The Brazilian Marco Civil da Internet: Features and the question of liability for content moderation

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Abstract: In the year of 2014 Brazil approved the so-called Marco Civil da Internet, its civil legal framework regulating the internet. This work seeks to present the context of the approval of this act and to briefly describe some of its provisions such as the ones concerning net neutrality, data protection and data retention duties by internet service providers. Moreover, the work seeks to inform about the judgement of a crucial case by the Brazilian Supreme Court (STF) which shall take place in the year of 2024 and will define if the provision of the Marco Civil da Internet concerning the civil liability of internet service providers is constitutional. As indicated at the final remarks of the paper, the Brazilian Supreme Court will be ruling if article 19 of the Marco Civil da Internet is still up to date and in which extent international legal initiatives such as the European Digital Services Act (DSA), which establishes heavier duties for the platforms, might influence Brazilian Law.

A. Introduction

In the context of our panel, "consumer protection and digitalization", I intend to approach a rule that came into force in Brazil in the year of 2014, the so-called Marco Civil da Internet[1], which could be translated as Civil Framework for the Internet.

My purpose is to present the context of the approval of this act and a general and a short description of it, as well as briefly deal with one case

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1 Lei nº 12.965, 23.04.2014.

involving perhaps the most important provision in this legal act in Brazil, Article 19, which states rules concerning the liability of internet service providers for illegal content. This case was presented to our Constitutional Court in the year of 2017 and should be decided in the year of 2024 after a long period of internal procedures[2].

I wish to close my remarks summarizing the greatest challenges that are ahead of Brazil in the regulation of the area.

B. Marco Civil da Internet - context of its approval and overview of its content

Let me start by drawing the scenario in which Marco Civil da Internet was discussed and approved.

On the year before the approval of the Marco Civil, 2013, we shall all remember, the Snowden leaks case captured the attention of the world. Edward Snowden as a former National Security Agency consultant leaked highly classified information from the United States of America security agencies.

Brazil was involved in this just like many other countries: the president at that time was Dilma Roussef and the Snowden leaks revealed among other things that the telephone of the presidential airplane was tapped by the NSA.

After these happenings, and especially because of the public statements of President Dilma Roussef demanding for a Brazilian rule on internet, the draft of the Marco Civil that had been in discussion since 2009 went on a fast-track procedure and was approved in April of 2014.

The name Marco Civil is due to the fact that most of the debates on the first decade of the years 2000 in our country were around the discussion of criminal law acts concerning the digital and the internet. These acts were indeed approved but the outcry that we lacked a basis of legislation for the use of the internet got louder. Even President Lula when he was in power in the first decade of this century claimed for a "civil act" for the internet in Brazil. Therefore, the name Marco Civil da Internet is so-called as a counterbalance to the criminal rules that entered into force firstly in Brazil.

At the beginning of the "digital", our country did not react by elaborating new general rules for the "new world". Instead, it awaited the occurrence of

2 The case was filed at the Constitutional Court, Supremo Tribunal Federal, under following identification: RE 1.037.396. For details: www.stf.gov.br.

the facts to trigger the legislation in the areas that claimed for regulation. A different development was chosen by Germany, where the Civil Code was very early adapted for the new ways of establishing relationships as a result of the reform of the law of obligations in the year of 2001.

One example of regulation other than in the field of criminal law, is the electronic signatures act[3], that Brazil approved in 2001, establishing a national public key infrastructure that can be considered as a real success, as it has enhanced the security of online transactions for decades.

When we turn back do Marco Civil, it is relevant to mention that it established many rights for the use of the internet. And among those rights a minimum of data protection was already there. As we know, our general rule for data protection was approved only in 2018[4], but the Marco Civil almost five years before regulated, for instance, consent in the context of data protection, determining some of its conditions.

What really happened is that during the elaboration of the Marco Civil draft, the idea was present of importing some of the data protection rules from the general data protection act that was already being discussed at that time in the Parliament.

Also, interesting to note that the Decree n. 8771 which established detailed regulation of the Marco Civil brought to our legislation the concept of personal data[5], which is very similar to the one that would later on be present in our Data Protection Law and that was also inspired in the European model.

It is clear that these rules were only the beginning of specific general rules in data protection in Brazil. With the enactment of the Data Protection Law, other possibilities of legal basis for the processing of data along with the traditional consent were foreseen and now Brazil has a very modern and updated legislation in the field[6].

3 The act is the so called Medida Provisória nº 2.200-2/2001. This act is still in force in Brazil and in the year of 2020 the Lei nº 14.063 established new levels of electronic signatures in the direction of the European regulation.

4 The so called LGPD, Lei Geral de Proteção de Dados: Lei nº 13.709/2018.

5 I mean hereby the idea that personal data is the information related to an identified or identifiable natural person.

6 It is curious to note that inspired by the European tradition the Brazilian data protection act also stated the possibility of processing data on the legal basis of the legitimate interest of the controller or processor (Article 7, X, LGPD).

Marco Civil also established in Brazil the principle of *net neutrality*[7] which states that the internet service providers must treat all internet communications equally, offering users and online content providers consistent rates irrespective of content, website, platform, equipment or application, source or destination address.

The guarantee of a minimum of internet access to the users in Brazil is therefore a big issue in this act and it remains a constant challenge for the regulation to find the balance between the net neutrality principle and the business models of service providers that wish to sell different kinds of data packages.

I mention here two other very important rules that were enacted with the Marco Civil. And these are the ones that assign a term for the data retention duty within the activities of service providers.

In this subject the Marco Civil states a twelve-month term for the retention of the internet access data by internet connection providers (Art. 13). That means that with this information it is possible to know when the user's connection to the internet started and when it stopped.

The second rule on the data retention duty establishes a six-month term for the retention of the information concerning the access to the applications (Art. 14). We deal here with the application layer. With this information it is possible to know when the user's access to a specific application started and when it stopped. This rule was totally new in Brazil when it came into force, because so far only the access information would be collected by internet service providers.

In both cases the service provider will only disclose the retained information upon receipt of a judicial order.

A final remark about the context of the facts during the legislative debate of the draft of the Marco Civil da Internet should be made. At that time, the Brazilian government expressed the intention to design the rules so that internet service providers should be obligated to host their data centers in Brazil and not overseas. The effects of this provision would prevent happenings such as the ones brought about by the Snowden leaks case.

This specific rule suggested by the government was widely rejected by specialists and associations, that considered a step backwards in a world

7 Art. 3, IV and art. 9, Marco Civil da Internet.

that was already and still runs towards globalization: the provision was not included in the approved version of the act[8].

Nonetheless it is interesting to notice that this discussion has gained new impulse in the years that followed the approval of the Marco Civil da Internet. And this not exactly in Brazil, but especially in Europe in the context of the international transfer of personal data.

As broadly known, the European Court of Justice delivered two very relevant judgments in the years 2015 and 2020, when it ruled that the European Commission's adequacy decision for the international data transfers with the United States of America were invalid, respectively, Safe Harbor Framework and Privacy Shield Framework.

The main issue in the discussion is that of the possibility of the access U.S. intelligence authorities may gain by requesting the disclosure of personal data from citizens covered by European data protection legislation to its public entities or to in its territory-based companies.

These concerns have raised the implementation of measures in order to avoid that the communication established in Europe flows to the United States of America, or at least that when this occurs there will be no information request by the NSA. The concept of digital sovereignty describes the possibility of countries, organizations and individuals take independent and self-determined decisions related to the use and design of systems and the information created and processed by these systems[9].

If we take the example of the Commissioner for Data Protection in the State of Hessen in Germany, we will notice that this state has implemented specific measures in order to promote digital sovereignty such as the negotiation with videoconference applications providers so that the information exchanged by this means in Hessen does not flow to servers located in the United States[10].

In July 2023 a new adequacy decision for the United States of America was issued by the European Commission. It is not surprising to notice that

8 SOUZA, Carlos Affonso; LEMOS, Ronaldo. Marco Civil da internet: construção e aplicação. Juiz de Fora: Editora Associada LTDA, 2016.

9 On the matter see: Digitale Souveränität und Künstliche Intelligenz - Voraussetzungen, Verantwortlichkeiten und Handlungsempfehlungen. https://www.de.digital/DIGITAL/Redaktion/DE/Digital-Gipfel/Download/2018/p2-digitale-souveraenitaet-und-kuenstliche-intelligenz.pdf?__blob=publicationFile&v=5.

10 On this, see the Commissioner's Report for Data Protection in the year of 2021 in the State of Hessen. https://www.zaftda.de/tb-bundeslaender/hessen/landesdatenschutzbeauftragter-2/807-50-tb-lfd-hessen-2022-20-8296-vom-08-06-2022/file.

the non-profit organization Non of Your Business, under the leadership from Austrian data protection activist Max Schrems, has announced that they will challenge the decision before the European Court of Justice[11].

What concerns Brazil, the supervision authority for data protection, ANPD, will most likely deliver in the year of 2024 a regulation on international data transfers and the issue of digital sovereignty should be addressed. As we see, the discussions about the location of servers and data centers could be relived in Brazil just like ten years before when Marco Civil da Internet came into force, but this time in the context of the international transfer of personal data.

C. Marco Civil da Internet and the case brought to the Constitutional Court

Getting back to the Marco Civil da Internet, and as mentioned in my introduction, I would like to focus on a case that is under judgement by our Constitutional Court and that comprehend the legal text I have just introduced but that at the same time touches on the consumer protection and on our Code of Consumer Protection[12].

The case has to do with content moderation through platforms. But before I report about this decision, let me shortly come back to Marco Civil da Internet.

Marco Civil rules the matter of content moderation stating as usual that there is no general monitoring or active fact-finding obligations for service providers[13]. They are as a basic principle not liable for illegal content published by other users.

But the most discussed provision of this legal text in this context is Article 19, the one that determines that in honor of the values of freedom of expression and to avoid censorship[14] the service provider will only be liable for the illegal content published on its platform if the provider does

11 https://noyb.eu/en/european-commission-gives-eu-us-data-transfers-third-round-cjeu.

12 The Brazilian Code of Consumer Protection was enacted by the Lei nº 8.078/1990.

13 Article 18 of Marco Civil da Internet.

14 It can be stated that in general the Brazilian legal system considers the freedom of expression in a preferred position when confronted with personality rights. A very important case in which these values were balanced was the constitutional claim (ADPF 130) against the so-called Brazilian Press Act. This judgement took place in 2009 and the conclusion was that of the unconstitutionality of the act, considering the fact that it was enacted during the military dictatorship in Brazil and contained

not take efforts to remove the publication after a judicial order. I repeat: *an order from a court* is necessary to give knowledge to the service provider and trigger its liability for the damages the publication caused to the internet user.

An exception to the requirement of a judicial order for the removal of the illicit material takes place when the publication encloses sexual material or nudity. In this case the notice submitted by the affected individual should be enough to impose a subsidiary liability on the service provider[15].

As mentioned, we have this rule since 2014. But it is interesting to notice that before its enactment, courts in Brazil including our highest one for the interpretation of federal law, Superior Tribunal de Justiça (STJ), had consolidated the notice and take down principle, according to which the service provider will be liable in case he is directly notified by the user and does not remove the illegal content.

The change promoted by Marco Civil da Internet generated many complaints from consumer protection associations, from academy and other institutions considering that the efforts needed to be made by the users with the new rule would be much higher to remove the illegal content, interfering in the exercise of their rights. The comparison is between the simple notice made directly by the user towards the service provider and the formalities and costs involved with filing a suit in a court.

This gave rise to the aforementioned constitutional complaint. I should here observe that the case was at its origin processed in the courts of the State of São Paulo and the last decision there, which will be tested in the Brazilian Constitutional Court raises the question that the consumer law as a constitutional value should prevail over the Brazilian legal framework for the Internet (Marco Civil da Internet).

It will be decided if although the Marco Civil states the liability of service providers for illegal content only after a judicial order, the rules of the Consumer Code that determine a strict liability for damages for defective services should be or should not be applicable. It is always to be mentioned that since the entry into force of the Consumer Code in 1990, Brazil has developed a very powerful system to protect these relationships. Brazilian law is since then marked by this attribute and whenever a new act or subject

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some outdated rules such as limitations on the freedom of expression of journalists and even criminal dispositions in order to restraint the press freedom.

15 Article 21 of Marco Civil da Internet.

comes to debate in Parliament, considerable worries are expressed so that the high level of consumer protection should not be affected.

If we take one more time the example of the Brazilian data protection act (LGPD), we get an idea of the importance consumer protection has gained in our country. During the discussion of the LGPD, especially in the subject of the rule of civil liability, the concern of not interfering in the strict liability rules of consumer law was present. For this reason, the new rule was designed in such a way that consumers would face no disadvantages.

The specific article states that any violation of rights in the field of data protection will still remain subject to the consumer liability dispositions already in force.

These interfaces between consumer law and the rules that followed it, such as LGPD and Marco Civil da Internet, make so challenging for lawyers and courts to find the reasonable approach that guarantees harmony to the system.

This is a reason why the case dealing on the constitutionality of Marco Civil da Internet was supposed to have a public hearing so that the society and judges would plunge into the details and complexity involved in the matter. But on the exact week in the year of 2020 when the hearing should take place the covid pandemic was declared in Brazil and thus the activities suspended. The public hearing eventually took place in March 2023. As usual in Brazil, and the same happens when judgements of the Constitutional Court occur, the hearing was also r live stream broadcasted and remains recorded in the internet.

These moments are a very rich experience for the constitutional judges and for the society as a whole. Just like many other countries of the Roman Germanic system, the weight of judicial decisions has considerably increased in Brazil in the last decades. As argued by constitutional law scholars, some of the debate that usually takes place at the legislative houses has been brought to the Judiciary, as the decisions in many of its procedures affect the entire population and not only the demanding parties of the concrete case.

A handful of *amici curiae* were admitted contributing with their perspective regarding the matters in dispute.

One interesting remark made by the lawyers of the social media providers is that along the years their services have evolved considerably. As argued, nowadays the platforms monitor and remove most of the illicit content that is published. This seems to be a true fact but it is still questionable if all this effort made by social media platforms covers many cases

where agility and uncomplicated measures are needed, especially when individuals face violations to their personality rights.

Another aspect that is usually pointed out in the debate is that Marco Civil da Internet facilitates the access to courts when claims for content removal or for damages are necessary. In this case, the Internet users may file their suits at the specialized courts for the popularly called "small claims". This means that the suits are processed in a fast track, with no costs and reduced possibilities of appealing against a sentence.

The judgement of this case is anxiously awaited in Brazil and involves, a general repercussion, meaning that lawsuits on this subject are suspended and await this decision that will have *erga omnis* effects, confirming that the work of the courts and especially of our Constitutional Court draws much of the attention in the field of law.

D. Final Remarks

Marco Civil da Internet was recognized as a modern legal initiative when it was approved in Brazil (2014) and it opened a broader path for the regulation of the digital world. The issues raised at that time such as the location of data centers of service providers are not abandoned and now gain a new impulse with the legislation of data protection and the chapter that deals with international data transfers.

Nonetheless, it is appropriate to ask if Marco Civil da Internet could be by any means modernized, as we consider the facts that have been attracting the attention of courts and legislators around the globe.

One of the questions that raise after the approval of the Digital Services Act in Europe and its approach for the continuity of the notice and take down model is if we will have an influence in Brazil of the Brussels effect when our Constitutional Court decides the subject.

We shall here remember that according to the DSA, following the steps of the E-commerce Directive, the responsibility for the platform is triggered upon the user's notification of the illegal content without the need for a judicial decision.

The European Model based today on the DSA and in this context, we could also exemplify through the German NetzDG (Netzwerkdurchsetzungsgesetz), which is in force for over five years, is based on setting heavier duties for the platforms such as:

– Transparency reporting obligations on content moderation;
– Run mechanisms to allow users to notify them of illegal content;
– Provide statement of reasons for suspensions of services;
– Provide internal complaint-handling systems to the decisions that are made in the work of moderation.

As we have seen, the Brazilian legal system at this moment does not impose such duties like the European legal system, although we should not forget the intense effort that has been made by the social media platforms in order to monitor the violations of its terms of use that prohibit illicit content.

The crucial question still emerges: Is the Brazilian system and Article 19 of the Marco Civil still up to date?

And I should mention here not only the Brussels effect but also the UNESCO effect. UNESCO is also elaborating its guidelines for regulating digital platforms, aiming to safeguard freedom of expression and access to information.

And in this initiative duties imposed to the service providers shall also be present.

In this context we should also consider the value of democracy. The UNESCO Guidelines set a list of specific measures to guarantee the integrity of elections in an open fight against disinformation.

And as we have seen in Brazil in the last presidential election, in the year of 2022, content moderation in the electoral context is of an immense importance. For someone who lives in Brazil and votes in the elections it is quite confusing and challenging to get real information and true facts especially during presidential campaigns. A war of fake news usually takes place at this decisive event of the democracy. The Brazilian Electoral courts and mainly the Superior Electoral Tribunal face an overload of work during elections and the fake news issue in this area has turned to be one of the greatest challenges of the country.

Targeting the Brazilian population, the Superior Electoral Tribunal has been working intensively to promote campaigns that help the voters to recognize and to avoid being influenced by disinformation during the election period.

But the efforts shall not stop: with the growing sophistication of generative artificial intelligence tools, democracy will face enormous challenges in order to maintain its foundations of justice and freedom when people exercise one of their most valuable rights such as the one to elect representatives.

The next steps are to be followed in Brazil: new law drafts, new judicial decisions and new facts are to come. But if an opinion would be asked, there should be no doubt that a tendency is currently present in our country: Brazil will most likely be influenced by the Brussel effect and raise the level of duties to internet platforms.

This tendency expresses the widespread inspiration of the European legal tradition in Brazilian Law, what can be confirmed through examples listed in this work, such as data protection, electronic signatures, and others, and remembering the European influences in our Consumer Protection and in our Civil Code.