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Connectivity at Risk /

*Study on the impact
of blocking uncertified
mobile devices in Brazil*

Abstract

This study and opinion deals with the Brazilian Telecommunications Agency (Anatel)'s decision to block uncertified cell phones in Brazil. It argues that such a measure, if adopted, would impact the right to freedom of expression and restrict Internet access for millions of Brazilians, being especially negative for the low-income part of the population. The measure would also have an impact on citizens' right to privacy due to the creation of a specific database with information on these devices. It is also argued that the measure is disproportionate and unnecessary because the mobile network should not be used to restrain the use of uncertified handsets that were purchased in good faith by consumers. We recommend the adoption of alternative solutions to deal with the situation.

Introduction

The proponents of this opinion and technical study are civil society associations whose mission is to promote digital inclusion and ensure that decisions taken in the context of public policy with respect to technological issues foster not only economic and social development but innovation as well.

In this sense, this opinion and study aims to examine, from the perspective of the public interest and human rights, the measures that have been taken by the Brazilian Telecommunications Agency (hereafter Anatel) in order to implement the blocking of uncertified cell phones (many of them pejoratively called “xing-lings”).

The adoption of such measures raises issues relevant to the Brazilian law, including themes directly related to the privacy of telecommunications service users, possible violations to the constitutional right of freedom of expression, in addition to a potentially disproportionate negative impact on low-income populations, the main users of uncertified devices.

In this study, we examine the legality of the possible blockage of the afore-mentioned uncertified cell phones and suggest the adoption of less burdensome alternative measures to deal with the issue, preventing the complete blockage of these devices and the production of detrimental effects in relation to disadvantaged populations.

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1/ Context

This study falls within the context of the announcement by Anatel that it would unilaterally block uncertified cell phones – that is, those not in compliance with Anatel’s regulations¹ – by means of technical measures. In order to achieve this, the agency would make use of the fact that each handset has a unique identifying number called IMEI (International Mobile Equipment Identity) that works, mutatis mutandis, as the digital print of the handset. When it comes to devices that have passed Anatel’s approval process², this number is stored in a database called Equipment Identity Register. Non-approved handsets also have an IMEI number, but they are not recorded in this

database. According to what Anatel announced, the blocking of these uncertified devices would have a first stage, initiated in January 2014, which would consist of the implementation of the Handset Management Integrated System (hereafter referred as Siga, from the Portuguese acronym for Sistema Integrado de Gestão de Aparelhos)³. In this phase, IMEIs would be collected to allow for an assessment of the legality of devices connected to the mobile network. Secondly, to the best of our knowledge, the handsets considered unauthorized and without a recognized IMEI would be unilaterally disconnected from the network, with the support of the telecommunications service providers⁴.

¹ Anatel’s note:

<http://www.anatel.gov.br/Portal/exibirPortalNoticias.do?acao=carregaNoticia&codigo=32941>. This is the note that explains the system that is being implemented, the SIGA; we didn’t have access to Anatel’s other note that announces the implementation of the measure.

² According to Anatel’s Art. 3, VIII, bylaw 242/2000, approval by Anatel is “a private act, whereby, in the manner and in the cases provided for in this bylaw, the Agency recognizes the certificates of compliance or accepts the declarations of conformity for telecommunication products;” Available at: <http://legislacao.anatel.gov.br/resolucoes/15-2000/129-resolucao-242>. Accessed on: 04/09/2015. According to bylaw 242/2000, the certification ceases to be issued by Anatel, and begins to be given by independent bodies, Designated Certification Bodies (OCD in Portuguese), which issue certificates of conformity to be approved by Anatel.

³ Anatel’s explanatory note about SIGA: In relation to news published in the press about the system, the Integrated System of Appliances Management (SIGA), Anatel clarifies that: • The system, managed by the telecommunications providers, is in an experimental phase. • In the first phase, the system will allow a diagnosis of the legality of the devices connected to the network providers. From this information, the next measures will be announced in order to ensure access of only approved devices to the networks. • At present, there is no decision as to the period of implementation of the measures or whether there will be blocking of devices currently in operation. Any measures to be adopted will be object of broad dissemination to users in a timely manner. • Anatel recommends that consumers do not buy handsets, landlines or cell phones, without the seal of the Agency. Equipment without the seal may show connection failures, for they are often made with low-quality material, and they may cause interference. Available at: <http://www.anatel.gov.br/Portal/exibirPortalNoticias.do?acao=carregaNoticia&codigo=32941>

⁴ “At present, there is no decision as to the period of implementation of the measures or whether there will be blocking of devices currently in operation. Any measures to be adopted will be object of broad dissemination to users in a timely manner.” <http://www.anatel.gov.br/Portal/exibirPortalNoticias.do?acao=carregaNoticia&codigo=32941>

1.1/ The use of cell phones in Brazil

In Brazil, the use of cell phones is so widespread that there are more cell phones in operation than people. Currently, the Brazilian population is estimated at 204 million⁵ people and, in January 2015, there were 281.7 million cell phones⁶, which is equivalent to 1.38 cell phone per person.

The use of cell phones has been responsible for an increase in the number of people connected to the Internet in Brazil. This trend has been observed throughout the world. According to a survey by the ITU (International Telecommunications Union) conducted in 2014, approximately 32% of the world's population accesses the Internet through the cell phone⁷. In Brazil, access to mobile broadband services was the sector that grew fastest in recent years, from 6% in 2009 to 22% in 2013⁸. In 2014, 43 million people accessed the Internet through the cell phone in Brazil and 3.8 million Brazilians had their first contact with the Internet through the cell phone⁹.

According to the latest Household Analysis National Research (PNAD, which stands for the Portuguese acronym of "Pesquisa Nacional de Análise de Domicílio") released by the IBGE (IBGE is Brazil's Statistics and Census Institute, where IBGE stands for Instituto Brasileiro de Geografia e

Estatística), the northern region presented the highest percentage of households using cell phones to access the Internet, 75.4%, surpassing access through personal computers, which was 64.8%¹⁰. And in some towns, Internet access exceeded access through personal computers. For example, in Sergipe, a small state in the northeast of Brazil, 28.9% of connections were obtained through cell phones or tablets whereas only 19.3% through computers. In Pará, Roraima, Amapá and Amazonas – sparsely populated states situated in the north of the country – the ratio was 41.2% to 17.3%, 32.0% to 17.2, 43.0% to 11.9% and 39.6% to 11.1% respectively¹¹.

Thus, Internet connection via cell phones has allowed an increase in the number of people connected to the Web, especially in more remote areas, where there are no landline phones, benefitting the poorest part of the population, since cell phones are cheaper than computers or tablets. That is, cell phone technology has been a major gateway to connectivity for Brazilians.

If the cell phone has allowed an increase in connectivity of the Brazilian population, the uncertified device, known in Brazil pejoratively as "xing ling",

has an important role in this growth because they have a more affordable price. While the price of cell phones (smartphones) ranges between R\$ 500,00 and R\$ 4.000,00¹², "xing lings" cost around R\$ 200,00¹³. And these devices often allow the simultaneous use of more than one SIM card, enabling the user to take advantage of promotions by different carriers, therefore allowing users to pay a minimum price to communicate.

These devices are called "xing ling" because many

of them, though not all, are manufactured in China and in other Asian countries and, more often than not, they fail to comply with regular customs procedures¹⁴. But once these devices come into the country, they are sold at popular stores, where consumers buy them legally. Thus, if there is any regulatory failure with respect to the entry of these devices and their non-approval, these failures should not be attributed to consumers, but to other links in the chain that failed before the consumer acquired the unit in good faith.

⁵ IBGE data, available at: <http://www.ibge.gov.br/apps/populacao/projecao/>. Accessed on: 03/26/2015.

⁶ <http://www.teleco.com.br/ncel.asp>

⁷ ITU data, available at: <https://www.itu.int/en/ITU-D/Statistics/.../ICTFactsFigures2014-e.pdf>. Accessed on: 05/25/2015

⁸ http://www.teleco.com.br/internet_usu.asp

⁹ Survey conducted by FNazca and Data Folha. Available at: <http://pt.slideshare.net/2acesconteudo/pesquisa-fradar-13-fnazca-e-datafolha-20132014>. Accessed on: 03/26/2015

¹⁰ PNAD 2013 - Internet and Television Access and Cell Phone Ownership for Personal Use, p. 36. Chart 9. IBGE.

Available at: <http://loja.ibge.gov.br/pesquisa-nacional-por-amostra-de-domicilios-pnad-2013-acesso-a-Internet-e-a-televis-o-e-posse-de.html>. Accessed on: 05/19/2015.

¹¹ PNAD 2013 - Internet and Television Access and Cell Phone Ownership for Personal Use, p. 36. Chart 10. IBGE. Available at: <http://loja.ibge.gov.br/pesquisa-nacional-por-amostra-de-domicilios-pnad-2013-acesso-a-Internet-e-a-televis-o-e-posse-de.html>. Accessed on: 05/19/2015.

¹² Price examples: <http://www.americanas.com.br/linha/350392/celulares-e-telefones/smartphone>. Accessed on: 05/19/2015.

¹³ Price survey made in the popular market of the Saara („Saara" stands for Sociedade de Amigos da Rua da Alfândega e Adjacências, a series of popular stores on Rua da Alfândega and nearby streets in downtown Rio), in Rio de Janeiro, in June 2014.

¹⁴ <http://www1.folha.uol.com.br/mercado/2011/02/875189-celulares-clandestinos-ja-sao-20-do-total.shtml>

1.2/ Impact of the decision announced by Anatel to block cell phones

No one knows exactly how many people will be directly affected by such a decision, because Anatel has not disclosed the number of people who use non-approved cell phones. According to data available, this number varies between 34 and 40 million sets. According to a survey made by the Folha de São Paulo, in 2011, 20% of 202.9 million sets¹⁵ at the time did not have certification by Anatel, which amounts to about 40 million devices. According to the latest data obtained by the consulting firm Strategy Analytics, non-approved handsets amounted to 12.7% of all devices on the market¹⁶, which in 2013 totaled 271,099,799, which would mean approximately 34.5 million devices¹⁷.

As one can see, if the measure to block the use of uncertified devices is in fact implemented, mil-

lions of people will be disconnected overnight from the mobile network and from Internet access. Such a measure would not only have a direct impact on these users' right to communication but it would also directly affect their right to freedom of expression, since such an act would remove the necessary infrastructure for that right to be exercised, besides interfering directly with the right of access to information for millions of Brazilians. If that was not enough, the measure would violate the good faith of those users who have purchased uncertified devices unaware of that fact, in absolute good faith. In other words, the disconnection would render purchased handsets useless. It would be tantamount to a real expropriation of private property without any previous compensation, and outside of constitutional procedures.

¹⁵ "Illegal cell phones already comprise 20% of the total", Folha de São Paulo. Available at: <http://www1.folha.uol.com.br/mercado/2011/02/875189-celulares-clandestinos-ja-sao-20-do-total.shtml>. Accessed on: 03/30/15.

¹⁶ "Illegal cell phones will be blocked by the cellular carriers; learn how to identify these devices", Uol, Available at: <http://tecnologia.uol.com.br/noticias/redacao/2013/04/17/detalhes-desmascaram-copias-piratas-de-smartphones-veja-dicas-para-evitar-compra.htm>. Accessed on: 04/09/2015.

¹⁷ Total cell phone handsets in 2013. Available at: http://www.teleco.com.br/ncel_hist.asp. Accessed on: 03/31/2015.

2/ Denying Internet access to cell phones purchased in good faith violates civil rights and the human right to freedom of expression

Recently, mobile phones have become one of the main means of communication and a gateway to Internet access. These devices allow the exercise of the constitutional right to freedom of expression by a considerable part of large disadvantaged portions of the Brazilian population. The Internet, more than any other means of communication, has had a relevant impact on the way in which ideas and information are shared and accessed. Not by chance Article 7 of the Brazilian Civil Rights Framework for the Internet determines that “Internet access is essential to the exercise of citizenship”.

Furthermore, access to the Internet has become essential not only for the realization of the right to freedom of expression, but also for the enjoyment of other rights such as the right to participate in cultural life and to enjoy the benefits of scientific and technological progress (article 14 of the San Salvador protocol), the right to education (article 13 of the San Salvador protocol), the right to assembly and association (articles 15 and 16 of the

American convention), political rights (article 23 of the American convention) and the right to health (article 10 of the San Salvador protocol), among others.¹⁸

Not only will disconnecting millions of people from their cell phones, and consequently from the Internet, make it harder for them to access information (and therefore other fundamental rights, as well as their right to exercise citizenship, as prescribed by the Civil Rights Framework for the Internet), but it will also have a negative impact on the integration of the affected users into the social fabric and with the State itself. To the extent that information and communication technologies increasingly pervade every person’s life, the simple blocking of a certain technology may be regarded as a real act of censorship (and in this case, analogous to the expropriation of assets or even confiscation) if there is not the correct balance between the rights and the interests involved in the implementation of this measure.

In that regard, we highlight the report published by the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, which says explicitly that the right to freedom of expression has two dimensions: an individual one and a collective or social one. Therefore, freedom of expression is an instrument for the exchange of information and ideas between people and for mass communication between humans, which includes both the right to communicate one’s own point of view, information or opinions to others and everyone’s right to receive and get to know such views, information, opinions, reports and news, freely and without any interference that may distort them or obstruct them.¹⁹

Disconnecting people would be a violation of the human right to freedom of expression and to international law, which would subject Brazil to international accountability on the basis of the international legal system. Article 19 of the Covenant on Civil and Political rights, of which Brazil is a signatory, states that the right to freedom of expression includes „the freedom to seek, receive

and impart information and ideas of all kinds, (...) in printed or artistic form, or by any other means of their choice.” Cell phones have been instrumental to the exercise and enjoyment of that right. In this regard, the UN Special Rapporteur for Freedom of Expression expressly recognized that mobile technology is crucial for connectivity, especially in remote areas and in developing countries, becoming a means of exercising other rights.²⁰

Besides, the Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights stated that countries have a positive obligation to provide universal access to the Internet and this should include measures to ensure that vulnerable people may acquire computers and similar equipment at affordable prices²¹. Complementing this recommendation, the UN Special Rapporteur on Protection of the Right to Freedom of Opinion and Expression recommends that countries support policies and programs that facilitate the connection to the Internet through the use of mobile technology²². That is, the measure announced by Anatel is totally contrary to the recommen-

¹⁸ Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression “Freedom of Expression and the Internet Report”, 12/31/2013. paragraph 36. Available at: <https://www.oas.org/pt/cidh/expressao/docs/publicaciones/2014%2008%2004%20Liberdade%20de%20Express%C3%A3o%20e%20Internet%20Rev%2020HRRRev%20LAR.pdf>. Accessed on 06/15/2015.

¹⁹ Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression “Freedom of Expression and the Internet Report”, 12/31/2013 par. 35. Available at: https://www.oas.org/pt/cidh/expressao/docs/publicaciones/2014%2008%2004%20Liberdade%20de%20Express%C3%A3o%20e%20Internet%20Rev%2020HR_Rev%20LAR.pdf. Accessed on: 06/15/2015.

²⁰ UN report. Promotion and protection of the right to freedom of opinion and expression, 08/10/2011, p. 75. Available at: <http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf>. Accessed on: 03/30/2015.

²¹ Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression “Freedom of Expression and the Internet Report”, 12/31/2013, para. 47. Available at: https://www.oas.org/pt/cidh/expressao/docs/publicaciones/2014%2008%2004%20Liberdade%20de%20Express%C3%A3o%20e%20Internet%20Rev%2020HR_Rev%20LAR.pdf.

²² UN report. Promotion and protection of the right to freedom of opinion and expression, p. 91. Available at: <http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf>. Accessed on: 03/30/2015.

dations of several international bodies, to which Brazil has a binding relationship, including the UN, because instead of supporting and facilitating (network) connections, the Brazilian State would be doing the opposite: disconnecting the very people who rely on this type of equipment for the exercise of their citizenship, allowing minimum levels of communication and Internet access.

We would like to highlight a recent UN's report, published in May 2015, by the same rapporteur, which emphasized the importance of keeping communication through mobile handsets anonymous, as well as free from State interference, allowing the full exercise of freedom of opinion and expression in contemporary communication. The report pointed out some government practices which would represent an obstacle to the implementation of these rights. A practice that is specifically mentioned in the report, among others, is the required registration of cell phone SIM cards, which would

give governments the ability to monitor users of those lines²³.

If the mandatory SIM card identification poses risks to the exercise of freedom of expression, along the same lines, the IMEI identification of all handsets is cause for even more serious concern. Especially because a SIM card can be easily changed. With respect to a mobile device, which has a unique IMEI, such a change comes up against prohibitive economic barriers, especially for the most vulnerable part of the population. Thus, it is clear that the mere control and registration of IMEIs in Brazil, even being used for legitimate purposes (such as the halting of robotic devices), is in itself an action with damaging effects for the fundamental right of privacy, and consequently, for freedom of expression. The report even recommends that countries should not adopt measures to identify users and their communication media²⁴, as would be the case if obligatory SIM and IMEI identification was required.

²³ UN report. *Promotion and protection of the right to freedom of opinion and expression*, 05/22/2011, p. 51. Available at: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/CallForSubmission.aspx>. Accessed on: 05/29/2015.

²⁴ UN report. *Promotion and protection of the right to freedom of opinion and expression*, 05/22/2011, p. 60. Available at: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/CallForSubmission.aspx>. Accessed on: 05/29/2015.

2.1/ The Brazilian Civil Rights Framework for the Internet and Internet access

As briefly mentioned above, the Brazilian Civil Rights Framework for the Internet has asserted some of the civil rights that ensure freedom of expression – defended by special rapporteurs representing both the OEA and the UN – such as the right to have access to the Internet, to information, to knowledge and to the participation in cultural life and in the conduct of public affairs²⁵.

Furthermore, as seen, the Brazilian Civil Rights Framework for the Internet prescribes that Internet access is essential to the exercise of citizenship²⁶, and that there must be “no suspension of Internet

connection, except for debt directly resulting from its use.”²⁷ Therefore, the right to Internet access is a fundamental right that should be guaranteed by the State, which must ensure the necessary conditions for people to have effective access, and not take steps that prevent or hinder Internet access, especially in relation to the most vulnerable sectors of the population, as they use the cell phone as their only means of communicating socially. Thus, the blocking of these non-approved devices would be an unreasonable and disproportionate measure, affecting a precondition to the exercise of citizenship and in violation of the Brazilian legal system.

²⁵ UN report. *Promotion and protection of the right to freedom of opinion and expression*, 05/22/2011, p. 60. Available at: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/CallForSubmission.aspx>. Accessed on: 05/29/2015.

²⁶ Law 12.965, 04/23/2014. Art. 4. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm. Accessed on: 06/16/2015.

²⁷ Law 12.965, 04/23/2014. Art. 7. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm. Accessed on: 06/16/2015.

2.2/ Disproportionality of the measure

Any restriction of the right to freedom of expression must observe the parameters stipulated by international law²⁸ and the restriction must not put the right itself in jeopardy²⁹. The measure announced by Anatel goes far beyond simply putting that right at risk. There would be, in practice, an invalidation of the exercise of freedom of expression for millions of Brazilians who use their cell phones as a way to exercise that right. The blocking of these devices would increase the digital divide, placing the economically underprivileged classes at a distinct disadvantage and hurting consumers who, in good faith, acquired their uncertified devices because they couldn't afford to purchase other equipment and without any knowledge of their lack of certification.

In addition to being an extreme measure, it would have a profound impact on the base of the social pyramid, whereas the top would not be affected. The ITU, in a study done about the use of fake cell phones, reaffirmed that, because it is more accessible, this type of device is used by the poorest layer of the population and any measure against this use would generate a big impact on those people³⁰.

It is worth noting that many high-end handsets purchased abroad by more favored economic classes are also not approved by Anatel, but in practice, Anatel's decision would eventually affect specifically only those at the base of the social pyramid. Since equipment purchased abroad is from well-known manufacturers, they would not be

disconnected. And, even if they were, the impact would be smaller, due to the smaller number of people affected and the fact they belong to more privileged classes (in this respect, Anatel follows

article 67 of bylaw 242³¹, which allows the use of equipment from abroad, provided they are certified by a foreign administration).

²⁸ Art. 19, § 3. *International Covenant on Civil and Political Rights, 1966. § 3. "The exercise of the right provided for in § 2 of this article implies special duties and responsibilities. As a result, it may be subject to certain restrictions, which must, however, be expressly provided for in the law and necessary to: 1. ensure the respect of the rights and reputation of others; 2. protect the national security, order, health or public morals."*

²⁹ UN report. *Promotion and protection of the right to freedom of opinion and expression, 08/10/2011, p. 76.* Available at: <http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf>. Accessed on: 03/30/2015.

³⁰ ITU Technical Report - *Counterfeit ICT equipment. 11/21/2014, p. 23.* Available at: http://www.itu.int/dms_pub/itu-t/opb/tut/T-TUT-CCICT-2014-MSW-E.docx. Accessed on: 05/29/2015.

³¹ Resolution 242 of November 30th, 2000. Art. 67. *The use, in the national territory, of telecommunication products, portable type, classifiable as part of personal systems, of global or regional usage, will be admitted during the legal stay of its owner in the country, as long as the products are certified by a foreign Administration that gives reciprocal treatment in relation to the matter, or that integrates an Understanding Memorandum of which Brazil is a signatory. Sole paragraph. The authorization referred to in the heading does not include the possibility of marketing the product.* Available at: <http://www.anatel.gov.br/legislacao/resolucoes/15-2000/129-resolucao-242>. Accessed on: 05/25/2015.

2.3/ About the disproportionality and the ineffectiveness of the measure

We would like to cast light on a misconception about the procedure whereby the blocking of cell phones would occur. The telecommunications network should not be used as a way to remedy failures in other parts of the governmental system that allowed the widespread use of devices not approved by Anatel. The effort to prevent the use of these cell phones should be made at the entrance door³², by halting smuggling, introducing a crackdown on tax avoidance and inspecting retail stores. But never affecting the consumer in good faith.

Although article 156 of Law 9472/97 says that the connection of uncertified equipment may be blocked, this provision should be analyzed in conjunction with art. 7, III of Anatel's bylaw that determines that, in the absence of a certification standard, one must take into consideration the impact of the product on the universalization of telecommunications. In fact, uncertified handsets play an important role in the universalization of telecommunications³³ in Brazil and this should be necessarily taken into account before defining

the scope of the decision to block uncertified cell phones.

The ITU itself acknowledges that blocking devices through their IMEI may not be the best measure since there is the possibility of IMEIs being cloned, creating problems for users of legitimate devices. In addition, the blocking operation of all non-approved devices would have a big impact on the internet, affecting all users³⁴. Finally, the complete blockage of these devices alone, without the implementation of measures that will meet the connectivity needs of this part of the population, is also discriminatory, as only the poorest will suffer the consequences of being disconnected.

Finally, the principle of net neutrality supported by the Brazilian Civil Rights Framework for the Internet includes discrimination in relation to the „end device“, i.e. the device itself. The network cannot discriminate against the „end devices“ that connect to it, unless expressly stated in the decree that regulates the Civil Rights Framework, which so far is not the case.

³² Decree 6759/2009: Art. 605: Customs may retain, by official request or at the request of the person concerned, in the course of customs conference, those products of counterfeit, altered or cloned brands, or with false indication of origin. Available at: http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/decreto/d6759.htm. Accessed on: 04/09/2015.

³³ Resolution 242 of November 30th, 2000. Art. 7 "In the absence of regulations or standards for certification issued by Anatel, it will be up to the agency to decide on the desirability and feasibility of conformity assessment and approval, taking the following into account: III-the contribution of the use of the product or equipment to the achievement of the goal of universalization and to the modernization of telecommunications services". Available at: <http://www.anatel.gov.br/legislacao/resolucoes/15-2000/129-resolucao-242>. Accessed on: 05/25/2015.

³⁴ ITU Technical Report - Counterfeit ICT equipment. 11/21/2014, p. 23. Available at: http://www.itu.int/dms_pub/itu-t/opb/tut/T-TUT-CCICT-2014-MSW-E.docx. Accessed on: 05/29/2015.

3/ International experience

If such a measure were implemented, Brazil would be close to measures adopted (and strongly criticized by the international community) in countries such as Kenya, Uganda and the United Arab Emirates. In 2012, Kenya shut down 1.89 million unregistered devices after a campaign asking people to send their IMEI numbers by SMS for verification of their legality, so that non-approved devices could be disconnected. After this measure, some people were even unable to work, due to the type of activities they exerted, which led to the mobilization of Kenya's consumer federation in order to ask for compensation for people who bought their phones in good faith, without knowing, for example, that they had not been approved. The denial of compensation gained international repercussion and mobilized civil society around the topic³⁵.

A similar situation occurred in Uganda. The country adopted the same measure after a campaign of clarification on the legality of the handsets and it also denied any kind of compensation for the seizure of fake devices, generating enormous negative repercussions³⁶.

In 2011, the United Arab Emirates also blocked cell phones with unidentified IMEIs and it is estimated that 100,000 devices were unilaterally disconnected³⁷.

Brazil certainly does not need or should follow in the footsteps of these countries, especially in respect to the State that abides by the Rule of Law, which should have guided the actions of the National Telecommunications Agency in the first place.

³⁵ "Kenya: 1.9 Million 'Fake' Phones Shut", 10/02/2012. Available at: <http://allafrica.com/stories/201210020512.html>. Accessed on: 05/20/2015. "Kenya's battle to switch off fake phones", 5/10/2012. Available at: <http://www.bbc.com/news/world-africa-19819965>. Accessed on: 20/05/2015.

³⁶ "Frequently Asked Questions about Counterfeit Mobile Phones". Available at: <http://www.ucc.co.ug/files/downloads/fake%20phone%20booklet.pdf>. Accessed on: 05/20/2015.

"Blocking inactive fake phones starts today, UCC, says", 02/01/13. Available at: <http://www.monitor.co.ug/Business/Blocking-inactive-fake-phones-starts-today--UCC-says-/688322/1680796/-/rdjdqez/-/index.html>. Accessed on: 05/20/2015.

"Uganda: Fake Phones Row Deepens", 02/22/2013. <http://allafrica.com/stories/201302250526.html> Accessed on: 05/20/2015.

³⁷ "Counterfeit phones to be cut off from today" 01/01/2012. Available at: <http://www.thenational.ae/news/uae-news/counterfeit-phones-to-be-cut-off-from/today>. Accessed on: 05/20/2015.

4/ Privacy and IMEI database

In addition to the violation of freedom of expression, Anatel's measure raises serious questions regarding users' privacy. As mentioned above, at this very moment a database is being created with the IMEIs of the devices connected to the Brazilian network and, based on the identification of the legality of these devices, a kind of cell phone „black list“ will be created so that they can be later blocked. This measure alone is already against the UN report mentioned above.

Furthermore, the creation of this database in itself, even before any cell phone shutdown, presents risks for the violation of users' privacy. In a world that strongly opposes mass surveillance and where monitoring rules are not well defined, and considering that Brazil still does not have a law regulating personal data protection, the creation of a database like that is burdensome and worrying, going directly against the constitutional clause that protects privacy and private life.

In this scenario, once the database is created, the

potential for improper usage is huge. For example, it can be used to promote the temporary blockage of the given device for any reason whatsoever. In authoritarian countries this type of database is being used to remove access from users involved in political opposition movements, for example, in widely documented cases.

Therefore, there are a number of possibilities of violation of human rights, in particular the right to privacy, originated from the creation of such a database. Hence the importance that the State be an agent of citizenship, acting to establish parameters, checks and counterbalances to prevent the monitoring and surveillance of its citizens. In addition to this, when it comes to any possible requests for blocking, there must always be prior judicial control, as a way to ensure the constitutional guarantees – privacy and proper legal proceedings – of these cell phone holders, including at the administrative level, since the decision to block these devices produces effects in the sphere of private interests³⁸.

³⁸ Federal Superior Court. Resolution # 158.543, Raporteur was Minister Marco Aurélio, Judiciary Journal of 10/06/1995.

5/ Anatel's arguments for the ban on uncertified devices

Anatel defends the disconnection of uncertified cell phones arguing that these devices, which have not gone through the certification process, may affect the aircraft communications network, which can cause accidents, and they may pose health risks to users in relation to the level of noise and emission of radio frequency³⁹, in addition to exposing the user to the risk of shocks during their use or while charging the cell phone batteries⁴⁰. Furthermore, the use of non-approved devices constitutes a violation punishable by a fine or seizure⁴¹.

Concerns about network interference and possible risks to the health of users are legitimate and important. However, it turns out that Anatel, so far, has not presented any technical study that proves these claims and that justifies the adoption of such a radical measure. These devices have already been in use for years and have not caused any plane crashes. Any measure that restricts or, in this case,

makes it impossible for users to enjoy a fundamental right must be widely justified, especially by empirical data. We are aware that studies conducted by ITU indicate that uncertified devices do affect the network⁴². Still, the State must adopt the principle of proportionality and seek some measure that proves to be less harmful to the fundamental right to freedom of expression, privacy, individual rights and access to communication.

If, on the one hand, one of Anatel's concerns is to ensure that consumers have access to safe products, on the other hand, it cannot fail to protect consumers who have purchased products in good faith. Many of the uncertified devices are purchased at stores without the consumer knowing of the need for government approval. So, if their devices are blocked, they should at least be indemnified for that loss. Especially since the purchase of the unit occurred due to the failure of the Sta-

te itself, which failed to monitor or prevent these devices from being sold. Furthermore, it would be the responsibility of the Public Administration to supervise marketed products effectively, in order to avoid damage to consumers. If cell phones really expose people to danger, agencies with police po-

wer should act effectively to withdraw them from the market and not just interfere with the telecommunications network to block the cell phones that were bought, to the detriment of their purchasers in good faith, as announced by ANATEL.

³⁹ There are studies pointing to the contrary, in the sense that there is no hard and fast evidence that using cell phones causes cancer. International Commission on Non-Ionizing Radiation Protection, "MOBILE PHONES, BRAIN TUMOURS AND THE INTERPHONE STUDY: WHERE ARE WE NOW", *Environ Health Perspect* 119 (11): 1534-1538; Available in 2011. Available at: <http://www.icnirp.org/cms/upload/publications/ICNIRPSCIreview2011.pdf>. Accessed on: 04/09/2015.

⁴⁰ Anatel's brochure on the use of non-approved equipment. Available at: <http://www.anatel.gov.br/Portal/verificaDocumentos/documento.asp?numeroPublicacao=239888&assuntoPublicacao=Certificacao%20Tcnica&caminhoRel=Cidadao-Informaes%20e%20Consultas-Cartilhas&filtro=1&documentoPath=239888.pdf>. Accessed on: 04/09/2015.

⁴¹ Anatel's 242/2000 resolution. Art. 55. Available at: <http://www.anatel.gov.br/legislacao/resolucoes/15-2000/129-resolucao-242>. Accessed on: 05/25/2015.

⁴² See ITU Technical Report - Counterfeit ICT equipment. 11/21/2014. Available at: http://www.itu.int/dms_pub/itu-t/opb/tut/T-TUT-CCICT-2014-MSW-E.docx. Accessed on: 05/29/2015.

6/ Certification Standards

In addition to the scenario described above, the process of certification and approval of devices is considered complex and bureaucratic⁴³. Anatel's 242 bylaw provides that, when there are no certification standards issued by Anatel, the Agency should "decide on the desirability and feasibility of conformity assessment and approval," taking some principles into account, among them the "contribution of the use of the product or equipment to the compliance with the goals of universalization and modernization of telecommunication services"⁴⁴ and "the international experience in the use of the product or equipment"⁴⁵. Anatel itself acknowledges that the products used must also be considered in view of the fulfilment of the goals of universalization of telecommunication services and these devices have indeed played a very important role in order to achieve this goal. Disconnecting them from the network would re-

present a backward step on the path towards the complex goal of universalizing a telecommunication service which is becoming increasingly more important.

The Agency must also consider the international experience in the use of cell phones. These devices are also used in other countries and, before carrying out the disconnection, Anatel should present study analysing the risk of the use of non-approved devices and possible damage caused by them.

In these cases of lack of formal regulations, Anatel could also use other globally recognized international standards⁴⁶, loosening somewhat the current rigid certification system and ensuring that people are connected, following the guidance of art. 7, III, of the 242/2000 bylaw.

⁴³ See http://www.teleco.com.br/tutorials/tutorialhomolog/pagina_4.asp

⁴⁴ Anatel's 242/2000 bylaw, art. 7, III: Art 7 "In the absence of by-laws or standards for certification issued by Anatel, it will be up to the Agency to decide on the desirability and feasibility of conformity assessment and approval, taking the following into account: IV- the international experience in using the product or equipment." Available at: <http://legislacao.anatel.gov.br/resolucoes/15-2000/129-resolucao-242>. Accessed on: 04/09/2015.

⁴⁵ Anatel's 242/2000 bylaw, Art. 7, IV: Art. 7 "In the absence of by-laws or standards for certification issued by Anatel, it will be up to the Agency to decide on the desirability and feasibility of conformity assessment and approval, taking the following into account: III-the contribution of the use of the product or equipment to the achievement of the goal of universalization and to the modernization of telecommunication services". Available at: <http://legislacao.anatel.gov.br/resolucoes/15-2000/129-resolucao-242>. Accessed on: 04/09/2015.

⁴⁶ Exemplos de standards internacionais: International Commission on Non Ionizing Radiation Protection que estipula standards de emissão de radiação de aparelhos celulares: <http://www.icnirp.org/>
International Electrotechnical Commission - Requisitos de segurança para equipamentos de transmissão de rádio: <https://webstore.iec.ch/webstore/webstore.nsf/artnum/036545!opendocument>
Standards de segurança para equipamentos de informação e tecnologia: <https://webstore.iec.ch/webstore/webstore.nsf/mysearchajax?Openform&key=60950%201&sorting=&start=1&onglet=1>
Standards internacionais de segurança: <http://www.itesafety.com/standards.htm>
Recomendações da ITU para cada tecnologia específica: http://www.itu.int/dms_pubrec/itu-r/rec/m/R-REC-M.1073-3-201203-!!!PDF-E.pdf
IEEE - Standards para baterias de celular: <http://standards.ieee.org/findstds/standard/1725-2011.html>

Conclusions:

The act of permanent blocking uncertified devices will, in practice, affect fundamental rights of millions of Brazilians, especially those who are most vulnerable and for whom the cell phone is the primary means of communication. It's a disproportionate and discriminatory measure, since it affects the poorest layer of the population.

The creation of the database with the IMEIs of the devices also poses a major threat to the privacy of citizens to the extent that there is no legal basis to justify the collection and use of this information by the government. This is an unnecessary and disproportionate measure in relation to the problems it aims to combat.

Anatel did not provide any study showing the damage that these devices may cause to the population and that may justify the adoption of such a drastic measure. We need to develop studies that seek alternatives to achieve the goals intended by

the Agency, without the rights of an enormous range of people being affected.

Dealing with this issue is not simple, and a solution should be worked out with the joint effort of several government agencies, and not only Anatel. Following the recommendations of the UN Special Rapporteur for Freedom of Expression, Brazil should implement positive measures to ensure that people have access not only to the Internet, but also to low-cost terminals and equipment, adopting, if necessary, subsidizing measures⁴⁷.

We are facing a situation in which we have to ponder about both (i) the right to freedom of expression, privacy, and Internet access, and (ii) the need of the State to combat the use of uncertified products but which have been freely marketed – and acquired in good faith. In this case, what should prevail is the guarantee of and respect for the fundamental rights to freedom of expression and

privacy, forcing the State to review its monitoring procedures in this case.

The ITU itself recognizes that blocking devices can turn to be a not very effective measure because many IMEIs are cloned and mass blocking could also cause problems to the network, affecting the communication of all people, besides it being a measure that would impact primarily the most vulnerable part of the population, who use these devices as their primary means of communication.

ITU recommends that any practice related to the

disconnection of cell phones should be taken gradually and that transitional measures be adopted such as, for example, blocking only new devices that have just been connected to the network instead of disconnecting devices in use⁴⁸. Any measure to be adopted must be preceded by a major communication campaign, in conjunction with consumer defense entities, to guide and inform people about the changes, presenting alternatives.

Therefore, we respectfully request that the following measures be taken instead of blocking uncertified devices in Brazil.

⁴⁷ UN report. *Promotion and protection of the right to freedom of opinion and expression*, 08/10/2011, p. 75. Available at: <http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf>. Accessed on: 03/30/2015.

⁴⁸ ITU Technical Report - *Counterfeit ICT equipment*. 11/21/2014, p. 23. Available at: http://www.itu.int/dms_pub/itu-t/opb/tut/T-TUT-CCICT-2014-MSW-E.docx. Accessed on: 05/29/2015.

Requests:

We request that Anatel:

- act in line with the work of control and inspection of the customs authorities in ports, airports and other customs posts of the country to prevent the entry of uncertified products;
- strengthen the control of these uncertified devices in retail stores;
- present and give wide dissemination to a study that analyzes the risks of the use of uncertified devices for the network and for the health of the population, based on empirical data;
- examine whether these devices are in compliance with some international certification standard that makes their use legal;
- encourage policies that will enable people to purchase certified devices at equally affordable prices, if their non-approved devices have been blocked;
- adopt a transitional measure, before any shutdown, to mitigate the impact of the disconnection of non-approved cell phones;
- draw up an information campaign in conjunction with consumer bodies to give guidance to the affected users in advance and to present alternatives;
- stop the collection and storage of IMEIs immediately, extinguishing the database of these records, as these seriously affect privacy, in addition to the fact that the creation of this database is unnecessary and disproportionate in relation to the problem which it aims to solve.
- Finally, we request that, if a non-certified cell phone has to be blocked, a fair compensation be granted prior to the shutdown, indemnifying all consumers who purchased uncertified cell phones in good faith, on the grounds of government failure in preventing the entry and marketing of those products. In other words, the consumer in good faith shall not bear the economic burden of a failure whose responsibility lies with the State.



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In these terms, we respectfully ask for acceptance.



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