

Recognition of the partial and progressive unconstitutionality of art. 19 of the MCI

1. Art. 19 of Law No. 12,965/2014 (Civil Rights Framework for the Internet), which requires order specific judicial provision for the civil liability of internet application providers for damages resulting from content generated by third parties is partially unconstitutional. There is a state of partial omission that arises from the fact that the general rule of art. 19 does not provide sufficient protection for highly relevant constitutional legal assets (protection of fundamental rights and democracy).

Interpretation of art. 19 of the MCI

2. Until new legislation is enacted, Article 19 of the MCI must be interpreted in such a way that internet application providers are subject to civil liability, except for the application of specific provisions of electoral legislation and normative acts issued by the TSE.

3. The internet application provider will be held civilly liable, in the terms of art. 21 of the MCI, for damages resulting from content generated by third parties in cases of crime or unlawful acts, without prejudice to the duty to remove the content. The same rule applies in cases of accounts reported as inauthentic.

3.1. In cases of crimes against honor, art. 19 of the MCI applies, without prejudice to the possibility of removal by extrajudicial notification.

3.2. In the case of successive replications of the offensive fact already recognized by court decision, all social media providers must remove publications with identical content, regardless of new court decisions, based on judicial or extrajudicial notification.

Presumption of liability

4. The presumption of liability of providers is established in the event of of illegal content when it comes to (a) paid advertisements and boosts; or (b) artificial distribution network (chatbot or robots). In these cases, liability

may occur regardless of notification. Providers will be excluded from liability if they prove that they acted diligently and within a reasonable time to make the content unavailable.

Duty of care in the event of mass circulation of seriously illegal content

5. The internet application provider is responsible when it does not promote the immediate unavailability of content that constitutes serious criminal practices provided for in the following exhaustive list: (a) antidemocratic conduct and acts that conform to the types provided for in articles 296, sole paragraph, 359-L, 359-M, 359-N, 359-P and 359-R of the Penal Code; (b) crimes of terrorism or preparatory to terrorism, as defined by Law No. 13,260/2016; (c) crimes of inducing, instigating or aiding suicide or self-harm, under the terms of art. 122 of the Penal Code; (d) incitement to discrimination based on race, color, ethnicity, religion, national origin, sexuality or gender identity (homophobic and transphobic conduct), subject to classification under arts. 20, 20-A, 20-B and 20-C of Law No. 7,716 of 1989; (e) crimes committed against women due to their female sex, including content that propagates hatred or aversion towards women (Law No. 11,340/06; Law No. 10,446/02; Law No. 14,192/21; PC, art. 141, § 3; art. 146-A; art. 147, § 1; art. 147-A; and art. 147-B of the PC); (f) sexual crimes against vulnerable persons, child pornography and serious crimes against children and adolescents, under the terms of arts. 217-A, 218, 218-A, 218-B, 218-C, of the Penal Code and arts. 240, 241-A, 241-C, 241-D of the Child and Adolescent Statute; g) human trafficking (CP, art. 149-A).

5.1 The liability of internet application providers provided for in this item concerns the configuration of systemic failure.

5.2 A systemic failure, attributable to the internet application provider, is considered to be: failing to adopt adequate measures to prevent or remove the previously listed illegal content, constituting a violation of the duty to act responsibly, transparently and cautiously.

5.3. Measures shall be considered adequate if, in accordance with the state of the art, provide the highest levels of security for the type of activity performed by the provider.

5.4. The existence of illicit content in an isolated, atomized form is not, in itself, sufficient to give rise to the application of civil liability under this item. However, in this case, the liability regime provided for in art. 21 of the MCI will apply.

5.5. In the cases provided for in this item, the person responsible for publishing the content removed by the internet application provider may request its reinstatement in court, upon demonstrating the absence of illegality. Even if the content is restored by court order, there will be no imposition of compensation on the provider.

Incidence of art. 19

6. Article 19 of the MCI applies to (a) email service provider; (b) application provider whose primary purpose is to hold closed meetings via video or voice; (c) instant messaging service provider (also called private messaging service providers), exclusively with regard to interpersonal communications, protected by the confidentiality of communications (art. 5, item XII, of the CF/88).

Marketplaces

7. Internet application providers that operate as marketplaces are civilly liable in accordance with the Consumer Protection Code (Law No. 8,078/90).

Additional duties

8. Internet application providers must issue self-regulation that necessarily cover a notification system, due process and annual transparency reports in relation to extrajudicial notifications, announcements and boosts.

9. They must also make channels available to users and non-users specific service, preferably electronic, which are accessible and widely publicized on the respective platforms on a permanent basis.

10. Such rules shall be published and reviewed periodically, in such a way that transparent and accessible to the public.

11. Internet application providers operating in Brazil must establish and maintain headquarters and a representative in the country, whose identification and contact information must be made available and easily accessible on their respective websites. This representation must grant the representative, necessarily a legal entity with headquarters in the country, full powers to (a) respond before the administrative and judicial spheres; (b) provide the competent authorities with information regarding the operation of the provider, the rules and procedures used for content moderation and for managing complaints through internal systems; transparency reports, monitoring and management of systemic risks; rules for user profiling (when applicable), advertising placement and paid content promotion; (c) comply with court orders; and (d) respond to and comply with any penalties, fines and financial consequences that the represented party may incur, especially for non-compliance with legal and judicial obligations.

Nature of liability

12. There will be no objective liability in the application of the thesis stated here.

Appeal to the legislator

13. The National Congress is called upon to draft legislation capable of remedy the deficiencies of the current regime regarding the protection of fundamental rights.

Modulation of temporal effects

14. In order to preserve legal certainty, the effects of this regulation are modulated. decision, which will only be applied prospectively, except for final decisions.