

IMPACT OF SUPREME COURT DECISION ON PARTIAL UNCONSTITUTIONALITY OF THE INTERNET LAW

EXPLORING THE LIABILITY OF INTERNET PLATFORMS FOR THIRD PARTY CONTENT

JULY 2025

ARTICLE 19 OF THE MCI - GENERAL OVERVIEW



Article 19: of Federal Law 2.965/2014 (“Internet Law” or “MCI”): To ensure freedom of expression and prevent censorship, an internet application provider may only be held civilly liable for damages resulting from third-party content if, after receiving a specific court order, it fails to take the necessary measures—within the scope and technical limits of its service and within the specified timeframe—to make the infringing content unavailable, except as otherwise provided by law.

General Rule established by the MCI: Notice-and-takedown model after a court order



Internet platforms (“Platforms”) are only liable for content posted by users if they receive a specific court order to remove the content and fail to comply



Exceptions:

- (i) Copyright-protected material.
- (ii) Intimate photos shared without consent must be promptly removed upon notice from the rights holder or victim; no court order is required

DISCUSSION ON THE BRAZILIAN SUPREME COURT (“STF”) (UN)CONSTITUTIONALITY OF ARTICLE 19 OF THE MCI

MAIN ARGUMENTS:

AGAINST THE CONSTITUTIONALITY	PRO CONSTITUTIONALITY
Safe Harbor to Platforms	
Provides unfair immunity and special privileges to Platforms	Ensures freedom of expression and prevents censorship
Violates constitutional rights to privacy, honor, image, and consumer protection rights	Prevents excessive and abusive removal of content (chilling effect)
No Incentive to exclude hate speech and harmful content	

BRAZILIAN SUPREME COURT HEARING ON ARTICLE 19

TOPIC 533

(REXT 1.057.258): MAIN SUBJECT:

WHETHER PLATFORM IS REQUIRED TO MONITOR REMOVE OFFENSIVE CONTENT, WITHOUT COURT INTERVENTION

ORIGIN: Pre-MCI case. Google ordered to remove Orkut community

GOOGLE’S ARGUMENTS:

Freedom of expression and the risks of over-censorship

TOPIC 987

(REXT 1.037.396): MAIN SUBJECT:

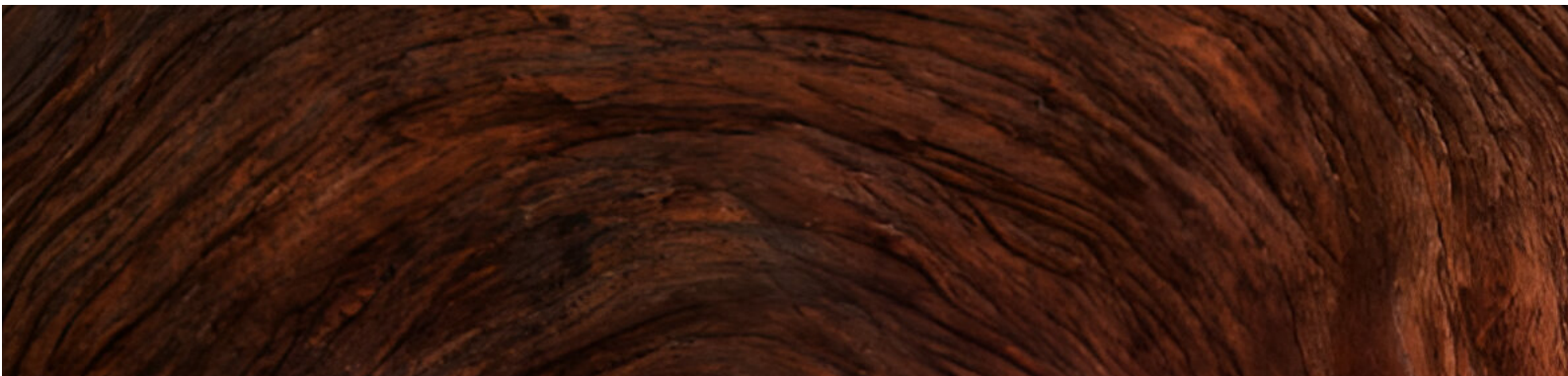
LIABILITY OF APPLICATION PROVIDERS, WEBSITES, AND SOCIAL MEDIA PLATFORMS FOR DAMAGES RESULTING FROM UNLAWFUL ACTS BY THIRD PARTIES, IRRESPECTIVE OF A PRIOR COURT ORDER FOR CONTENT REMOVAL

ORIGIN: Case involving fake Facebook profile

MERCADO LIVRE, acting as amicus curiae, highlighted legal stability and the importance of legal stability and Platform protection

GOOGLE AND MERCADO LIVRE’S MAIN ARGUMENTS

	GOOGLE	MERCADO LIVRE
COURT-ORDERED LIABILITY	Prevents arbitrary takedowns and safeguards freedom of expression	Shields Platforms from undue liability for content that Platforms neither created nor control
PROTECTION OF FREEDOM OF EXPRESSION	Limits censorship and ensures users’ rights	Prevents unnecessary takedowns of legitimate content
ALIGNMENT WITH STF CASE LAW	Aligns with STF’s support for balancing expression and personality rights	Stresses need for nuanced interpretation depending on provider type; urges STF to weigh fundamental rights accordingly
LEGAL CERTAINTY & LITIGATION REDUCTION	Reduces litigation and provides clear liability rules	Highlights role in preventing unnecessary lawsuits and ensuring stable digital business conditions
RESPONSIBILITY OF CONTENT CREATORS	Fosters accountability and curbs abusive behavior online	Emphasizes that content creators—not Platforms—should be held accountable
EMPIRICAL EVIDENCE OF POSITIVE IMPACT	Reduces duration of proceedings	Reduces the number of lawsuits and increases administrative efficiency in simpler cases



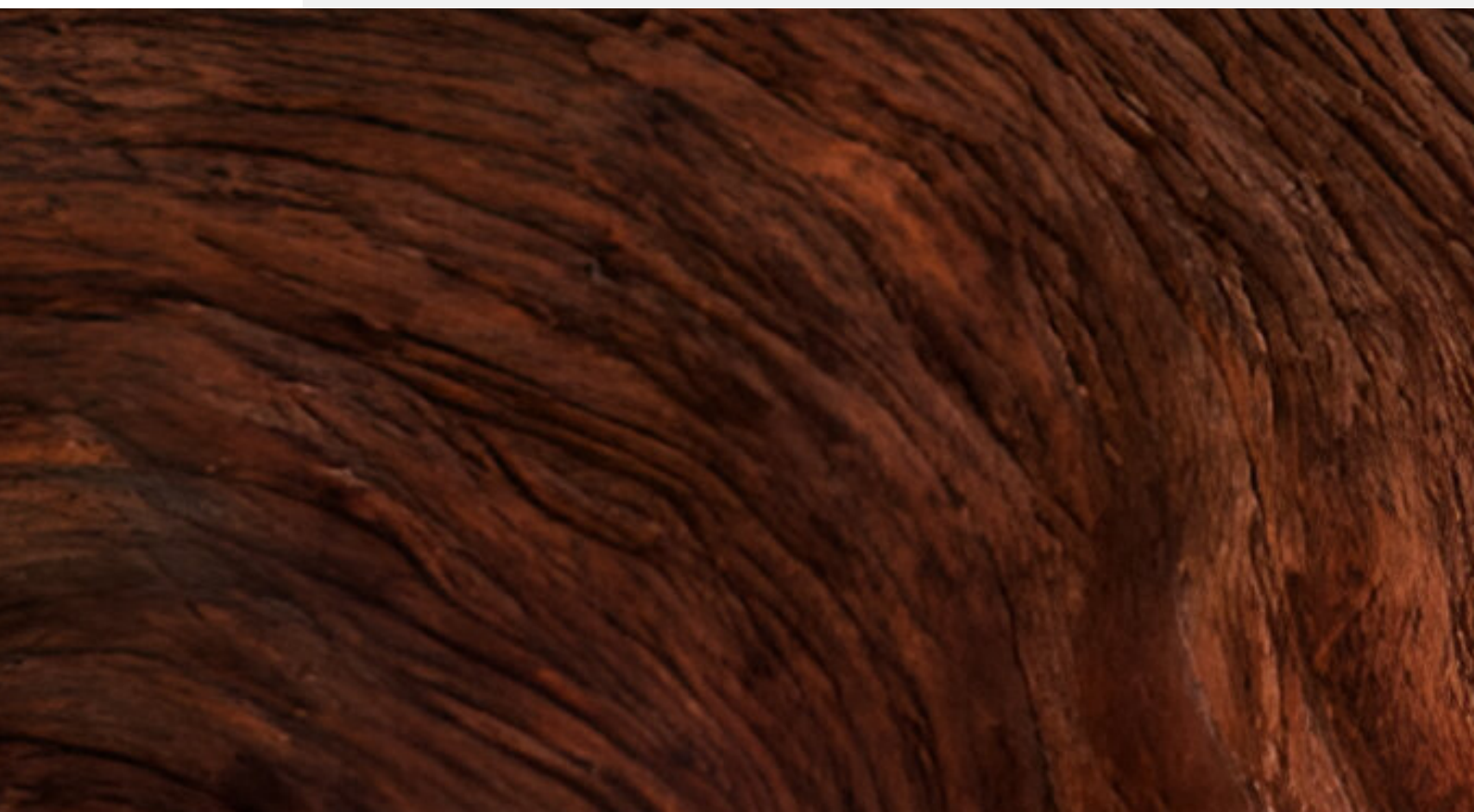
MERCADO LIVRE'S ARGUMENTS AS MARKETPLACE

APPLICATION PROVIDER: Develops functionalities accessible via a terminal connected to a network, enabling users to access and use functionalities over the internet. These include social media platforms (Facebook, Instagram, TikTok), email or messaging services (Gmail, Outlook, WhatsApp), e-commerce websites (online marketplaces like Amazon and Mercado Libre), hosting and video services (YouTube, Vimeo), transportation or delivery apps (Uber, iFood), and collaborative or cloud storage software (Google Drive, Dropbox)

However, because Marketplaces are distinct from Content Application Platforms, Mercado Livre argues that:



- Marketplaces are primarily designed to facilitate commercial transactions between sellers and buyers, while social networks are mainly focused on organizing and moderating public debate
- Marketplaces are already subject to sufficient legal frameworks (Brazil's Consumer Defense Code (CDC), Brazilian Data Protection Law (LGPD), and other laws which impose obligations on both sellers and intermediaries to protect consumers.



STF DISCUSSION

POSITIONS EXPRESSED BY JUSTICES

	 JUSTICE TOFFOLI	 JUSTICE FUX	 JUSTICE BARROSO	 JUSTICE ANDRÉ MENDONÇA
	Article 19 is unconstitutional	Article 19 is unconstitutional	Article 19 is partially unconstitutional	Article 19 is constitutional
GENERAL RULE FOR LIABILITY	Internet application providers are generally liable under Article 21 of the MCI for damages from third-party content if they fail to act upon notification by the offended party, except as provided under electoral laws and TSE regulations	Article 19 does not exclude liability for providers who, with unequivocal knowledge of illegal acts, do not promptly remove content	Judicial decision and removal under Article 19 applies to crimes in offenses of honor, as well as residual civil content	Platforms are only liable if they fail to comply with a specific court order for content removal. No general duty to monitor or remove content absent judicial intervention
OBJECTIVE LIABILITY	Providers are objectively liable without notification if they recommend, boost, or moderate content, or if dealing with fake accounts, copyright issues, or specified illegal activities	Providers must actively monitor for clearly illegal content like hate speech and terrorism, with a duty to protect the democratic state	The notification and removal regime established under Article 21 should extend to crimes (except honor crimes) and presumed knowledge of illegality in ads	Objective liability does not apply to third-party content. Platforms may only be held liable for their own actions or omissions, particularly when failing to enforce their Terms of Use
DUTY TO PREVENT ILLICIT PRACTICES	Providers must act diligently to prevent and mitigate illicit practices by adopting necessary measures against illegal content	For offensive postings, unequivocal knowledge of illegality requires prior notification by interested parties	Platforms must prevent systemic risks and proactively remove extremely harmful content; Congress must regulate systemic risk mitigation	Platforms may be held accountable for failure to apply Terms of Use or implement digital security mechanisms, but have no general duty to monitor user content.
USER COMMUNICATION CHANNELS	Providers must offer accessible, widely publicized, and permanent electronic communication channels for users and non-users	Platforms must provide efficient, functional, and confidential electronic channels for receiving user complaints	Platforms have a duty of care to prevent systemic risks, requiring proactive measures against specific harmful content	In cases where content is removed without a court order (e.g., under Terms of Use), Platforms must respect due process, ensuring: (i) access to reasons, (ii) preference for human moderation, (iii) right to appeal, and (iv) timely response
FOREIGN PROVIDERS	Requires foreign Platforms operating in Brazil to maintain a legal representative in the country to receive and answer judicial and administrative orders	Not specifically addressed	Not specifically addressed	Platforms (domestic and foreign) are subject to the same liability under Article 19. No distinct obligations arise from their nationality

**JUSTICE FLÁVIO DINO****JUSTICE CRISTIANO ZANIN****JUSTICE GILMAR MENDES**

Article 19 is partially unconstitutional

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Article 19 is partially unconstitutional

GENERAL RULE FOR LIABILITY

Article 19 applies exclusively to offenses involving honor. For other illicit content (e.g., child abuse, terrorism, self-harm), liability may arise under Article 21 of the MCI or general civil law, especially following extrajudicial notice

A judicial order is still required for complex cases, but extrajudicial notification is sufficient for clearly illicit content, as per Article 21 of the MC

Four-tier liability system should apply: judicial order for honor crimes vs. varying regimes depending on Platform involvement

OBJECTIVE LIABILITY

Platforms may incur strict (objective) liability under consumer protection law (Article 14 of the Consumer Defense Code) in cases of systemic failure to adopt adequate technical safeguards, particularly in high-damage cases.

Under objective liability with duties of care, a differential regime applies such that “active” Platforms are responsible after notifications and “neutral” Platforms are when content is not manifestly criminal

A Platform’s knowledge of illicit content in paid/promoted material is presumed, creating direct liability for infringing content, e.g., extremist or harmful posts

DUTY TO PREVENT ILLICIT PRACTICES

Platforms are subject to a duty of prevention and diligence, requiring the implementation of state-of-the-art technical and procedural measures to prevent the dissemination of high-risk content. Failure to do so qualifies as systemic negligence

Platforms must have procedural safeguards, as well as moderation and user notification protocols that reflect their care and mitigation duties.

Platforms’ have an active curatorial role via algorithms, demanding procedural duties and oversight by the Data Protection Authority (“ANPD”) for moderation of decisions

USER COMMUNICATION CHANNELS

Platforms must develop regulated self-regulation protocols, including: **(a)** user notification systems; **(b)** internal appeal mechanisms; and **(c)** public and periodically updated transparency reports on moderation and takedowns

Effective extrajudicial notification/complaint channel, due-process rules for content removal and moderation transparency are necessary

Platforms are subject to procedural obligations (notification systems, appeals channels, etc) and transparency reports under oversight of ANPD

FOREIGN PROVIDERS

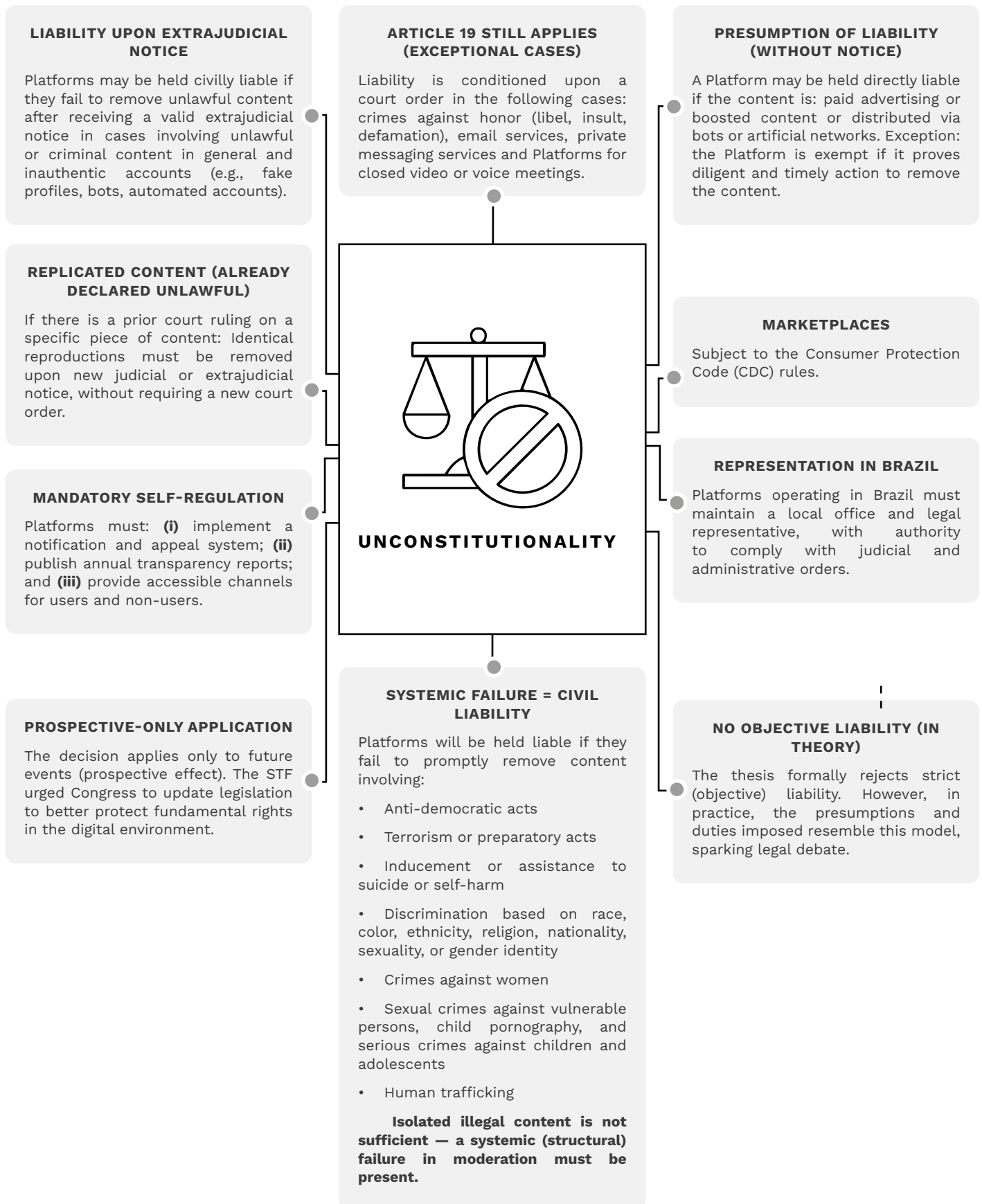
Both domestic and foreign providers must comply with proactive procedural duties. Compliance will be monitored by the Federal Prosecutor’s Office (PGR) until specific regulation is enacted

Not specifically addressed

Both foreign and domestic Platforms should be subject to regulatory oversight by ANPD

	 JUSTICE NUNES MARQUES	 JUSTICE CARMEN LUCIA	 JUSTICE EDSON FACHIN	 JUSTICE ALEXANDRE DE MORAES
	Article 19 is constitutional	Article 19 is partially unconstitutional	Article 19 is constitutional	Article 19 is partially unconstitutional
GENERAL RULE FOR LIABILITY	Platforms may only be held liable if they fail to comply with a specific court order	Platforms are only liable after non-compliance with a court order, except in cases of content involving crimes against honor and threats to the democratic rule of law	Platforms may only be held liable after a specific judicial decision, even for seriously unlawful content	Platforms face liability without a court order in cases involving serious content (e.g., hate speech, terrorism, child pornography, incitement to suicide)
OBJECTIVE LIABILITY	Rejects any form of objective liability. Platform liability is subsidiary and conditioned on non-compliance with a court order	Platforms can no longer be considered neutral and therefore subject to civil liability, especially when a judicial order is ignored	Rejects strict liability. Article 19 remains adequate for Brazil's digital landscape under proof of fault requirements.	Framework does not impose strict liability, but Platforms may face a presumption of liability in cases of promoted content, automated networks, or paid advertising — even without prior notice
DUTY TO PREVENT ILLICIT PRACTICES	Platforms must have internal digital due process, with notification and opportunity for user defense	Platforms play an active role in content distribution and therefore must take action to prevent abuse	A Platform's duty of moderation should be systemic and legislative, rather than imposed by the judiciary.	Platforms should have heightened duties of care, requiring immediate removal of gravely illicit content. Failing to act may constitute a systemic failure by the Platform
USER COMMUNICATION CHANNELS	Platforms must ensure a fair internal process, allowing users to respond before content and profiles are removed	Platforms have a duty to provide transparent and appeals-based due process to protect user's from abuse, as well as their freedom of expression.	Excessive takedowns should be reviewed by courts on a case-by-case basis	Platforms should follow a structured self-regulation model, including: (i) notification channels, (ii) appeal mechanisms, and (iii) periodic public transparency reports
FOREIGN PROVIDERS	All Platforms, domestic or foreign, must comply with Article 19 until legislation is changed	Did not address the issue directly but applies liability framework to all Platforms	All Platforms, domestic or foreign, must comply with Article 19 until legislation is changed	Platforms operating in Brazil must maintain a legal representative in the country to receive and answer judicial and administrative orders

OUTCOME: PARTIAL AND PROGRESSIVE UNCONSTITUTIONALITY OF ARTICLE 19 OF THE BRAZILIAN INTERNET LAW (MCI).



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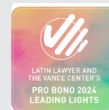
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