



RASA AND THE RECENT CHANGES PROMOTED BY ANATEL

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The Regulation for the Application of Administrative Sanctions - RASA, approved by ANATEL through Resolution No. 589, of May 7, 2012, "establishes parameters and criteria for the application of administrative sanctions for violations of Law No. 9.472 (LGT), of July 16, 1997, and other applicable rules, as well as for non-compliance with the duties arising from concession contracts, designation acts or acts and terms of permission, service authorization, authorization for the use of radio frequency, satellite exploitation right, or other administrative acts of concrete effects issued by the Agency "(art. 1 of RASA).

The RASA 2012, which resulted from the revision of the RASA 2003, brought significant changes in the regulation of the application of sanctions by the Agency, especially regarding:

- (i)) the possibility of signing a conduct adjustment commitment;
- (ii) the provision of parameters for the application of administrative sanctions: alteration of the list of mitigating factors, and provision of methodological calculation of the base value of fine sanctions;
- (iii) the possibility of applying sanctions for obligations to do and not to do;
- (iv)) the summary filing rite for infractions of simple ascertainment; and
- (v) the reduction factor of the fine applied in case of non-litigation.

After 10 years of its existence, ANATEL decided to include in its Regulatory Agenda for the 2023-2024 biennium the reassessment of the Regulation, considering that "the improvement of the sanctions regulation aims to make it, ultimately, more effective in the pursuit of the objectives set by the norms and other regulatory actions of the Agency. Thus, it collaborates with the development of the sector and the expansion of access, with quality and adequate prices"¹.

Thus, in order to subsidize the changes to be made to the RASA, ANATEL determined the preparation of the Regulatory Outcome Analysis, which established two topics for analysis of the 2012 RASA:

- (i) possibility of applying sanctions of obligation to do and not to do; and
- (ii) reduction factor of the fine applied in case of non-litigation.

Regarding the first issue, RASA 2012 sets forth in its article 3 that the obligations to do and not to do are types of sanctions to which violators will be subject to. In other words, such sanctions constitute determinations for someone to do or fail to do something, as punishment for non-compliance with a legal or regulatory obligation and cannot be confused with duties already provided for in the regulations.

According to the Regulatory Result Analysis - ARR made available by ANATEL in March 2023, "the option to provide in RASA/2012 the sanction of obligations to do and not to do was intended to make available to the administrator another option of administrative sanction to be imposed when non-compliance with obligations, expanding the existing alternatives, to better serve the public interest"², as well as "that the problem that was sought to be addressed with the inclusion of the sanction of doing and not doing in RASA/2012 was related to the effectiveness of the administrative sanction"³.

¹ Public Consultation Proposal for the Regulatory Agenda for the biennium 2023-2024, developed within the scope of administrative process 53500.023403/2022-76, SEI 8569811, p. 23.

² Regulatory Result Analysis - ARR prepared within the scope of administrative process 53500.037809/2020-74, SEI 10022624, p. 19.

³ Ibidem.



Also according to the aforementioned ARR, it was possible to verify that the sanctions of obligations to do and not to do only began to be used by ANATEL in 2019, despite being already provided for in the regulation since 2012, and that "a challenge to the full implementation of the sanctions of obligations to do is the fact that, out of the 27 (twenty-seven) decisions to apply sanction of obligation to do, in 16 (sixteen) of them the sanctioned providers did not accept the obligation imposed. In other words, less than half of the decisions were accepted by the providers and, only if they are effectively complied with, they will have the desired effect of improving telecommunications services"⁴.

In this sense, the ARR proposes, as a way of encouraging compliance by providers with the sanctions of obligation to do, that the granting of a 25% (twenty-five percent) discount provided for in article 33, paragraph 5, of RASA/2012 also be extended to this type of sanction, not being provided only for fine sanctions.

Regarding the second issue addressed by ANATEL in its Regulatory Outcome Assessment, the existence of the fine reduction factor applied in case of non-litigation was intended to discourage administrative and judicial litigation, with a 25% reduction, if the Provider expressly waived the possibility of appealing to the first instance administrative decision.

On this point, it is important to highlight the understanding consolidated by ANATEL through the edition of Precedent 23/2021, in the sense that "the discount set forth in § 5 of art. 33 of the Regulation for the Application of Administrative Sanctions (RASA), approved by Resolution No. 589, of May 7, 2012, on the amount of the fine sanction, at the moment of the issuance of a new Decision Order of first instance, replacing the appealed order, due to the exercise of the retraction judgment of the competent authority, whether total or partial, is not applicable".

This case precedent was edited after a consultation request formulated by Telefónica⁵, given that "in a restrictive reading of art. 33, § 5 of the RASA, the individual would not be entitled to the reduction of 25% (twenty-five percent) on the amount of the original fine when exercising the retraction judgment, provided that he would have already submitted an administrative appeal and, therefore, could not expressly waive it. However, Telefónica advocated the possibility of an extensive interpretation of this institute, according to which the individual would be entitled to the reduction on the entire amount of the fine, whether in case of total or partial retraction, given that it was stipulated in a new decision, substituting the previous one under the terms of the RIA"⁶. However, this understanding was not accepted by ANATEL's Board of Directors.

In brief lines, ANATEL concluded that RASA achieved its objective insofar as it encouraged the administered not to submit administrative appeals to the Agency's decisions.

In order to continue with the process of amending and updating RASA/2012, ANATEL instituted a new process, No. 53500.003897/2023-53, which defined the next actions to be developed by the Agency, as well as its execution schedule, which provides for the preparation of a Regulatory Impact Analysis and the proposal for normative adaptation for the 2nd semester of 2023 and the holding of a public consultation on the subject in the 2nd semester of 2024.

However, despite the existence of a procedure for the purpose of changes and updating of RASA, ANATEL recently issued, on June 23, 2023, the Internal Resolution⁷ No. 219, which approved the new methodology for calculating the base amounts of fine sanctions for non-compliance with Users' rights, which entered into force on July 3, 2023 and applied to cases pending first instance decision.

⁴ Idem, p. 55-56.

⁵ Petição submetida no âmbito do processo administrativo 53500.037809/2020-74 em 15/08/2022, SEI 8966972.

⁶ Cf. Avaliação de Resultado Regulatório – ARR (...), p. 63

⁷ Disponível em <https://informacoes.anatel.gov.br/legislacao/resolucoes-internas/1876-resolucao-interna-219>, acesso em 10-07-2023.



The major change introduced by the new methodology brings more objective criteria for the calculation of the fine, including the definition for the application of the terms "significant number of users" and "limited group of users", which indicate the seriousness of the infringement and constitute relevant criteria in the calculation basis used by ANATEL.

As approved by the Agency, the infraction should be considered as serious by reaching a significant number of users, under the terms of article 9, paragraph 3, IV of the RASA, in cases of:

- Infringements in which the quotient of the division between the universe reached (Ua) and the total universe considered (Ut), whether number of users or number of calls, results in a value equal to or greater than 0.01, i.e. that the infringement reaches 1% of the universe considered and that the universe reached is equal to or greater than 30,000 (thirty thousand) users or calls, depending on the case; or
- Infringements in which the universe considered is neither the number of users nor the number of calls, and the quotient of the division between the universe reached (Ua) and the total universe considered (ut) is greater than 0.2, that is, it reaches 20% of the total universe considered.

In addition, the infraction shall be considered as medium by reaching a limited group of users, under the terms of art. 9, § 2, II, of the RASA, in cases of:

- Infringements where the universe considered (Ut) is number of users or number of calls and the number of affected persons (Ua) is equal to or greater than 1,000 (one thousand); or
- Infringements in which the universe considered is neither number of users nor number of calls, and the quotient of the division between the universe reached (Ua) and the total universe considered (ut) results in a value between 0.1 and 0.2, that is, it reaches between 10% and 20% of the total universe considered.

It is noteworthy that, as pointed out by Rapporteur Moisés Queiroz Moreira 923rd Session of ANATEL's Deliberative Council, held on July 7, 2023, which unanimously approved the changes listed above, the technical area raised the possibility and need for the matter to be reviewed to improve the calculation methodology, providing for two different calculations, one for specific infractions and the other for systemic infractions.

The Directing Council understood that there would be no obstacles to the approval of the methodology incorporated by Internal Resolution 219/2023, even if the technical area resumes the work for further improvements.

Thus, the matter regarding the regulation of sanctions by ANATEL is deemed as material by the Agency, with new changes already introduced and changes to be made in the coming years. In this sense, it should be a point of attention for all telecommunications service providers and agents subject to ANATEL rules.

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