the relationship between the user of a telecommunications service by *one* provider and the provider of *another user's* telecommunications service.

Second, a telemarketer that places more than a certain number of very short calls uses its telephone service in a way that burdens the network of its own telephone provider. In addition, robocalls are generally unwanted by the recipient of the call and, as the order explains, harm the recipient in various ways. All of this makes it comparatively straightforward to classify this behavior as an inappropriate use of the telemarketer's own telecommunications service. Regulating a user's use of its telecommunications service and defining the limits of appropriate use of that service seems to fit easily into the wording of Art. 4, I LGT. In addition, the unwanted nature of the calls and the harm allowed the agency and the courts to rely on broader interests and principles such as consumer protection.

By contrast, internet applications send data to their customers because the customers *requested* it. Moreover, both the internet application and the Brazilian customer who uses that application use their telecommunications service exactly in the way intended by the LGT and the Marco Civil. The customer uses her own internet service (SCM or SMP – the customer's telecommunications service) to send and receive data packets over the internet in order to use the applications of her choice, as is her right under the Marco Civil. The customer's ISP is fully compensated for her use of the ISP's telecommunications service by the customer's subscription fees. Customers that use their internet access service more pay higher prices, since plans with higher speeds or larger caps are more expensive.

The internet application uses its own internet service (the application's telecommunications service) to send and receive data packets over the internet and pays its own ISP for that service, or the application provides this service to itself. There is nothing inappropriate about being a successful internet application that responds to requests by its customers.

Thus, neither the customer nor the internet application use their respective telecommunications services in an inappropriate manner.

Finally, the "problem" that the consultation seems to allude to – that a large share of traffic on internet access networks is associated with a small group of providers of internet content, applications, and services – affects the networks of the Brazilian ISPs, not the network of the applications' ISPs. This "problem" is triggered by the use of the ISP's telecommunications service by the ISP's own subscribers: a large percentage of traffic on an ISP's network is associated with these services because these services are so popular with the ISP's subscribers. The internet applications are just responding to their requests.

Under Art. 4, I LGT, a user has the duty to use its own telecommunications service in an appropriate manner. Imposing regulatory duties on a user of *one* telecommunications service for the impact that the users of a telecommunications service by *another* provider create on *that* provider's network goes beyond the scope of Art. 4, I LGT, especially when, as here, the user in question uses its own telecommunications service exactly in the way it is intended.

Finding otherwise would be similar to finding that mothers use their landline telephone service in an inappropriate manner by answering their children's calls on Mother's Day. If so many customers of Vivo's mobile telephone service call their mothers on Mother's Day that Vivo's mobile network cannot handle all of the calls, the mothers are not violating their duty to use their landline telephone service in an appropriate manner if they answer their children's calls – even though them answering the phone contributes to Vivo's problem.

The Zenvia/Telefonica Order does not suggest otherwise.

The consultation document suggests that there is precedent for regulating the relationship between value-added services and the providers of telecommunications services, discussing an order resolving a dispute between Zenvia, a company that allowed others to send automatic text messages through various SMS providers, and Telefonica, a specific SMS provider.[12]

The measures in that Order are not comparable to the measures contemplated in this proceeding, either. The Order found that Zenvia was a value-added service and that Telefonica was the provider of the telecommunications service *that supports it*, making Zenvia a user of Telefonica's telecommunications service.[13]

Thus, like the Robocall Order, the Order concerned the relationship between a user of a telecommunications service and the provider of *that* service.

By contrast, while online applications are value-added services, they are not users of a telecommunications service provided by their customers' ISPs, and these ISPs are not a "telecommunications service that supports [them]."[14]

Thus, the Zenvia/Telefonica Order does not provide a basis for regulating the relationship between the user of a telecommunications service by *one* provider and the provider of *another user's* telecommunications service, either.

[12] See the discussion in Section 2.3.5 of the consultation document.
[13] Judgment No. 369/2021 (SEI No. 7625988), available at https://sei.anatel.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?eEP-wqk1skrd8hSlk5Z3rN4EVg9uLJqrLYJw_9INcO6iadR15cXfdUNwlr6c2e8qQe6O66FSFmQiwyzfUkQeeEvf0wkdGbmMMuU4KyxJ4XC-E2nbbcnbIvf4yUG3Jpjs, citing Analysis No. 134/2021/EC (SEI No. 7535289), available at https://sei.anatel.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?eEP-wqk1skrd8hSlk5Z3rN4EVg9uLJqrLYJw_9INcO4PR6tQ7ON88MpU31ukzMfbLzTDVoN0kOIZy9MfvHH844q1IREZr5RpX9mS452W6kPAiNfj3SNzRPhrbeDa3GV3.
[14] See the discussion in Fn. 4 above.

Conclusion

In sum, Anatel has some authority to define the contours of the rights and duties of value-added services as users of the telecommunications service that supports them (Art. 61, paragraph 1 in connection with Art. 3 & Art. 4 LGT) and to adopt regulations necessary to ensure value-added services' rights to provide these services (Art. 61, paragraph 2 LGT).

However, forcing internet applications to pay their customers' ISPs would go beyond the scope of these provisions.

First, while internet applications are value-added services, they are not users of a telecommunications service provided by their customers' ISPs, and these ISPs are not a "telecommunications service that supports [them]."[15] Instead, internet applications are users of a telecommunications service provided by their *own* ISP, or they provide this service to themselves.

Second, popular internet applications are not using their own internet service (the telecommunications service that supports them) in an inappropriate manner when they send data that their customers requested. Thus, their actions do not implicate their duty to use their telecommunications service appropriately under Art. 4, I LGT.

Third, forcing internet applications to pay their customers' ISPs would go beyond the scenarios addressed in existing Anatel Orders. The Robocall Order and the Corporate SMS Order both concerned relationships between a user of a telecommunications service and *its own* provider of that service.[16] The Corporate SMS Order addressed the relationship between a value-added service (which is the user of the telecommunications service that supports it) and the telecommunications service *that supports it* - a special case of the relationship between a user of a telecommunications service and *its own* provider of that service. By contrast, forcing apps to pay their customers' ISPs would require Anatel to regulate the relationship between the user of *one provider's* telecommunications service (the apps) and the provider of *another user's* telecommunications service (the customers' ISP).

[15] See the discussion in Fn. 4 above.

[16] The Corporate SMS Order addressed the relationship between a value-added service (which is the user of the telecommunications service that supports it) and the telecommunications service *that supports it* - a special case of the relationship between a user of a telecommunications service and *its own* provider of that service.