EXECUTIVE SUMMARY OF LEGAL OPINION

Digital Platforms' general duty of care for children

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CRIANÇA e CONSUMO

1. As a rule, digital platforms have a business model that allows for the interaction of, at least, two parties or poles, known as market "parties." The growing importance of such economic agents, which play a pivotal role in the digital economy, is mainly due to their enormous capacity for data extraction and interference in the flow of information.

2. The performance of these activities bring about several negative externalities. In this context, it is up to the platforms to adopt duties of care and protection, which stem from the principle of objective good faith, to prevent unfair damage to their users; even if such damage results from content created by third parties, in compliance with reasonable parameters. Since platforms and users establish a relationship of consumption, such a relationship is subjected to Brazil's Consumer Defense Code (CDC, in its

initials in Portuguese). Brazil's Consumer Defense Code (herein referred to as CDC) rules that suppliers must comply with the duty of care. The precise identification of the content of this duty cannot be abstract, but rather clearly defined through criteria such as predictability of risk, severity of the damage, etc.

3. Regarding children, the duty of care should be, in any case, stricter, including holding economic agents liable for the duty to prevent damage or its spreading due to the broad, special, and priority protection granted to children. In fact, in light, above all, of art. 227 of Brazil's Federal Constitution and Brazil's Children and Teenagers Rights Act (herein referred to as ECA, by its initials in Portuguese), the principles of children' best interests and the absolute priority must be paramount to construing digital platforms` private autonomy, consequently, to defining their civil liability regime.

4. To fully grant the rights of children, it is up to the platforms to put together adequate age verification mechanisms that are not restricted to mere self-declaration.

5. When platforms include age-restrictive clauses for using the service and assign parents full responsibility for their children's activities while using the platform, that does not mean those economic agents should no longer perform the duty of care. Indeed, clauses that "make it impossible, exonerate or mitigate supplier's liability for defects of any nature in the products and services or imply waiver or disposition of rights," as well as those that "transfer responsibilities to third parties" are null and void under the terms of article 51, items I and III of the CDC.

Damage caused by content created by third parties

6. With regards to damage resulting from content created by third parties, Law No. 12,965/2014 sets forth, in article 19, that internet application providers — such as digital platforms — shall only be held liable if they are unwilling to remove harmful content after a specific court order has been issued. Moreover, platforms shall be held liable if images containing nudity or

sexual intercourse are disclosed with no permission of the people involved. Moreover, the same applies if platforms do not comply with extrajudicial notification by victims or their proxies.

7. Brazil's Civil Rights Framework for the Internet [Marco Civil da Internet] states that providers have a broad exemption related to any duties of care. Therefore, providers must only comply with court orders. The purpose of the Law is to grant freedom of speech and avoid prior censorship. The wording of the Law, however, starts from the premise that digital platforms play a passive role regarding information flows. The platforms, however, regulate their users' speech, impose policies and terms of service, and moderate illicit content automatically, either through software or manually, before publication (ex ante moderation), or after (ex post moderation).

8. Given the control exercised by platforms over the dissemination of content produced by third parties, it is mandatory to perform a systematic interpretation of Brazil's Civil Rights Framework for the Internet to correctly equate the power and responsibility of digital platforms, especially with regards to vulnerable groups, such as children.

9. While such an interpretative effort is necessary for several other matters, it is even more critical when it comes to the protection of childrens. This issue concerns the criteria of civil liability - both the specific ones provided for in Brazil's Civil Rights Framework for the Internet and the general ones provided for in Brazil's Civil Code and the CDC. Such criteria have consistently demanded an interpretation compatible with constitutional and legal principles that impose broad protection for this hyper vulnerable group.

10. The duty of care must be exercised on content control and the platforms' very architecture. The idea of a duty of care that would focus on the platform design is essential for children constantly exposed to risks in virtual environments. Often, the damage is related to the very concept of the platform's business model.

11. One must acknowledge that the business model that causes damage to third parties is the result of a deliberate choice by the platforms. Adverse effects can be reduced by implementing duties of care in the platform's architecture and, in their absence, by the responsibility arising from breach of such duties.

12. Especially concerning the protection of children, platform's duty does not depend on legislative reforms or the adoption of regulatory measures since they already derive from the systematic interpretation of Brazil's Civil Rights Framework for the Internet, Brazil's Federal Constitution, ECA, Brazil's Civil Code, and the CDC.

13. It is important to note that the need to balance conflicting interests is inherent to the exercise of private autonomy. In addition, the duty of care itself can be used by platforms as a legitimate justification in cases where they are accused of unduly restricting freedom of speech, if content has been deleted with no reasonable explanation.

14. Platforms are not directly responsible for third-party content. Nonetheless, there are good reasons to argue that they must be held liable when allowing, tolerating, broadcasting, or even promoting and encouraging content in situations in which this is incompatible with the general duty of care, especially from a perspective of reasonableness and probability of harm. This conclusion is even more apparent regarding the damage or threats suffered by children. The duty of care must be more rigorous and conform to the principle of integral protection. There should be immediate removal of illicit content after notification of the platform, by whatever means, but also the adoption of a series of measures to effectively implement the duty of care. Doing so would prevent, as much as possible, the occurrence of damage, without which it is impossible to grant adequate protection in terms of what Brazil's Federal Constitution and ECA require.

15. Especially concerning children, the principle of integral protection has the necessary corollary of applying the understanding that, when in doubt, the most compatible measure should be taken to prevent harm.

16. There is no other possible understanding today, mainly because of the role digital platforms play in the information flow. According to articles 19 and 21 of Brazil's Civil Rights Framework for the Internet, there is a mere absolute presumption of guilt concerning damage resulting from content created by third parties. However, platforms may still be held liable if they fail to comply with other duties of care, if there is proof of wrongdoing considering Brazil's Civil Code, the CDC, and, in the specific case of children, also considering the ECA.

17. Concerning children, there are two main takeaways : (i) article 19 of Brazil's Civil Rights Framework for the Internet does not exempt platforms from liability for maintaining content denounced, extrajudicially, as harmful, and (ii) in cases of illegality, it is possible to understand, depending on the case, that the platform had the duty to remove the content, regardless of any notification, so that inaction may be construed as fault according to the circumstances. In addition, the duty of care must also affect the platforms' design. Given the principle of integral protection for children, it is essential to prevent all reasonably foreseeable damage by requiring platforms to have a transparent policy on the measures taken towards reaching this goal.

18. Thus, depending on the case, the duty of platforms to repair may be set regardless of notification from the victim. It is necessary to examine the obligation to suppress the content considering objective good faith. One cannot accept platforms generically arguing it is impossible to monitor or exempt themselves from liability without further consideration of the diligence standard required from them. This observation is fundamental when considering the degree of sophistication of these agents in extracting data and in the respective use of algorithms to determine the flow of information.

Damage that does not result from content created by third parties: Brazil's General Data Protection Law (LGPD as initials in Portuguese) and advertisements aimed at children

19. There is damage that results exclusively from the performance of digital platforms or that is not directly related to the content created by third parties, such as damage resulting from the collection and processing of data and abusive advertisements. In relation to such damage, , the application of articles 19 and 21 of Brazil's Civil Rights Framework for the Internet should be immediately ruled out, as the legal wording itself makes it clear that the provisions only apply to damage resulting from content created by third parties.

Collecting and processing data from children

20. Brazil's General Data Protection Law (herein referred to as LGPD) established differentiated treatment for collecting, storing, and processing data from children. The LGPD recognizes the need for special protection in compliance with Brazil's Federal Constitution and the ECA. The Law is vital given the risks of the so-called surveillance society, which threatens privacy, personal identity, and isonomy and can jeopardize the future of children.

21. Article 14 of the LGPD is short. Nonetheless, it establishes critical parameters to understand the duties of care imposed on controllers and operators due to the greater vulnerability of children. The Law is based on four pillars: (i) the need to have children's best interest at heart; (ii) the requirement of reasonably verifiable specific parental consent; (iii) the impossibility of conditioning playing games or using other applications to having children share unnecessary personal data, and (iv) greater transparency and clarity as regards platforms` data policies.

22. Parental consent must be verifiable, and controllers are responsible for making the best efforts to ensure that fully informed parents express

their agreement with the privacy policy given to their children's data.

23. Although expressed, the consent shown by pressing "click" still arouses many controversies because of long texts, unintelligible language, and users' difficulty finding and accessing the Terms of Use. All those issues can impair people's capacity for fully informed consent, as required by the LGPD.

24. Even in cases where parents or a child's legal guardian consent to collecting and processing of data, such processing must comply with the principle of best interest, in accordance with the provisions of article 14's caput. In other words, the platform's obligation to act per the child's best interest remains even if the parents expressly consent to them collecting, processing, and using data in a way that is not consistent with this purpose.

25. In addition to the hypotheses of consent, there are other legal bases for data processing. Enforcing articles 7 and 11 on the data of children is controversial in legal doctrine. We believe that the possibility of processing data based on controllers,' or third parties' legitimate interest should be ruled out as a rule. Indeed, the vague notion of controllers' legitimate interest could clash with the special protection granted to children, allowing for abusive conduct. Children's rights must prevail to the detriment of controllers' legitimate interests because the principles of children's best interest and absolute priority must be paramount to construing children's data processing. As a rule, excluding the hypothesis of express consent, data processing shall only be performed in the cases provided for in article 11, item II, and 14, §3, of the LGPD.

Abusive advertisements

26. Early access to the internet, combined with the widespread use of smartphones and the growing use of digital platforms, has radically changed the extent and form of advertising consumed by children. Digital platforms and online marketing are also growing.

27. Children have, therefore, been massively subjected to internet advertising: from the so-called display ads, also known as banners, on web pages, to those displayed in video format on digital platforms, or "native advertising", which has advertising bias that appears camouflaged, whether in texts or multimedia content. Within the "veiled" advertising category in the digital age, two advertising models stand out for their broad dissemination among children: unboxing videos and videos produced by child YouTubers.

28. Children find themselves in a peculiar stage of their development. For this reason, the CDC has deemed advertising that "takes advantage of a child's lack of judgment and experience" abusive in article 37, § 2°. Further on, in article 39, IV, policymakers prohibited suppliers from taking advantage of "the weakness or ignorance of consumers on the grounds of their age, health, knowledge, or social status, and foisting products or services on customers." Brazil's National Council on Children and Teenagers Rights (herein referred to as Conanda) has issued Resolution n° 163. The information outlined in article 37, § 2 of the CDC and Resolution No. 163 lists, in advance, technical resources and persuasion strategies regarded as abusive. Therefore, the Judiciary's argument that advertising can only be considered abusive on a case-by-case analysis has lost support.

29. Unlike TV ads, advertisements on digital platforms can take different formats. There is "native advertising" on YouTube. Contracts are signed between advertisers and YouTubers. Ads can be displayed on the platform through a contract signed by YouTube and advertisers. YouTube users resort to that strategy to monetize their videos.

30. In some cases, advertisements stem from a contractual relationship between advertisers and the platform. Then, it is clear that the damage does not result from intermediating third-party content. However, it is the direct outcome of the platform's decision to deliver contextual advertising in children's content. Therefore, it is plain to see the platform's responsibility, even if it shares responsibility with advertisers, when the advertising is abusive per provisions of article 37, § 2° c/c in article 39, IV, and Conanda Resolution No. 163.

31. Concerning clandestine advertising, usually produced by YouTubers, there is a clear rule in the CDC that prohibits "clandestine advertising," even for adults, as inferred from article 36 of the CDC.

32. In this context, one of the first duties of care expected of platforms, given the express prohibition of veiled advertising in the Consumer Code, especially for content aimed at children, is demanding users not to upload this type of content. The prohibition must be expressly included in platforms` "Terms and Conditions," enforcing appropriate penalties on users in case of non-compliance. Thus, the content must be immediately removed if the platform becomes aware of veiled advertising through extrajudicial reporting. With prominent YouTubers and unboxing channels, which account for millions of subscribers, one would expect the platform to be aware of harmful content. Punishment must also be stricter if platforms are found to be monetizing this type of harmful content. Furthermore, it is up to platforms to implement duties of care in their design to prevent their algorithms' from promoting and spreading veiled advertisements.

33. If contextual advertising appealing to children's inexperience and lack of judgment resorts to the use of strategies listed in Conanda's Resolution n° 163, such advertising must be banned. Targeted advertising exploiting children's vulnerability cannot be tolerated. We are aware that the LGPD demands data processing compliance by bearing children's best interest at heart. One of the most important forecasted developments is precisely curbing advertising based on data collected from children.

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