



the global voice of
the legal profession®

IBA Intellectual Property, Communications
and Technology Law Committee

Digital Regulations in the Metaverse Era

BRAZIL

Regional Coordinator:

Alan Campos Elias Thomaz *CT* | *Campos Thomaz, São Paulo*



Data

Simone Lahorgue Nunes *Lahorgue, Rio de Janeiro*

Camila Mariotto *Lahorgue, Rio de Janeiro*

1. Are there any data (personal and non-personal) policies, strategies and regulations applicable to the metaverse in your jurisdiction?

There are currently no specific policies, strategies or regulations designed for the metaverse related to personal and non-personal data in Brazil. However, the existing regulations on personal and non-personal data apply to the metaverse. Such regulations include the Brazilian Federal Constitution and the Brazilian General Data Protection Law (Law No 13,709/2018, or the LGPD). Sectoral laws also apply, for example:

- the Brazilian Regulatory Framework for the Internet (Law No 12,965/2014);
- the Brazilian Consumer Defence Code (Law No 8,078/1990);
- the Brazilian Industrial Property Law (Law No 9,279/1996);
- the Brazilian Copyright and Neighbouring Rights Law (Law No 9,610/1998);
- the Brazilian Civil Code (Law No 10,406/2002); and
- the Consolidation of Labour Laws (Decree Law No 5,452/1943).

However, there are specific projects being developed for the metaverse, such as MC.Metaverso Brasil, Metalndústria, Metaverso da Amazônia and Centro Cultural Virtual SP. Metaverso Brasil is a partnership between the Special Secretariat for Youth of Rio de Janeiro and Meta, which aims to replicate reality through digital devices within collective virtual shared spaces. Metalndústria is a project designed for companies seeking to enhance their use of technology, reform production lines, and implement or enhance digitalised and integrated industrial infrastructures. Its aim is to establish a collaborative ecosystem focused on automation and communication. Metaverso da Amazônia seeks to connect individuals with Indigenous peoples and the world's largest rainforest. It was created for the 75th Annual Meeting of the Brazilian Society for the Advancement of Science (SBPC), the largest scientific event in Latin America. Finally, Centro Cultural Virtual SP has been created by the government of São Paulo to enhance cultural activities at the institution, São Paulo Cultural Centre (CCSP). These initiatives are not focused on personal and non-personal data.

2. How is the various personal and non-personal data associated with the metaverse protected in your jurisdiction?

Brazil's Federal Constitution ensures personal data protection for all individuals as a fundamental right (Article 5, LXXIX). Personal data protection is regulated by the LGPD, the Brazilian data protection law that draws inspiration from the European Union's General Data Protection Regulation (GDPR). It lays down rules to ensure the fundamental rights to freedom, privacy and the free development of the personality of every individual (Article 1).

With regard to non-personal data, Brazil does not have specific regulations on this matter. That said, there are rules that regulate confidential business information and databases. This will be analysed further in the response to Question 5.

Q 3. Who are the different stakeholders involved in the data value chains in the metaverse and, in the case of personal data, what are their data protection roles? How are their activities regulated under regional or national policies, strategies and regulations?

The stakeholders involved in the data value chains in the metaverse vary depending on the context, but generally include providers, creators and participants (users). In addition to the main stakeholders, civil society, academia, government and policymakers may also be involved.¹

Depending on the role played by the stakeholder, they can be a data controller, data processor or personal data subject. According to the LGPD:

- a data controller is a private or public individual or legal entity that makes decisions regarding the processing of personal data;
- a data processor is a private or public individual or legal entity that processes personal data on behalf of a data controller; and
- a data subject is the individual to whom the personal data that is being processed relates (Article 5 items V, VI and VII).

Their activities are regulated by the LGPD and, in cases involving a consumer relationship, the Consumer Protection and Defence Code also applies.

Q 4. In relation to personal data, what are the data protection principles (eg, transparency) applicable to the metaverse? What are the most common types of infringement of data protection principles in the metaverse (eg, data minimisation) in your jurisdiction?

The LGPD sets out the data protection principles that apply to the metaverse whenever personal data is processed. These principles closely mirror the principles established by the GDPR, such as the processing of data for limited purposes, data minimisation, accuracy, transparency, integrity, confidentiality of the data, non-discrimination and accountability (Article 6). The LGPD does not establish any criminal sanctions for the infringement of personal data protection principles. It states that administrative penalties shall be imposed by Brazil's National Data Protection Authority (Autoridade Nacional de Proteção de Dados or ANPD) (Article 52). The penalties are:

1. a warning, accompanied by a specified timeframe for implementing corrective actions;
2. a fine of up to 2 per cent of the total revenue of a private legal entity, group or conglomerate in Brazil for the previous financial year, excluding taxes, or a daily fine, with both options capped at a maximum of BRL 50m (approximately US\$9.3m) per breach;
3. public disclosure of the breach once it has been duly investigated and confirmed;
4. temporary blocking of the personal data associated with the breach until the situation has been resolved; and
5. permanent erasure of the personal data related to the breach.

The LGPD further stipulates that any party responsible for causing material or moral harm as a result of breaching the data protection law, whether individual or collective, must compensate the affected party (Article 42). Recently, Brazil's Superior Court of Justice (Superior Tribunal de Justiça or STJ) rendered its inaugural decision concerning data controllers'

¹ 'Metaverse Privacy and Safety' (World Economic Forum, July 2023), see www3.weforum.org/docs/WEF_Metaverse_Privacy_and_Safety_2023.pdf, accessed on 22 February 2024.

liability relating to personal data breaches.² Among other issues, the Court determined that the mere occurrence of a breach does not grant the data subject the right to compensation for moral damages.

We are not aware of any local cases related to the infringement of data protection principles in the metaverse. However, the ANPD has become stricter in its statements about the importance of complying with the LGPD principles in general (eg, WhatsApp's 2021 privacy policy update case).

The Supreme Federal Court has also been relying on the LGPD's principles in recent rulings.

5. In relation to non-personal data, how is data sharing/licensing regulated in your jurisdiction? Is data ownership recognised? How is proprietary information, including any rights to datasets, regulated in your jurisdiction? What are the most common types of infringement of these rules in the metaverse (eg, unlawful use of proprietary information) in your jurisdiction?

There is no specific regulation on non-personal data in Brazil and we are not aware of any local cases related to non-personal data offences in the metaverse. In the context of data licensing or data sharing agreements, the Brazilian Civil Code applies when determining the requirements for the validity and enforceability of such contracts.

While the terms 'proprietary information' and 'trade secrets' are not explicitly defined in Brazilian law, certain actions that can be deemed to be unfair competition, such as the unauthorised disclosure, exploitation or use of confidential information, can constitute both a civil tort and a criminal offence (Articles 207, 209 and 195, items XI and XII of the Brazilian Industrial Property Law, Articles 186 and 927 of the Brazilian Civil Code, and Articles 223-A and 223-D of the Brazilian Consolidation of Labour Laws).

The Brazilian Copyright and Neighbouring Rights Law grants a database owner economic rights over it. It is worth noting that this right applies solely to the structure of the database, without prejudice to the copyright related to the content stored therein (Article 87).

The improper use of databases and unfair competition are subject to legal sanctions. Article 184 of the Brazilian Criminal Code specifies that three months to a year's imprisonment or a fine will apply for copyright violations, while Article 195 of the Brazilian Industrial Property Law provides for the same penalties for acts of unfair competition.

6. Are there any policies, strategies or regulations applicable to digital marketing in the metaverse in your jurisdiction?

There is no specific regulation on digital marketing in the metaverse in the region; however, several Brazilian laws and regulations are applicable to advertising more generally.

The Federal Constitution states that the manifestation of thought, creation, expression and information in any form, process or medium shall not be subject to any restriction. An exception is made in the case of commercial advertisement for tobacco, alcohol, pesticides, medications and therapies, which are subject to legal restrictions and must include, whenever necessary, warnings about the consequential harm related to its use (Article 220).

Law No 9,294/1996 sets out some restrictions related to alcoholic beverages, tobacco, medications and pesticides. In the event of an infringement, the following sanctions may apply: a warning, a fine, suspension of the advertisement for up to 30 days, an obligation to publish corrections or clarifications, seizure of the product advertised or the temporary suspension of television or radio programming where the advertisement was aired (Article 9). Decree Law No 3,688/1941 (Law of Misdemeanours) bans advertising on certain subjects (eg, abortion, lotteries, the unauthorised practice of a profession) and stipulates sanctions for each type of infringement.

² Superior Court of Justice (Second Panel) Case No 2130619/SP. Appellant: Eletropaulo Metropolitana Eletricidade de Sao Paulo SA. Appellant: Individual Rapporteur Francisco Falcão (7 March 2023).

In addition to statutory regulation, advertisement activity is also submitted to a self-regulation system involving market stakeholders, through the National Council for Advertising Self-Regulation (O Código Brasileiro de Autorregulamentação Publicitária or 'Conar'), outlined in the Brazilian Advertising Self-Regulation Code. Conar has already issued a ruling on a case in the metaverse involving the advertising of alcohol.³ The case was dismissed, as Conar was of the opinion that there was no breach of the advertising ethics rules.

The Consumer Protection and Defence Code establishes as basic rights of the consumer, protection from misleading and abusive advertising (Articles 6, IV and 67). Moreover, among other rules, it establishes that advertisements must be broadcast in such a manner that the consumer may easily and immediately recognise it as an advert (Article 36). Furthermore, the supplier/provider must store the factual, technical and scientific data that support the advertisement in case those with a legitimate interest request access to such information (Article 36, sole paragraph). The Consumer Protection and Defence Code criminalises these practices and stipulates sanctions for each type of infringement (Articles 67, 68 and 69).



7. Are there any policies, strategies or regulations in your region/country focused on ensuring protection of minors' data? What is the age of consent for data protection purposes? Is it necessary to verify the consent provided by a responsible adult?

The Federal Constitution is the most relevant legislative act that provides for minor's rights. It stipulates that the family, society and the state must ensure the protection of children, and that minors must be safeguarded from any and all forms of negligence, discrimination, exploitation, violence, cruelty and oppression (Article 227). The Brazilian Child and Adolescent Statute (Law No 8,069/1990) is the specific statutory law protecting children, including the inviolability of their physical, psychological and moral integrity (Article 17).

The LGPD states that the processing of personal data of children and adolescents shall be performed in their best interests (Article 14).

The consent of minors under the age of 12 to process their personal data shall be given by their parents or guardians. In this case, the data controller shall make all reasonable efforts to verify that the consent was given by the child's representative and shall disclose information about the types of data collected, the way the data is used and the procedures for exercising the data subject's rights (Article 14, paragraphs 1, 2 and 5). The participation of minors in games, internet applications or other activities shall not be conditional on the collection of personal data that is not strictly necessary for the activity (Article 14, paragraph 4).

Although the text of the LGPD is controversial, the ANPD has recently clarified that in addition to consent, other legal bases established in Articles 7 and 11 can be used for the processing of personal data of children and adolescents, as long as the best interests of the minor are always considered.

In addition, information on the processing of minors' data shall be provided in a simple, clear and accessible manner, taking into account the physical, perceptive, sensorial, intellectual and mental characteristics of the user (including audiovisual resources, when appropriate), in order to provide the necessary information to the parents or legal representative of the child and to ensure that it is appropriate for the child (Article 14, paragraph 6).

The Brazilian Regulatory Framework for the Internet sets out the rules regarding the exercise of parental control over content deemed inappropriate for children. It also determines that the government, along with the internet service provider, the provider of intermediary services and civil society shall foster education and good practices for the digital inclusion of children and adolescents (Article 29).

³ National Council for Self-Regulation of Advertising (Second Panel) Case No 184/22. Plaintiff: Conar. Defendants: Diageo Brasil and Sabrina Sato Rapporteur Márcia Esteves (December 2022).

Q 8. How are international data transfers regulated in your jurisdiction? Is there any case law or are there any decisions by a regulator regarding infringements of these rules in your jurisdiction?

The LGPD states that an international data transfer may take place for the purposes listed in Article 33. These are:

1. when an adequacy decision has been issued by ANPD in favour of the recipient country;
2. related to the existence of:
 - (i) contractual clauses for a given transfer;
 - (ii) standard contractual clauses;
 - (iii) global corporate rules or regularly issued stamps; and
 - (iv) certificates and codes of conduct;
3. to comply with international law in the case of international cooperation between public intelligence, investigative and prosecutorial agencies;
4. to protect the life or physical safety of the data subject or of a third party;
5. when the national authority authorises the transfer;
6. when the transfer results in a commitment undertaken through international cooperation;
7. when the transfer is necessary for the execution of a public policy or act of public service competence;
8. when there is specific and express consent of the data subject for the transfer, duly informed about the international nature of the operation;
9. in order to comply with a legal or regulatory obligation of the data controller;
10. for the execution of a contract or preliminary procedures related to a contract of which the data subject is a party, at the request of the data subject; or
11. for the regular exercise of rights in judicial, administrative or arbitration proceedings.

Please note that some legal bases, such as the ones established in items (1), (2) and (5), are not yet valid options to legitimate a cross-border data transfer, as they are dependent on the ANPD issuing further regulation.

Brazil's courts have not issued any relevant decisions on international data transfers. The ANPD has not yet ruled on any cases on the matter.

Q 9. How is automated decision-making regulated in your jurisdiction? Is there any case law or are there any decisions by a regulator regarding infringements of the rules applicable to automated decision-making in your jurisdiction?

A data subject has the right to request the review of decisions taken solely based on the automated processing of personal data that affects their interests, including decisions with the aim of defining the data subject's personal, professional, consumer or credit profile or aspects of the data subject's personality (LGPD, Article 20). Contrary to the GDPR, the LGPD does not require 'human intervention'.

Whenever requested, the data controller shall provide clear and adequate information regarding the criteria and procedures used for the automated decision, without prejudice to commercial and industrial secrecy. If the data controller does not provide such information, the ANPD may carry out an audit to verify discriminatory aspects in the automated processing of personal data.

Judges in Brazil have already issued a few decisions relating to the deactivation of user accounts on Facebook. In one such decision, the judge held the defendant liable as it did not provide 'clear and adequate information regarding the criteria and procedures used for automated decision-making'.⁴

Brazilian courts have also issued decisions related to ride-hailing application services (including Uber). In one such decision, the judge clarified that according to the LGPD, the review of decisions made solely based on the automated processing of personal data does not need to be conducted by an individual.⁵

The ANPD has not yet issued a decision in any cases involving automated decision-making.



10. What rights are granted to individuals in regard to protecting their rights on the metaverse and how can they exercise them? What is the level of enforcement based on private claims in your jurisdiction?

As addressed in the response to Question 1, all Brazilian laws and regulations are potentially applicable to the metaverse. Although there is no specific law on the subject, existing legislation such as the Brazilian Federal Constitution, the Brazilian Data Protection Law and other sectoral laws are applicable and enforceable.

When it comes to criminal law, however, a few unique aspects need to be taken into account. The principle of legality establishes that no one shall be found guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence at the time when it was committed (Article 5, section XXXIX of the Brazilian Constitution). According to that principle, an offence must be clearly defined in the law. If it is not the case, the law must be amended so that such conduct also becomes a criminal offence in the metaverse.

Efforts to enforce laws within the metaverse are currently underway. In 2022, the Ministry of Justice and Public Security (MJSP) and the police conducted a search and seizure warrant in the metaverse. The procedure was carried out as part of a collaborative operation (*Operação 404*) aimed at dismantling websites and internet applications involved in piracy and copyright infringement. According to news reports, out of the many apps targeted, 300 were programmed to steal users' personal data, such as banking information, passwords, pictures and email addresses.⁶



11. Are there any upcoming policies, strategies or regulations that will impact the use of data on the metaverse?

There is a Bill of Law, which aims to establish principles applicable to the metaverse, such as privacy and data protection, while also providing rules and guidelines for the metaverse, including those governing the entering into contracts and other legal acts within this environment.⁷ However, there is no indication that the National Congress of Brazil intends to prioritise passing this bill in the near future.

4 Court of Justice of São Paulo Case No 1020259-93.2023.8.26.0001. Plaintiff: Individual. Defendant: Facebook Serviços Online do Brasil Ltd. Judge Violeta Miera Arriba (31 July 2023).

5 Labour Court of Goiânia Case No 0010860-28.2023.5.18.0002. Plaintiff: Individual. Defendant: Uber do Brasil Tecnologia Ltd. Judge Ronie Carlos Bento de Sousa (28 November 2023).

6 'For the first time, a Brazilian court serves a search and seizure warrant in the metaverse' (Exame, 29 June 2022), see <https://exame.com/future-of-money/pela-primeira-vez-justica-brasileira-cumpre-mandado-de-busca-e-apreensao-no-metaverso>, accessed on 22 February 2024.

7 Bill of Law No 2175 (2023).

Cybersecurity

Alan Campos Elias Thomaz *Campos Thomaz, São Paulo*

Juliana Sene Ikeda *Campos Thomaz, São Paulo*

Filipe Starzynski *Campos Thomaz, São Paulo*

1. Are there any cybersecurity policies, strategies or regulations applicable to the metaverse in your jurisdiction?

Although there is no specific regulation for cybersecurity in the metaverse, there are several regulations that can be applied to guarantee user security in this digital environment, as follows:

- the Brazilian Civil Rights Framework for the Internet (Marco Civil da Internet or MCI, Law No 12,965/2014), which determines the principles, guarantees, rights and duties for internet use in Brazil. This law also defines the civil liability of internet service providers and internet users;
- the General Data Protection Law (Lei Geral de Proteção de Dados or LGPD, Law No 13,709/2018), which establishes rules for the processing of personal data, including in the digital environment. The law also creates the National Data Protection Authority (ANPD), which is responsible for overseeing compliance with the LGPD;
- the Cybercrime Law (Law No 12,737/2012), which establishes the definition of cybercrimes, such as hacking into a computer device, intercepting data and disseminating false information, and which amends the Penal Code;
- the National Cybersecurity Policy (Decree No 11,856/2023), which is intended to guide cybersecurity activities in Brazil; and
- the National Plan for the Internet of Things (Decree No 9,854/2019), which aims to implement and develop the Internet of Things in Brazil in compliance with the data security and data protection guidelines.

In addition to the general laws detailed above, there are laws regulating cybersecurity issues in specific sectors, such as finance, insurance, health, automotive and other sectors.

2. What are the secure-by-design principles applicable to the metaverse in your jurisdiction?

Generally, organisations might face liability if harm is caused due to a lack of care in protecting physical and digital systems. Therefore, applying a precautionary approach might be recommended to avoid liability from a cybersecurity standpoint. Also, according to the LGPD and other laws, organisations should implement technical and organisational measures to avoid a data incident. Being proactive rather than reactive is an important requirement in dealing with personal data.

Q 3. Have there been any cyber incidents in the metaverse in your jurisdiction? How do the applicable policies, strategies or regulations react to cyber incidents?

We are not aware of any relevant cyber incidents affecting the metaverse. Moreover, specific laws might apply and reporting obligations to relevant authorities would be triggered if there was an incident leading to harm to the affected individuals. The applicable sanctions vary from warnings, monetary penalties and a ban on handling data and accessing systems in the metaverse. There have been many court decisions and administrative investigations in Brazil dealing with cybersecurity incidents.

Q 4. Are there any cybersecurity standards in your jurisdiction specifically applicable to the metaverse? What are the main obligations they set out?

Currently, there are no cybersecurity standards specifically applicable to the metaverse in Brazil. However, the courts and laws have established that taking proactive measures to avoid a data incident might mitigate the risk of penalties. Therefore, by implementing a metaverse project, which includes a robust governance programme and the adoption of leading security standards, such as International Organization for Standardization (ISO) standards, the risk of penalties would be reduced.

Q 5. Are there any upcoming policies, strategies or regulations that will impact cybersecurity in the metaverse?

No.



Interoperability and digital identity

Elysangela Rabelo *Rabelo Law, São Paulo*

Giulio Gatti *Rabelo Law, São Paulo*

Q 1. Are there any interoperability policies, strategies or regulations applicable to the metaverse in your jurisdiction?

As the metaverse tends to replicate and expand upon social interactions of the physical world, the relevant laws and regulations already in place are applicable as well. Nonetheless, the enforcement of laws and regulations in a digital environment may face unique challenges: legal innovations may be required to tackle those challenges.

Decree No 10,046/19, which provides for the data sharing governance in the federal administration, the Citizen Base Register and the Central Data Governance Committee, defines interoperability as the 'ability of different systems and organisations to work together to ensure that people, organisations and computer systems exchange data'.

However, a single comprehensive law governing the metaverse or its interoperability has not been enacted in Brazil.

Q 2. What are the challenges to implement metaverse interoperability in in your jurisdiction? Are digital identities an effective way for the data subject to exercise self-determination in your jurisdiction?

Although many data protection laws throughout the world emphasise the users' informational self-determination,⁸ a metaverse that requires constant data sharing is a significant data protection challenge in each step of the process, such as the definition of the controller or processor, the respective scope of the data, processing limits, liabilities and compensation for damages, among others.

One of the most relevant topics is the development of a unique user identification and authentication protocol (a digital ID) across platforms. A digital ID would be possible within an interoperable metaverse, in which the user would not be required to create multiple avatars, logins and authentication methods but instead would hold a single identification that several vendors and platforms could use to authenticate and secure their respective information.

Such digital ID could be used to:

- distinguish each individual user from its metaverse counterpart;
- improve the convenience of different products and services available;
- log individual information; and
- provide companies with broader ways to collect and process data on the behaviour, interests and characteristics of each customer.

However, there are certain challenges to be overcome:

- *Open-source versus closed-sourced software approaches*: in which open source is a 'software that is available in source code form, can be modified by users, and can be redistributed even in modified form without paying the original owners';⁹ whereas with 'closed source software, only the firm developing the software can provide the support.'¹⁰

8 Fernando Eduardo Serec, *Metaverso: Aspectos Jurídicos 2022* (Grupo Almedina, 2022), 67.

9 Dirk Riehle, 'The single-vendor commercial open course business model' (2012) *Information Systems and e-Business Management* 10(1):5-17 < <https://link.springer.com/article/10.1007/s10257-010-0149-x> > accessed on 16 February 2024.

10 *Ibid.*

- *Data inconsistency*: in which the same data collected from one or more sources are kept in different databases and do not match with each other, resulting in duplicates, incomplete or erroneous information.
- *Lack of compatibility*: each party may display their own standard for their systems, whether open-source or closed-source, that are not compatible with each other.
- *Maintenance of systems*: standards and systems may not have similar levels of maintenance and updates throughout the years, further hindering the capacity to be interoperable with each other.

However, there is no technical protocol for a unique digital ID yet, for example, and each company relies on its own proprietary code.

If we want the metaverse to become a revolutionary reality in the future, a seamless interaction between different platforms essential, so that users may be able to transit amongst platforms within the metaverse, be it to use, add, modify or migrate assets from one technology to another. Therefore, interoperability is an essential factor to be addressed so the metaverse can become the virtual world it is intended to be.

3. How is interoperability implemented in your jurisdiction? Is there any case study regarding successful interoperability development in your jurisdiction?

In Brazil, an interesting case study of implemented data interoperability can be found within the banking industry. As the authority responsible for the approval and monitoring of financial institutions, Brazil's Central Bank (BCB) holds the authority to enforce the regulatory compliance of the sector¹¹ and has taken the lead within the banking sector to implement its open finance policy and infrastructure, of which interoperability is a key success factor.¹²

The regulatory strategy carried out by BCB invited participant institutions to discuss regulatory proposals¹³ to develop the governance, mitigation of conflicts of interest and sustainability of the initiative, to set forth schedules for participants to complete, and to establish a convention to be signed by and between participants to adhere to the technological and operational standards negotiated therein, as well as BCB's oversight of the convention to ensure regulatory compliance.¹⁴

The regulatory-driven model conducted by BCB can be seen as an example of a successful implementation of interoperability within a complex industry, insofar that a succeeding initiative aims to include interoperability with the insurance sector as well.¹⁵

Although spearheaded by a government authority and applicable to a previously approved pool of participants, BCB's open finance case can be studied to identify certain key principles or best practices to ensure that an interoperability initiative can be successfully implemented in other contexts.

11 Law no 4,595, 31 December 1964: Establishes the Monetary, Banking and Credit Policy and Institutions, Creates the National Monetary Council and makes other provisions, published by the *Federal Official Gazette* on 31 December 1964.

12 Joint Resolution BCB no 1, 4 May 2020: Regulation on Open Banking, published by the *Federal Official Gazette* on 5 May 2020.

13 Public Consultation BCB no 73/2019: Publicises proposed normative acts on the implementation of the Open Financial System (Open Banking).

14 Joint Resolution BCB no 1, 4 May 2020: Regulation on Open Banking, published by the *Federal Official Gazette* on 5 May 2020

15 'Open Finance' (BCB, 2024) see www.bcb.gov.br/estabilidadefinanceira/openfinance, accessed 16 February 2024



Q 4. What are possible strategies to achieve metaverse interoperability in your jurisdiction?

We note two main strategies to achieve metaverse interoperability:

Fostering through public policy

It is not feasible to assume that the development of standards or its wide acceptance can be solved in any scenario exclusively by the private sector, which is why the intervention of the government through public policies could be a tool to foster standards in necessary areas.

In BCB's case, the incentive to achieve interoperability was twofold: (1) from the regulatory perspective, there was the obligation established to improve the network infrastructure of regulated institutions, as well as the government's systems efficiency, and (2) from the user's perspective, the aim to enhance users' experience, transparency and data security.

Nevertheless, the main takeaway is that the regulatory-driven model used by BCB before, during and after the normative action, fostered an environment of collaboration and transparency among all parties involved, which achieved its objective.

Such an approach resulted in an improvement of the existing standards while allowing the technical groups to negotiate among themselves the technological and operational standards, along with BCB's oversight actions to ensure compliance and sustainability from the beginning.

In the context of data protection, such regulatory-driven initiative is foreseen in LGPD, as the National Data Protection Authority (ANPD) holds the authority to regulate interoperability standards regarding portability, free access to data and security,¹⁶ for example.

A regulatory-driven model could also diminish risk of monopolies and foster competition, by preventing big companies from forcing their own proprietary standards onto developers to maintain their business practices.¹⁷

Economic feasibility

Even if fostered through public policy, the interest in improving interoperability can be encouraged so long that a return on investment can be attained as well. Otherwise, each party could simply opt for its own individual standard.

The value added by the convenience or unique experience provided through interoperability could become an advantage over competitors. Such strategy can be noticed within the industry by the development of organisations focused specifically on standards to foster the metaverse, for example, the Metaverse Standards Forum (MSF) and the Open Metaverse Interoperability Group (OMI).

In conclusion, similar to how the internet (which was not interoperable early on¹⁸) changed business models throughout the years, one can assume that the metaverse might also evolve into an interoperable structure to satisfy the market growth and users' demands.

¹⁶ Law no 13,709, 14 August 2018: General Data Protection Law (LGPD), published by the *Federal Official Gazette* on 15 August 2018

¹⁷ Tambiana Madiega, Polona Car, Maria Niestadt and Louise Van De Pol, 'Metaverse: Opportunities, risks and policy implications' (EPRS: European Parliamentary Research Service), 3, see www.europarl.europa.eu/cmsdata/268589/eprs-briefing-metaverse_EN.pdf, accessed 14 February 2024

¹⁸ Matthew Ball, *The metaverse: and how it will revolutionize everything* (Liveright Publishing Corporation, a division of WW Norton & Company, 2022), 130



5. Are there any upcoming policies, strategies or regulations that will impact metaverse interoperability in your jurisdiction?

As the metaverse tends to replicate and expand upon social interactions of the physical world, the relevant laws and regulations already in place shall be applicable as well. There have not been many bills proposed to govern the metaverse or its interoperability in Brazil.

We note Bill of Law 2,175/23, which provides for the regulatory framework of the metaverse and establishes principles, guidelines and standards for the use and conduct of legal business in virtual environments. The Bill proposes intends to, among other things:

- protect freedom of expression;
- promote digital inclusion and accessibility;
- foster technological innovation; and
- foster cooperation between public and private entities and civil society in the metaverse development.



AI in the metaverse

Alan Campos Elias Thomaz *Campos Thomaz, São Paulo*

Juliana Sene Ikeda *Campos Thomaz, São Paulo*

Filipe Starzynski *Campos Thomaz, São Paulo*



1. Are there any policies, strategies or regulations applicable to AI or the use of AI in the metaverse in your jurisdiction?

While there is currently no specific legislation in Brazil on artificial intelligence (AI) or its use in the metaverse, certain laws and regulations may be applicable, such as:

- the Brazilian Artificial Intelligence Strategy (EBIA) (MCTI Ordinance No 4,617/2021 (amended by MCTI Ordinance No 4,979/2021), issued by the Ministry of Science, Technology and Innovation (MCTI), defines the objectives and guidelines for the development and use of AI in Brazil. The strategy includes principles on ethics, transparency, responsibility and inclusion;
- the National System for Digital Transformation (SinDigital) (Decree No 9,319/2018 and MCTI Ordinance No 1,556/2018), comprises the Strategy for Digital Transformation (E-Digital), which aims to stimulate research, development and innovation as a way of fostering Brazil's digital transformation;
- the Technological Innovation Law (Law No 10,973/2004), which establishes measures to encourage innovation in scientific and technological research. This law provides the foundations for organising various players within the AI sector and it is a crucial ally in the advancement of technology in Brazil, particularly in AI applications for the public sector, by directing resources towards research and development;
- the Brazilian Civil Rights Framework for the Internet (Law No 12,965/2014), which establishes principles, guarantees, rights and duties for the use of the internet in Brazil. Considering that AI applications generally require an internet connection and that there are AI applications focused on the network environment, certain requirements provided in the law are applicable to the development of AI tools. Additionally, the principles established by this law provide interpretive guidance for the use of AI on the internet; and
- the General Data Protection Law (LGPD) (Law No 13,709/2018), which establishes rules for the processing of personal data, including in the digital environment. This law has direct implications for AI, as many applications rely on personal data, which are protected under the LGPD.



2. How is transparency and accountability related to AI ensured in your jurisdiction?

Although there are no specific regulations on AI or the metaverse, the misuse of AI can lead to accountability and the imposition of sanctions, as supported by other laws:

- The Civil Code (Law No 10,406/2002), which establishes rules of civil liability, including for damages caused by products and services. These rules may be applied to hold developers and users of AI systems accountable for damage caused, potentially requiring them to pay compensation to those harmed. This ensures legal protection to address adverse consequences resulting from algorithmic decisions or AI system failures.
- The Consumer Protection Law (CDC) (Law No 8,078/1990), which sets out specific rules for consumer protection that can be applied to protect consumers from AI systems in case of poor service provision. The CDC ensures that products and services using AI meet quality and safety standards, protecting consumers from abusive practices and potential harm. The CDC also provides several rules regarding the need for

transparency and clarity in connection with services and products marketed to consumers. This implies that the use of AI within the business-to-consumer (B2C) market cannot be hidden.

- The Criminal Code (Decree Law No 2,848/1940), according to which criminal liability in cases involving AI presents challenges related to culpability and intent. In Brazil's legal system, criminal liability is subjective, requiring proof of fault or intent by the agent. However, in situations involving AI, it may be difficult to attribute fault to an autonomous system. Therefore, it is crucial to assess human involvement in the creation, control and monitoring of AI, as well as the existence of intentional unlawful conduct by individuals responsible for the system. In such cases, the sanction will depend on the crime caused by the use of AI.
- The LGPD establishes rules for the processing of personal data, including those collected by AI systems. It ensures the right to privacy, transparency and non-discrimination. The National Data Protection Authority (ANPD) is responsible for the protection, implementation and enforcement of this law. In cases involving both AI and personal data, the ANPD can impose sanctions and penalties ranging from a warning, a fine of up to 2 per cent of company revenue (capped at BRL 50m), to the requirement to implement data blocking. The ANPD is also an active participant in supervising AI use and regulation in Brazil.
- Bill of Law No 2,338/2023 aims to be a comprehensive law on AI use and development in Brazil and it is still under discussion. If approved, there is a trend towards regulating the liability for damages resulting from the use of AI systems in a joint manner, so that all the parties involved in such use shall be liable for its performance and results.

3. How is algorithmic bias mitigated in your jurisdiction? Are there any policies, strategies or regulations aimed at promoting fairness and non-discrimination?

There are no specific laws or rules relating to algorithmic bias. Criminal laws against discriminatory actions may be applied, but we do not foresee any criminal accountability in this regard. However, if the technology is judicially recognised as discriminatory, civil compensation (indemnification) may be applicable.

4. What is intellectual property law treatment of AI-generated content used in the metaverse in your jurisdiction? Who are the rightsholders of that content?

The laws and regulations surrounding intellectual property (IP) do not specifically address the issues arising from AI-generated content, even less so in the context of the metaverse.

The matter of proprietary IP rights regarding AI-generated content is not settled in Brazil. There is also no case law regarding this matter. For the time being, contractual rules between AI creators and system operators should be effective.

5. Which stakeholders are liable for any damage caused to third parties due to the use of AI in the metaverse? What sanctions (civil, criminal, administrative) may apply in the case of infringement?

Local laws and regulations do not address the use of AI in the metaverse. There is also no case law on this specific matter. Nevertheless, based on the aforementioned laws (the Civil Code, CDC and Criminal Code) AI developers and manufacturers, as well as system operators and users, may be held liable.



6. Are there any upcoming policies, strategies or regulations that will impact AI in your jurisdiction?

Yes. As previously described, there are certain AI policies, strategies and regulations that can be applied to AI and its use in the metaverse.

There are also several bills on AI: PL 5051/19, PL 5691/19, PL 21/20, PL 872/21, PL 2338/23 and PL 3592/23. All of these texts are currently being jointly analysed by the Temporary Internal Committee on Artificial Intelligence in Brazil (CTIA) within the Federal Senate.

Human rights, accessibility and digital ethics

Larissa Galimberti *Pinheiro Neto, São Paulo*

1. Are there any human rights, accessibility and digital ethics strategies, policies or regulations applicable to the metaverse in your jurisdiction?

There are no human rights, accessibility and digital ethics strategies, policies or regulations applicable specifically to the metaverse in Brazil. On 26 April 2023, Bill of Law No 2,175/2023 was proposed by Federal Deputy Rubens Pereira Júnior before the House of Representatives, and the Bill is currently subject to review by the Committee on Science, Technology and Innovation of the House of Representatives. It aims to regulate the principles, rules and transactions applicable to the metaverse (a total of seven articles). There are also other bills of law under discussion related to the metaverse before the Senate. For example, Bill of Law No 261/2024, which proposes changes to Brazil's Criminal Code to provide for a new type of crime: 'causing psychological or emotional harm to others, through the practice of violent and cruel acts carried out in a virtual reality environment'.

In addition to these bills of law, there are more than 80 bills of law before the National Congress relating to aspects of AI regulation, of which Bill of Law No 2338/2023 is the most relevant to date.

Please refer to the responses to subsequent questions for further information on the regulations related to human rights.

2. Considering the various health risks associated with the metaverse and related technologies, are there any strategies, policies or regulations in your jurisdiction aimed at protecting public health?

There are several strategies, policies and regulations aimed at protecting public health in Brazil, but these are not specifically related to the metaverse. Health is protected under the Constitution of the Federative Republic of Brazil; the Criminal Code; federal, state and local laws; and regulations issued by the National Health Council and the National Health Surveillance Agency (Agência Nacional de Vigilância Sanitária or ANVISA); among others.

Overview

The Federal Constitution establishes 'health' as one of the social rights of Brazil (Article 6). Section II of the Constitution is concerned with the protection of 'health' and states that everyone in Brazil has the right to health, with Brazil being responsible for ensuring such right through social and economic policies that aim to reduce the risk of disease and other injuries, and provide universal and equal access to actions and services for their promotion, protection and recovery (Article 196).

Brazil ensures the right to health through its Unified Health System (Sistema Único de Saúde or SUS), which is responsible for providing comprehensive healthcare to all its citizens, regardless of their income or social status. The SUS is responsible for a wide range of health services, including primary care, specialised care, hospital care and emergency care, as well as for providing preventative and promotional health services, such as vaccination campaigns and health education programmes.

Health actions and services, provided by public or private entities of any kind, are regulated by Law No. 8,080/1990, which defines the responsibilities of SUS, as well as federal, state and local governments, in relation to public health. Another relevant piece of regulation is Law No. 9,782/1999, which established the national health surveillance system and created ANVISA. ANVISA is the regulatory body in Brazil responsible for promoting the protection of the population's health, through the sanitary control of the production and commercialisation of products and services subject to sanitary



surveillance, including environments, processes, inputs and technologies related to them, and the control of ports, airports and borders. Although none of the previously mentioned legislation explicitly refers to the use of a technology for health purposes in the metaverse, depending on the technology the device would need to be notified and/or licensed by ANVISA in order to be commercialised in Brazil.

Sanctions

The infringement of health-related rights may result in either criminal, administrative or civil liability, but again none of these offences are specific to an illegal act involving the use of the metaverse.

The Criminal Code (Law No 2,848/1940) lists health-related crimes, which includes: the crime of causing an epidemic through the propagation of pathogenic germs (Article 267); the crime of poisoning fresh water (Article 270); and the crime of manufacturing, selling, exhibiting for sale, keeping in storage for sale or, in any way, delivering for consumption anything or any substance harmful to health, even if not intended for consumption or medicinal purposes (Article 278).

The infringement of these rights by a government employee, during their term or in violation of their attributions, may result in administrative sanctions. The infringement of health-related rights may also result in civil liability, such as when such actions provoke moral damages.

Decisions

There have been numerous health-related decisions in Brazil. For example, the Brazilian Federal Supreme Court ruled on 2021 that Brazil has the duty to provide, in exceptional circumstances, medicine that, although not registered with ANVISA, is authorised by the health surveillance agency, provided that the patient's economic incapacity, the clinical indispensability of the treatment and the impossibility of a replacement are proven.¹⁹



3. Considering the various discrimination risks associated with the metaverse and related technologies, are there any strategies, policies or regulations in your jurisdiction aimed at ensuring non-discrimination?

There are several strategies, policies and regulations aimed at ensuring non-discrimination in Brazil, but none of them specifically relate to the metaverse environment. This matter is regulated through the Federal Constitution; federal, state and local laws; the Criminal Code; and international treaties, among others.

Overview

One of the fundamental objectives of the Federal Constitution is ensuring the wellbeing of all, without prejudice to origin, race, sex, colour, age or any other form of discrimination (Article 3, IV). Article 5, XLI, of the Federal Constitution further establishes that the law shall apply a penalty to any discrimination that undermines fundamental rights and freedoms.

Brazil is a member of the Organisation of American States (OEA) and is party to the American Convention on Human Rights, 1969. Through such document, Brazil undertakes to guarantee the free and full exercise of all rights and freedoms granted by the American Convention on Human Rights to every person subject to their jurisdiction, without discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national or social origin, economic position, birth or any other social condition.

Sanctions

The Anti-Racism Law (Law No 7,716/1989) and the Criminal Code (Law No 2,848/1940) sets out important provisions on non-discrimination and provides a series of sanctions for those who commit acts of discrimination.

For example, the first article in the Anti-Racism Law establishes that any form of discrimination (either by race, skin colour, ethnicity or religion) will be punished by law, while the Criminal Code provides that criminally actionable insults based on a person's condition are punishable with longer prison sentences compared to insults that are non-discriminatory (Article

¹⁹ Federal Supreme Court RE 1165959/SP; Supreme Court Justice Marco Aurélio. Trial on 18 June 2021.

140, section 3º). The Criminal Code also establishes that acts such as restricting, preventing or hindering the exercise of political rights by any person due to their sex, race, colour, ethnicity, religion or national origin shall be criminally punishable (Article 359-P).

Apart from the sanctions established by the Criminal Code and the Anti-Racism Law, acts of discrimination may also result in civil liability, such as when a discrimination-related offence affects a minor's personality rights and their image because, in this case, moral damages may be applicable.

Decisions

There have been numerous decisions on discrimination in Brazil. For example, the Brazilian Federal Supreme Court ruled in 2021 that the crime defined in Article 140, section 3º, of the Criminal Code is imprescriptible and applies to insults based on elements associated with those defined as race, colour, ethnicity, religion or origin.²⁰



4. Considering the risks to the freedom of expression and censorship associated with the metaverse, are there any strategies, policies or regulations in your jurisdiction aimed at mitigating them/promoting the freedom of expression and non-censorship?

There are several strategies, policies and regulations in Brazil aimed at promoting the freedom of expression and non-censorship, but none of these specifically relate to the metaverse. This matter is regulated by the Federal Constitution, federal laws and international treaties, among others.

Overview

The Federal Constitution establishes the fundamental right to: (1) the expression of thoughts (Article 5, IV) and (2) the expression of intellectual, artistic, scientific and communication activity, regardless of censorship or licence (Article 5, IX). Chapter V of the Federal Constitution focuses on 'social communications' and establishes that the disclosure of thought, creation, expression and information, in any form, process or vehicle, shall not suffer any restriction, and that any and all censorship of a political, ideological and artistic nature is prohibited (Article 220, section 2º).

As mentioned above, Brazil is subject to the American Convention on Human Rights, 1969. This document states that Brazil commits to ensuring the freedom of thought and the freedom of speech, and that these rights will not face any prior censorship or restrictions (event indirectly).

Sanctions

Some acts related to the freedom of expression may also result in civil liability, such as when such an act violates a third party's image or reputation as, in this case, moral damages may also be applicable.

Decisions

There have been numerous decisions on the freedom of speech in Brazil, such as the *Ellwanger* case, but none of them relate to the metaverse. The Brazilian Federal Supreme Court ruled in 2003 that Siegfried Ellwanger, an author of books that put forward discriminatory ideas against the Jewish community, was found guilty of crimes of racism despite his right in terms of freedom of speech, as such a right is not absolute in Brazilian law, especially when freedom of speech encroaches on criminal illegality.²¹

20 Federal Supreme Court HC 154248/DF; Supreme Court Justice Edson Fachin. Trial on 28 October 2021.

21 Federal Supreme Court HC 82424/RS; Supreme Court Justice Moreira Alves. Trial on 17 September 2003.



5. Considering the risks of misinformation and the risks associated with fake news and deepfakes in the metaverse, are there any strategies, policies or regulations in your jurisdiction aiming to mitigate them/promote freedom of expression and non-censorship?

There are no specific strategies, policies or regulations in Brazil that consider the risks of misinformation and the risks associated with fake news and deepfakes in the metaverse. Before the National Congress, there is a specific Bill of Law No 2,630/2020 (the 'Fake News Bill'), which aims to regulate these platforms in Brazil, including fake news. However, this Bill of Law does not apply specifically to the metaverse.

Overview

The Criminal Code lists crimes related to misinformation (more details below).

Additionally, the Fake News Bill (Bill of Law No 2,630/2020), regarding standards relating to the transparency of social networks and private messaging services, is currently being discussed by the Brazilian National Congress. The first draft of the bill establishes several obligations for service providers regarding transparency and the prevention of the dissemination of fake news. The Fake News Bill also states that such service providers are civilly, criminally and administratively liable if they infringe the bill's provisions.

The Artificial Intelligence Bill (Bill of Law No 2,338/2023) is another upcoming piece of regulation that aims to regulate such matters. The first amendment to the bill establishes that all operators of AI systems that generate content must authenticate and watermark the content to clearly label it as AI-generated content (Article 14). It also provides that the competent authority will develop best practices and standards for the detection of AI-generated content and the authentication of official content, as well as establish guidelines for content authentication and watermarking in order to label AI-generated content clearly.

Sanctions

The Criminal Code establishes as a crime slandering someone by falsely attributing a crime to them (Article 138).

Decisions

There have been several decisions regarding misinformation. For example, the Brazilian Supreme Court of Justice ruled in 2023 that the constitutional protection concerning freedom of expression does not extend to those who disseminate fake news, and that it is the judiciary's role to punish and repress those who create and/or disseminate fake news.²²



6. Are there any strategies, policies or regulations in your jurisdiction aimed at ensuring accessibility and inclusion in the metaverse? How are they enforced?

There are no policies, strategies or regulations in Brazil focused on ensuring accessibility and inclusion, and none specifically relating to the metaverse.

The Statute on Persons with Disabilities (Law No 13,146/2015) establishes that accessibility is mandatory on websites for use by people with disabilities, guaranteeing their access to available information, in accordance with the international best practices and guidelines on accessibility (Article 63).

Brazil is also a party to the International Convention on the Rights of Persons with Disabilities and its Optional Protocol from 2007. The Convention establishes that all countries must take appropriate measures to promote access by persons with disabilities to new information and communication systems and technologies, including in relation to the internet (Article 9.1).

For more information, please refer to the response to Question 3 on non-discrimination.

7. Are there any policies, strategies or regulations in your jurisdiction focused on ensuring the protection of minors on the metaverse?

There are no policies, strategies or regulations in Brazil focused on ensuring the protection of minors specifically on the metaverse. However, there are several strategies, policies and regulations aimed at protecting minors. This matter is regulated through the Federal Constitution, federal laws, international treaties and regulations by specific regulatory bodies, among others.

Overview

The Brazilian Statute of the Child and Adolescent (Law No 8,069/1990, Estatuto da criança e do adolescente or ECA) provides a series of rights to minors, further establishing that it is everyone's duty to safeguard the dignity of children and adolescents (Article 18 of the ECA). The ECA establishes rights such as to life and health (Article 7), freedom of speech (Article 16, II), freedom of belief (Article 16, III) and the inviolability of physical, mental and moral integrity, as well as the preservation of image, identity, autonomy, values, ideas and beliefs, personal spaces and objects (Article 17).

As mentioned previously, Brazil is party to the American Convention on Human Rights, 1969. This document states that Brazil commits to ensuring that every child has the right to the protection measures that their status as a minor requires from their family, society and the state.

Additionally, Bill of Law No 2,628/2022, relating to the protection of children and adolescents in digital environments, is currently being discussed by the Brazilian National Congress and is expected to be voted on by the end of 2024. The first draft of the bill establishes that it applies to all information technology products or services aimed at or likely to be accessed by children and adolescents, regardless of its location, development, manufacturing, offering, marketing and operation. The bill provides obligations relating to children and adolescents' privacy, parental control, monitoring and publicity, among others.

Sanctions

The ECA also lists various types of crimes against minors, such as producing, reproducing, directing, photographing, filming or recording, by any means, an explicit or pornographic sex scene involving a child or adolescent (Article 240), and administrative offences, such as disclosing, without due authorisation, by any means of communication, the name, act or any documents from the police or concerning administrative or judicial proceedings relating to a child or adolescent (Article 247).

Infringements of children's and adolescents' rights may also cause civil liability, such as when an offence affects a minor's personality rights and their image as, in this case, moral damages may be applicable.

Decisions

There have been several decisions regarding infringements of the ECA and other rights granted to children and adolescents in Brazil. For example, the Brazilian Federal Supreme Court ruled in 2015 that the federal courts are responsible for prosecuting and ruling on crimes consisting of making available or acquiring pornographic material involving children or adolescents (ECA, Articles 241, 241-A and 241-B), when committed through the internet.²³

8. Are there any policies, strategies or regulations in your jurisdiction focused on ethics-by-design on the metaverse? How are these rules enforced?

There are no policies, strategies or regulations in Brazil focused on ensuring ethics-by-design on the metaverse.

23 Federal Supreme Court RE 628624/MG; Supreme Court Justice Marco Aurélio. Trial on 29 October 2015.



However, the first draft of the Artificial Intelligence Bill (Bill of Law No 2,338/2023) establishes that the administrative sanctions applicable to those who violate the provisions of the bill may be reduced if the agents demonstrate the adoption of mechanisms and internal procedures capable of minimising risks, which includes the effective implementation of a code of ethics (Article 36, section 1º, VIII).



9. Are there any upcoming policies, strategies or regulations that will impact human rights, accessibility and digital ethics requirements in your region/country?

There are several upcoming policies, strategies and regulations impacting human rights, accessibility and digital ethics requirements in Brazil. Please refer to the answers above for more information on relevant upcoming bills.

Competition law

Guilherme Ribas *TozziniFreire, São Paulo*

Ciro Alvarenga *TozziniFreire, São Paulo*

1. Are there any competition strategies, policies or regulations applicable to the metaverse in your jurisdiction?

As the metaverse project is in its early stages, Brazil currently lacks specific competition strategies, policies and regulations directly applicable to it. Nevertheless, companies considering using the metaverse for their businesses – especially those suspecting that any of their projects could slightly restrict competition in Brazil – should pay special attention to Brazil's regulatory framework, especially the provisions set out in the Brazilian Competition Law (Law No 12,529/2011 or the BCL). General aspects of the the BCL are detailed below.

In the absence of specific regulations for the metaverse (*ex ante*) and based on the provisions established in the BCL, the Brazilian Competition Authority (Conselho Administrativo de Defesa Econômica or CADE) is deemed to be fully entitled to address potential anti-competitive practices within this virtual environment (*ex post*). While not explicitly designed for the metaverse, the core principles of the BCL can be applied to assess potential concerns about competition arising in this novel space due to its broad framework for identifying and addressing anti-competitive conduct.

Unlike certain legal frameworks, the BCL does not provide a specific or exhaustive list of illegal acts. Instead, it focuses on assessing the effects of each behaviour on competition. This allows the BCL to encompass not only classic anti-competitive practices such as cartels and dominant company abuse but also unforeseen activities which may emerge in the future. This flexibility is reflected in Article 36 of the BCL, which states:

'Art 36. The acts which under any circumstance have as an objective or may have the following effects shall be considered violations to the economic order, regardless of fault, even if not achieved:

- I – to limit, restrain or in any way injure free competition or free initiative;
- II – to control the relevant market of goods or services;
- III – to arbitrarily increase profits; and
- IV – to exercise a dominant position abusively.'

Furthermore, the BCL is applicable to conduct carried out wholly or in part within Brazilian territory or which may produce effects there. It also assumes that a company has a dominant position when it controls at least 20 per cent of the relevant market or is capable of unilaterally or compatibly changing market conditions.

The classification as it now appears in the Law leaves no doubt, therefore, about the possibility of action by the antitrust authority to investigate and punish any commercial conduct associated with the metaverse which may constitute infractions of the economic order. Even if practised in a virtual environment, it is clear that CADE would have the power to repress conduct adopted in this digital universe if it has the potential to produce restrictive effects on competition in Brazil. For the purposes of this chapter, our focus will be the persecution of anti-competitive conduct related to the metaverse. Much will still need to be debated regarding merger control taking place exclusively in the metaverse – if situations of this nature occur, specific thresholds should also be developed as regular ones set out in the BCL could probably not apply to relevant deals within the virtual environment.

In Brazil, despite the lack of a specific regulation applied to the metaverse, the *ex post* assessment might not be the only option, as any interested party may consult CADE's Administrative Tribunal, in order to request a position on the application of the competition legislation in relation to specific factual hypotheses (Article 9, paragraph 4 of the BCL). In this regard, CADE's Resolution No 12/2015, which sets up the consultation procedure, provides the following in Article 2:



'Art. 2. The Consultations regulated herein may deal with: [...]

II – the lawfulness of acts, contracts, business strategies or conduct of any kind, already initiated by the consulting party; or

III – the lawfulness of acts, contracts, business strategies or conduct of any kind, already conceived and planned, but not yet initiated by the consulting party.'

While discussing antitrust violations, the main topic that comes to mind is that of cartels. There is no doubt that cartels are the main concern of competition authorities, as the conduct is presumably illicit and is subject to the most serious sanctions in the BCL: traditional concerns associated with cartels are expected to apply entirely to real-world practices relating to the metaverse. For instance, one is already probably aware that the mere exchange of competitively sensitive information about the performance of companies in the metaverse (such as prices, marketing strategies, cost structure, customer portfolio, employee remuneration, etc) could trigger antitrust risks to companies.

However, the lawfulness of certain behaviour practised in the metaverse might not be obvious at first glance. This is the reason why it is possible that companies will soon have doubts about commercial practices in the metaverse referring both to client/supply relationships, as well as with regard to collaboration with competitors.



2. Are there any strategies, policies, regulations or best practices on how to carry out antitrust or competition risk assessment?

While there are currently neither specific regulations nor best practices directly targeting antitrust and competition risk assessments in the metaverse, BCL core principles can provide certain guidance on companies considering using the metaverse for their businesses, especially those suspecting that any of their projects could slightly restrict competition in Brazil. Although there is no case law regarding antitrust infringements in the metaverse, certain decisions rendered by CADE within digital ecosystem cases might throw some light on this. Particulars on such precedents are covered in greater detail in the below items with respect to: the standardisation and access to fair and non-discriminatory licences (Question 5); and (2) interoperability (Questions 5 and 6). This current response is limited to explaining the provisions of the BCL, including potential sanctions.

The BCL does not establish an exhaustive list of practices which could be deemed illegal, as it provides for the assessment of the effects (actual or potential) of each conduct, in order to determine to what extent it would have the power to restrict competition. This aims at encompassing not only widely known anti-competitive conduct such as classic cartels (in which case demonstration of effects is irrelevant) and regular commercial practices falling within the abuse of dominance concept, but rather at widening out to as-yet unidentified and potentially anti-competitive behaviours, including those in the metaverse.

Consequently, compliance with the BCL is highly important, as antitrust violations may result in severe sanctions if anti-competitive conduct is identified on the part of companies and individuals. Article 37 of the BCL stipulates that engaging in anti-competitive practices subjects companies to fines ranging from 0.1 to 20 per cent of their gross revenue from the previous fiscal year, within the sector where the infringement occurred. Moreover, the fine shall never be lower than the benefit gained from the conduct, when estimable.

Precedents from CADE suggest that fines for cartel behaviour typically range between 15 and 20 per cent of companies' gross revenue, while fines for unilateral anti-competitive conduct range from 0.1 to five per cent.²⁴

The law also provides for fines of one to 20 per cent of the company's fine for its directors who were directly or indirectly responsible for the conduct, with specific rules for fines imposed on associations and unions. Additionally, Article 38 of the law allows CADE to adopt any other necessary measures to ensure the cessation of illicit conduct, which may include the divestiture of assets and shareholdings.

It is worth noting that cartel conduct constitutes a crime in Brazil under Law 8,137/1990 (Article 4), with individuals engaging in such conduct subject to two to five years' imprisonment, as well as fines.

²⁴ See eg, CADE's Cease and Desist Agreement for cartel cases (TCC), 28, available at <https://cdn.cade.gov.br/Portal/aceso-a-informacao/participacao-social/contribuicoes-da-sociedade/outras-contribuicoes-concluidas/guia-tcc-versao-atual.pdf>, accessed 17 February 2022.

As significant as the sanctions prescribed by the legislation are the consequences arising from potential damages claims associated with anti-competitive conduct. In recent years, there has been a considerable number of such actions filed in Brazil²⁵ and abroad,²⁶ many involving multi-million-dollar amounts.

These brief considerations highlight why companies must exercise great caution in analysing the competitive effects of their conduct and adapting their policies, as well as preparing their employees for this new reality. In addition to being subject to substantial fines and potential high compensation payments, companies involved in CADE investigations or damages actions may also face restrictive measures that could hinder the establishment and development of their businesses in the metaverse.

3. What are the rules regarding market dominance and barriers to entry applicable to the metaverse in your jurisdiction?

Although new theories of harm might evolve and be applied by CADE (especially for digital ecosystems), the assessment of market dominance within investigations concerning unilateral conduct brings a greater degree of complexity and exemplification. This is because they are, in principle, lawful and only become anti-competitive to the extent that they have the possibility of restricting competition.

CADE's precedents indicate that, as a rule, unilateral conduct can only be considered anti-competitive if the agent carrying it out has market power. The BCL provides that companies that control 20 per cent or more of a relevant market will be presumed to have market power. Therefore, the conduct exemplified below will be especially sensitive for companies in this situation of market dominance.

Competition authorities around the world, including CADE, have shown particular concern about conduct in digital markets, such as, for example, by the so-called gatekeepers. A prime illustration reflecting this trend towards heightened scrutiny of digital markets is CADE's investigation involving the large Brazilian online food ordering platform, iFood, initiated in 2020 following a complaint filed by its competitor, Rappi. Allegations suggested that iFood held a dominant position in the online food ordering market and leveraged this status to adopt vertically restrictive practices, primarily through extensive exclusivity agreements with partner restaurants. In February 2023, CADE and iFood executed a settlement including provisions that impede or restrain exclusivity obligations in contracts signed between iFood and partner restaurants.

CADE's settlements are proven to be especially beneficial in dealing with unilateral conduct as they immediately stop the practice. The willingness of the Brazilian antitrust watchdog to settle in a yet barely known territory by the Brazilian officials (platforms/digital solutions, as reported in the responses to Questions 1 and 2, above) sends a message not only to potential gatekeepers, but also to companies considering using the metaverse for their businesses in Brazil and/or affecting the Brazilian market. At a time when Brazilian regulators are still discussing if, when and how to implement *ex ante* related solutions, CADE's intention to settle and fix *ex post* a market failure should bring awareness to all stakeholders investing and/or interested in local/ Brazilian digital ecosystems, including the metaverse.

These ongoing investigations involving crucial sectors of the digital economy undoubtedly highlight the significance and prioritised treatment that sections of the digital market have gained on competition authorities' agenda. This a trend is likely to persist concerning the metaverse. The metaverse is likely to encounter many of the same complexities and uncertainties witnessed in 'platform' cases. Consequently, in this early stage of shaping these new virtual environments, it will be important for metaverse stakeholders to heed ongoing antitrust discussions, shaping their ecosystem's rules to mitigate competitive risks and avert investigations into anti-competitive behaviour. Indeed, as currently defined, the metaverse would serve as yet another example of a platform where users are connected to various services, with the metaverse controller acting as a mediator for public access to information or commerce (ie, a gatekeeper).

²⁵ Luana Graziela Alves Fernandes, 'Passing on defence: current Brazilian case law in cartel damages actions' (2021), 26(1), *Revista do IBRAC*, 19. See https://bdjur.stj.jus.br/jspui/bitstream/2011/153359/passing_defense_jurisprudencia_fernandes.pdf, accessed 17 February 2022.

²⁶ In this respect, recent news reports indicate that companies allegedly harmed by anti-competitive conduct in Brazil are seeking foreign jurisdictions for damages, as shown in news reports: 'Gran Petro goes to Dutch court against Shell for damages in the aviation fuel sector in Brazil' (*Valor*, 1 March 2022), <https://valor.globo.com/empresas/noticia/2022/01/03/gran-petro-entra-na-justica-holandesa-contra-a-shell-por-danos-no-segmento-de-combustivel-de-aviacao-no-brasil.ghml>; and 'Brazilian orange juice magnate will face trial in London for illegal cartel operation, as we secure landmark judgment' (Pogust Goodhead, 5 November 2021), <https://pogustgoodhead.com/brazilian-orange-juice-magnate-will-face-trial-in-london>; both accessed 3 July 2024.



4. Are there any specific gatekeepers' obligations applicable to the metaverse in your jurisdiction?

There are currently no specific gatekeepers' obligations applicable to the metaverse in Brazil. However, there are ongoing proposals under discussion, as noted in answer to Question 7 below.



5. Are there any competition strategies, policies and regulations in your jurisdiction applicable to the metaverse that aim to promote standardisation and access to fair and non-discriminatory licences?

As reported previously, there are no competition strategies, policies and regulations in Brazil applicable to the metaverse. Nonetheless, based on BCL core principles, CADE has a history of initiating and then imposing remedies within unilateral conduct cases. The purpose is to eliminate and/or reduce competition concerns arising from general non-discriminatory practices more broadly, as well as more specific/tangent practice, such as those involved the lack of interoperability. CADE's enforcement power and interest in such cases also depends on the level of enforcement of a sectoral regulation (*ex ante*) if any, which mitigate anti-competitive concerns resulting from such practices.

For instance, the Brazilian Ports Agency (ANTAQ) and the National Land Transport Agency (ANTT) have already established regulations aimed at banning discriminatory practices in essential infrastructure services, a category which would potentially include the metaverse. Similarly, both the Brazilian Telecoms Agency (ANATEL) and BCB have issued specific requirements for telecommunication service providers and financial institutions, respectively, to address interoperability issues. However, even within sectors with existing regulations, CADE still retains the authority to intervene through *ex post* enforcement, correcting market failures and addressing competition concerns.

Regarding the metaverse, CADE's enforcement towards addressing issues arising from discriminatory treatment and non-interoperability issues leading to competitive issues is likely to depend on whether a specific agency will be created for the purposes of regulating gatekeepers' activity and, therefore, affecting the 'life and interactions in the metaverse'. Certain ongoing proposals in this respect are described in the response to Question 7. In this response however, we provide a few examples illustrating CADE's enforcement to address issues arising from non-discriminatory treatment and interoperability issues, in connection with anti-competitive practices.

As an example (apart from the iFood case referred to in the response to Question 3), in October 2023, CADE entered into three separate settlements in an unprecedented probe involving the abuse of dominance in the Brazilian online travel agency (OTA) market carried out through: (1) the execution of exclusivity contracts with transport companies and OTA platforms and (2) the creation of barriers for the development of competitors. The companies Bus Serviços Agendamentos, J3 Participações and RJ Participações – three large Brazilian conglomerates operating in ground passenger transport market, as well as a director from J3 Participações agreed to settle by paying roughly BRL 1.37m (US\$277,200). Bus Serviços and J3 Participações' settlements establish a ban on practising exclusivity with competing companies, as well as tailor-made non-discriminatory provisions. The agreement signed with RJ Participações focuses on obligations for such companies to adopt non-discriminatory criteria in their contracts. In this agreement, the Director of J3 Participações resigned his mandate as adviser to Bus Serviços and assumed the obligation of notifying the antitrust agency of any reacquisition of equity interest in that company.²⁷

Another interesting example relates to the *Bradesco/GuiaBolso* case. In October 2020, a large Brazilian banking conglomerate, Bradesco, reached an agreement with Brazilian antitrust regulator CADE to end practices that would allegedly have made it difficult for the bank's clients to access the personal finance application GuiaBolso, and also agreed to pay a fine of BRL 23.8m. CADE had started an administrative proceeding against the bank in 2019 for alleged anti-competitive practices tied to the application. According to the antitrust regulator, the bank influenced GuiaBolso's activities by implementing two-factor authentication for its clients when accessing their accounts on the fintech application. In contrast, other financial institutions allowed their clients to access their banking information with just their passwords for the GuiaBolso app. The regulator found that Bradesco's two-factor authentication was 'to the detriment of free initiative and free competition.'

²⁷ 'Brazil Ministry of Justice and Public Security CADE signs agreements in case involving the market of bus ticket online sales', (CADE, 5 December 2023), see www.gov.br/cade/en/matters/news/cade-signs-agreements-in-case-involving-the-market-of-bus-ticket-online-sales, accessed 3 July 2024.

The above should not only represent CADE's raising scrutiny over unilateral conducts over the past few years, but rather the authority's intention to detect potential wrongdoings practiced by players active in digital ecosystem-related markets (in which the metaverse is included); while also, in CADE's view, correcting market failures arising from the lack and/or insufficiency of local regulation. As previously stated, signing agreements to stop potential wrongdoings is a frequently used technique both in horizontal and vertically related conducts, given Brazil's antitrust legislation. From 2012 to 2022, CADE entered 68 settlements as part of investigations into unilateral conduct. Consequently, abuse of dominance-related settlements is likely to address issues arising from discriminatory treatment, as well as interoperability issues in the metaverse.

6. Are there any competition strategies, policies and regulations in your jurisdiction applicable to the metaverse that aim to promote interoperability in the metaverse?

As reported previously, there are no competition strategies, policies or regulations in Brazil applicable to the metaverse. Nonetheless, based on BCL core principles, CADE does have a history of initiating and imposing remedies within unilateral conduct cases in order to eliminate and/or reduce competition concerns arising from general non-discriminatory practices more broadly, as well as more specific/tangent practice, such as those involved the lack of interoperability. CADE's enforcement power and interest in such cases also depends on the level of enforcement of sectoral regulation (*ex ante*) – if any – which mitigates anticompetitive concerns resulting from such practices.

For instance, the Brazilian Ports Agency (ANTAQ) and the National Land Transport Agency (ANTT) have already established regulations aimed at prohibiting discriminatory practices in essential infrastructure services, a category which the metaverse would potentially fall under. Similarly, both the Brazilian Telecommunications Agency (ANATEL) and the Central Bank have issued specific requirements for telecommunication service providers and financial institutions, respectively, to address interoperability issues. However, even within sectors with existing regulations, CADE still retains the authority to intervene through *ex post* enforcement, correcting market failures and addressing competition concerns.

When it comes to the metaverse, CADE's enforcement towards addressing issues arising from discriminatory treatment and non-interoperability issues leading to competitive issues will likely depend on whether a specific agency will be created for the purposes of regulating gatekeepers' activity and, therefore, impacting the 'life and interactions in the Metaverse'. Certain ongoing proposals in this regard are described under Question 7 below. For this question, however, we provide a few examples illustrating CADE's enforcement to address issues arising from non-discriminatory treatment and interoperability issues, in connection with anticompetitive practices.

As an example, in October 2023, CADE entered into three separate settlements in an unprecedented probe involving the abuse of dominance in the Brazilian online travel agency (OTA) market carried out through the (1) execution of exclusivity contracts with transport companies and OTA platforms, as well as (2) creating barriers for the development of competitors. The Companies Bus Serviços Agendamentos, J3 Participações and RJ Participações – three large Brazilian conglomerates operating in the ground passenger transport market – as well as a director from J3 Participações agreed to settle by paying roughly BRL 1.367m (roughly US\$277, 200 or EUR 257, 600). Bus Serviços and J3 Participações' settlements establish a prohibition from practicing exclusivity with competing companies, as well as tailor-made non-discriminatory provisions. The agreement signed with RJ Participações focuses on obligations for such company to adopt non-discriminatory criteria in its contracts. In this agreement, the Director of J3 Participações resigned his mandate as advisor to Bus Serviços and assumed the obligation to notify the antitrust agency of any reacquisition of equity interest in that company.

Another interesting example relates to the Bradesco/GuiaBolso case. In October 2020, Bradesco – a large Brazilian banking conglomerate – reached an agreement with CADE to end practices that would allegedly have made it difficult for the bank's clients to access personal finance application GuiaBolso, and also agreed to pay a fine of BRL 23.8m. CADE started an administrative proceeding against the bank in 2019 for alleged anti-competitive practices tied to the application. According to the antitrust regulator, the bank impacted GuiaBolso's activities by implementing two-factor authentication for its clients when accessing their accounts on the fintech's application. In contrast, other financial institutions allowed their clients to access their banking information with just their passwords for the GuiaBolso app. The regulator found that Bradesco's two-factor authentication was 'to the detriment of free initiative and free competition'.

The above should not only represent CADE's raising scrutiny over unilateral conducts within the past few years, but rather the authority's intention to (1) detect potential wrongdoings practiced by players active in digital ecosystems and related markets (wherein the metaverse is included); (2) while also – in CADE's view – correcting market failures arising from the lack and/or insufficiency of local regulation. As previously stated, signing agreements to halt potentially wrongdoings is a frequently used technique – both in horizontal and vertically related conducts – given the Brazilian Antitrust Legislation. From 2012 to 2022, CADE entered 68 settlements as part of investigations into unilateral conducts. Thus, abuse of dominance related settlements should likely be a thing to address issues arising from discriminatory treatment as well as interoperability issues in the metaverse.

7. Are there any upcoming policies, strategies or regulations impacting on competition in your jurisdiction?

Legislative proposals

Following legislative initiatives from abroad seeking stronger regulation for Big Techs' activities, in November 2022 Brazilian legislators brought to the table a bill proposal suggesting stronger scrutiny for the activities of digital platforms. Bill of Law 2768/2022 (the Bill) mirrors certain provisions from those set forth in the EU Digital Markets Act (DMA). In the case it is approved, the Bill will establish a new benchmark for both the current Brazilian antitrust and the digital markets framework, including for the metaverse. In general terms, the proposal for the so-called Brazilian DMA provides for the: regulation; surveillance; and application of penalties with respect to activities performed by digital platforms offering services to the Brazilian market.

Special focus is given to gatekeepers, referred to in the Bill as 'digital platforms holding power to control essential access'. The Bill foresees the Brazilian Telecommunications' Agency (ANATEL) as the Brazilian DMA watchdog. A Digital Platforms Inspection Fund (FisDigi) would be created for gathering financial resources to assist ANATEL's potential new activities. In addition to resources provided by the government, gatekeepers should also contribute to the fund by way of a yearly fee amounting to two per cent of their gross turnover.

The Bill would apply to digital platform services – across eight market sectors – deemed as holding power to control essential access to digital markets, which will include the following:

- online intermediation services;
- online search engines;
- social networks;
- video sharing platforms;
- communication platforms;
- operating systems;
- cloud services; and
- advertising services.

It should be noted, however, that not all digital platforms falling under the above definition should be deemed as 'gatekeepers'. In Brazil, the digital platform must register annual revenues equal to or greater than BRL 70m in connection with services offered to the Brazilian public.

The Bill sets forth certain guiding principles for the activities of gatekeepers in Brazil, such as the following, much likely mirrored from the EU DMA:

- transparency and duty to provide information on its activities to the regulator;
- equal and non-discriminatory treatment in the supply of their services (ie, prohibition of self-preferencing practices, such as the leverage of market shares in a vertically related market, considering dominance held by digital platforms in its core business);

- proper usage of consumers data (ie, the prohibition of digital platforms to combine pieces of information from users without their specific consent); and
- open access to the platform for consumers (ie, refusal or non-supply may result in sanctions).

As mentioned previously, it should be noted that other authorities in Brazil are already entitled to enforce matters included in the Bill. For instance, CADE already considers self-preferencing risks and interoperability issues risks both in mergers and investigations (see the chapter on interoperability and the metaverse), while the Brazilian Data Protection Agency (ANPD) rules over the proper usage of personal data, which also comprises digital platforms. In case it comes into force, non-compliance with the legislation shall result in high fines of up to two per cent of net revenue, to be applied on a case-by-case basis.

Other bills being discussed with respect to the regulation of digital platforms include Bill of Law No 2120/2023 and Bill No 2804/2024. Bill 2120/2023 aims to address the Legal Framework for Digital Platforms, with the purpose of establishing 'standards and guidelines to guarantee freedom, responsibility and transparency in internet, as well as guaranteeing the rights of users on the internet, including whole protection and priority of children and adolescents'. Meanwhile, the Bill No 2804/2024 aims to amend laws 9472/1997 (General Telecommunications Law in Brazil), 9998/2000 (establishes the Telecommunications Services Universalisation Fund), 12965/2014 (the so-called Brazilian Civil Rights Framework for the Internet) and 13709/2018 (the Brazilian General Data Protection Law) to regulate and supervise internet application providers, among other provisions. This Bill foresees power to both ANATEL and ANPD (The National Data Protection Authority) to regulate aspects concerning digital platforms.

Public consultation on digital platforms regulation

In addition to the DMA-like proposal, in early 2024 the Brazilian executive branch – through its Ministry of Finance – kicked off a public consultation to explore the economic and competition implications of digital platforms, including search engines, instant messaging, social media and marketplaces. The government requested responses to a series of 16 open-ended questions.

The Ministry of Finance seeks to obtain contributions from society on the economic and competitive regulation of digital platforms in Brazil, questioning whether changes to the competition law are necessary, whether new regulation is necessary, which aspects should be subject to regulation and how to coordinate state action to manage the issue. The public consultation could result in the following consequences:

- changes to the BCL: this could include amendments to existing legislation (Law No 12529/2011);
- a new legal framework for digital platforms: this framework might be introduced by the executive branch, independent of ongoing debates in the National Congress, as provided for in the topic with respect to the Brazilian DMA-like proposal;
- a dedicated regulator or expanded powers for existing authorities: this could involve creating a new regulatory body solely focused on digital platforms or granting additional oversight powers to existing entities, including the antitrust authority and other federal agencies.

Led by the Ministry of Finance, a powerhouse in economic policymaking, the consultation process suggests a greater chance of these potential outcomes being realised. Although an official decision on the matter has not been issued, several interested parties submitted contributions – including the Brazilian Competition Authority and ANATEL – which have been gathered and are currently being assessed.

On one hand ANATEL emphasised to the Ministry of Finance the position provided in the Brazilian DMA-like proposal: to be the future regulator of competitive aspects of the digital market, although while maintaining a 'multilateral strategy' with other agencies. The document provides details to the agency's position on various aspects to be analysed in any potential regulations applicable to digital platforms. On the other hand, CADE positions itself as the most suitable agency in Brazil to lead the regulation of digital platforms, suggesting the need for legislative and institutional adjustments. CADE proposed the implementation of *ex ante* regulation for digital markets through the enactment of legislation that complements the Competition Law (Law No 12.529/2011). Also, instead of creating a new regulatory body, CADE suggests expanding its competencies to include a specific unit for digital markets.



Intellectual property

Alan Campos Elias Thomaz *Campos Thomaz, São Paulo*

Juliana Sene Ikeda *Campos Thomaz, São Paulo*

Filipe Starzynski *Campos Thomaz, São Paulo*



1. What are the intellectual property legal public policies, strategies and regulations applicable to the metaverse in your jurisdiction?

All IP laws in Brazil are applicable to the metaverse, as follows:

- *Industrial Property Law (Law No 9,279/1996)* – comprises the protection of patents, industrial designs, trademarks and unfair competition. It was enacted in accordance with the TRIPS Agreement.
- *Copyright Law (Law No 9,610/1998)* – regulates copyright, the term encompassing the rights of authors and related rights. The provisions of this are applicable to the nationals of and persons resident in countries that assure Brazilians or persons resident in Brazil of reciprocity in the protection of copyright or equivalent rights (in accordance with the Berne Convention).
- *Software Law (Law No 9,610/1998)* – provides protection of intellectual property of software and its commercialisation in Brazil. The protection system for intellectual property of software is the same granted to literary works by the copyright laws and connected provisions in Brazil, under the terms of this law.



2. How are intellectual property rights to ‘virtual objects’, ‘buildings’ and ‘avatars’, etc, protected in your jurisdiction?

Virtual objects, including buildings, and avatars, are protected by copyright, as virtual objects are actually designs and avatars can be perceived as characters. Consequently, the Copyright Law is applicable. If any of these virtual objects and/or avatars are used as a means to distinguish a product or a service, its owner may seek trademark protection with the Brazilian National Institute of Industrial Property (INPI).



3. How are digital replicas of physical objects protected in your jurisdiction?

There is no consensus on the protection of real objects (protected by industrial design or copyright) in the metaverse. There is no jurisprudence in Brazil regarding the possibility of replicating, in the metaverse, design furniture, for example, such as a Kartell chair. There is a school of thought that believes these virtual replicas would be infringing the copyright of the real objects, arguing that what is banned in the real world should not be allowed in the metaverse; while others believe that if there is no freeride, users should be free to (re)create iconic objects virtually in the metaverse.



4. How are user-generated content and other derivative works protected in your jurisdiction?

The Brazilian Copyright Law defines a ‘derivative work’ as ‘a work that, while constituting a new intellectual creation, is the result of the transformation of an original work’. As a general rule, copyright holders have the right to create, control and licence ‘derivative works’ based on their original and proprietary work, although derivative works may also be copyrightable, to the extent that they add new, copyrightable expression.

Regarding user-generated content, the Internet Act (Article 19) provides that, in order to ensure freedom of expression and prevent censorship, internet applications providers may only be held civilly liable for damages resulting from content generated by third parties if, after specific judicial order, the provider fails to take action to make the content identified as offensive unavailable on its service by the stipulated deadline, subject to the technical limitations of its service and any legal provisions to the contrary. At least while such provision is still effective the same should apply to the metaverse. However, there have been intense debates about the maintenance of such a rule, in which the government was trying to hold ISPs accountable for user-generated content.

5. Are there any collective rights management organisations active in your jurisdiction that also manage intellectual property rights in the metaverse?

The Copyright Law (Article 68) provides that the use of theatrical works, musical compositions or literary-musical works, and phonograms in public performances and executions requires prior authorisation from the author. In the event of a public performance, certain fees are due to the Central Collection and Distribution Office (ECAD), which is Brazil's main collective rights management organisation. The foremost question is: 'Does the use of music in the metaverse constitute public performance? Or would it be considered performance in a place of collective frequency?'

The ECAD has yet to issue any opinion regarding the metaverse. However, it has been actively seeking to determine that any general display of music on the internet should be considered a public performance. Consequently, ECAD is likely to adopt a similar stance regarding the metaverse.

6. How are intellectual property rights protected and enforced on the metaverse in your jurisdiction?

IP rights in the metaverse are protected and enforced by using the current legislation on intellectual property (such as the aforementioned Industrial Property Law, Copyright Law and Software Law).

The first case involving the enforcement of intellectual property and the metaverse in Brazil took place in 2022 and was part of 'Operation 404'. This operation blocked/removed hundreds of pirate apps and websites, as well as deleted several media profiles that were involved in seeking out individuals interested in consuming illegal content (on both the internet and the metaverse).

We have not identified any significant case law or decision regarding IP infringements in the metaverse in Brazil.

7. Are there any intellectual property strategies, policies and regulations in your jurisdiction applicable to the metaverse that aim to promote interoperability in the metaverse?

There are no specific regulations in Brazil aimed at promoting interoperability in the metaverse. Any illicit act (under civil laws) should generate compensation for damages. We have not identified any significant case law or decision in this regard.

8. Are there any competition strategies, policies and regulations in your jurisdiction applicable to the metaverse that aim to promote standardisation and access to fair and non-discriminatory licences?

Please see the chapter on competition law. We have not identified any significant case law or decision in this regard.



Q 9. Are there any other intellectual property issues related to the metaverse that have been addressed in your jurisdiction?

There are no specific issues officially addressed regarding regulation and the metaverse.

Q 10. What are the roles of metaverse providers?

Metaverse service providers must comply with the Internet Act (Law No 12,965/2014). This Law establishes principles, guarantees, rights and duties for the use of the internet in Brazil. Although there are no clear guidelines on this matter or any applicable case law, we believe that metaverse providers can be considered internet service providers (ISPs) under the Internet Act.

Q 11. How does your jurisdiction moderate content and how does it balance this with freedom of expression?

As previously mentioned, the Internet Act (Article 19) provides that, in order to ensure freedom of expression and prevent censorship, internet applications providers may only be held civilly liable for damages resulting from content generated by third parties if, after specific judicial order, the provider fails to take action to make the content identified as offensive unavailable on its service by the stipulated deadline, subject to the technical limitations of its service and any legal provisions to the contrary. Exceptions are made regarding image rights, especially against women and children, in such cases, the 'notice-and-take-down' approach shall prevail.

However, the Fake News Bill (Bill No 2,630/2020), which was almost approved at the beginning of 2023.²⁸ It advocated a higher level of liability (and consequently, content moderation) by ISPs, in view of its liability for illegal content. Additionally, there are certain unconstitutionality actions before the Supreme Court which may affect the application of Article 19 of the Internet Act.

Q 12. Are there any by-design notice mechanisms?

The lack of specific legislation relating to the metaverse means that there is no determination of by-design notice mechanisms in this regard. However, as previously mentioned, despite the lack of guidelines or case law, we believe that metaverse providers can be considered ISPs under the Internet Act. Consequently, they should adopt similar mechanisms as ISPs to comply with local laws.

Q 13. Are there any upcoming policies, strategies or regulations relating to intellectual property in your jurisdiction?

There is an intense debate and bills of law which aim to regulate AI in Brazil. If sanctioned, an AI Act will definitely affect IP rights inside (and outside) the metaverse.

In addition, Bill of Law No 2,175/2023 aims to establish a regulatory framework for the metaverse. However, discussions are still at an early stage and, in opposition to the AI regulation, will probably not be sanctioned.

28 Federal Senate, Legislative Activity, Bill No 2630 of 2020, www25.senado.leg.br/web/atividade/materias/-/materia/141944 accessed 27 June 2024.

Please note that the latest version of the Fake News Bill dealt with online copyright. This was probably why this Bill was not approved in 2023. The scenario is unclear, but we do not foresee the sanctioning of the latest version of the Fake News Bill in the near future.



Digital marketing and consumer protection

Patrícia Helena Marta *TozziniFreire, São Paulo*

Bruna Borghi Tomé *TozziniFreire, São Paulo*

Sofia Kilmar *TozziniFreire, São Paulo*



1. Are there any relevant policies, strategies or regulations applicable to digital marketing in the metaverse in your jurisdiction?

The metaverse, by providing an immersive virtual environment, enables internet users to virtually experience sensations very close to those of the real world, integrating the best of online and offline, including for consumer relationships. As a new model of interaction between consumers and suppliers, multiple and versatile opportunities open for brands to engage with their target audience, being a fertile ground for digital marketing.

Although there are yet no specific provisions on the metaverse in the Brazilian legislation, it should be noted that advertising, regardless of the support in which it is carried out, whether physical or digital, is considered a commercial practice and, as such, is subject to the CDC, which contains several principles aimed at advertising activities, as well as establishing consumer protection against misleading and abusive advertisements (Article 6, including IV).²⁹

Among the principles implemented by the CDC for advertising, the ones of advertising identification (Article 36), contractual linkage (Article 48), transparency of grounds (Article 6, III), loyalty (Article 4), and correction of advertising deviation (Article 60) are the most prominent.

Furthermore, in Brazil, advertising regulation is carried out through a mixed system of control, comprising the state's action, mainly through the provisions of the CDC, and Conar, a non-governmental organisation made up of advertisers and professionals from other areas, responsible for establishing ethical guidelines for advertising activities in Brazil.

The Brazilian Advertising Self-Regulation Code reinforces the fundamental principles and rights established by the CDC, as well as providing normative provisions to regulate the dissemination of promotional pieces relating to products or services, whether carried out via physical means or digital channels.

A key point when it comes to experiences promoted by brands in virtual environments is advertising identification. According to Article 36 of the CDC and Article 28 of the Brazilian Advertising Self-Regulation Code,³⁰ the content must be clearly distinguished as such, regardless of its form or means of dissemination. Advertisers must adopt ways in which the consumer can easily identify the commercial nature of the message, without any mistake or confusion. This recommendation is essential when dealing with the metaverse, as the environment allows promotional actions to take on new forms increasingly incorporated into the user experience, blurring the line between conventional advertising and veiled advertising.

Even though there are no specific regulations for the metaverse, companies that choose to promote their products and/or services through communications and experiences targeting consumers residing in Brazil are subject to the rules applicable to advertising at the national level, namely the CDC and the Brazilian Advertising Self-Regulation Code.

In any case, if such an immersive digital environment is qualified as an extension of the real world, virtual conduct, which affects important legal interests, is not beyond the scope of legal protection. Although there is a need for progress in terms of more specific norms to address the emerging challenges in the face of intense digital transformation, there are undeniably relevant regulations applicable to advertising in virtual environments, including the metaverse.

29 Law No 8,078, CDC, [1990].

30 Brazilian Advertising Self-Regulation Code, (Conar, 2021/2022), see www.conar.org.br/pdf/codigo-conar-2021_6pv.pdf, accessed 5 February 2024.



2. Are there any relevant policies, strategies and regulations regarding misleading advertising or other unfair commercial practices on the metaverse in your jurisdiction?

Firstly, the CDC itself, in Article 6, section XIII, and Article 37, addresses consumer protection against irregular advertisements, specifically banning all misleading or abusive advertising. In this sense, while misleading advertising is defined as conveying inaccurate data to the consumer, including by omission (Article 37, sections 1 and 3), abusive advertising is conceived as being detrimental to socially relevant values (Article 37, section 2).

Therefore, consumer legislation bans advertising communications that mislead consumers, whether by providing false information, omitting information, or, illustratively, being discriminatory or exploiting consumers' lack of experience or knowledge, especially for vulnerable groups such as children and adolescents.

Furthermore, protection against illicit advertising is reinforced by the Brazilian Advertising Self-Regulation Code, which, in Chapter II, sets out general principles to be observed by the involved actors – advertising brands, producers, agencies, and influencers – at the time of creating and disseminating advertising pieces.

Regarding the regulation of unfair or anticompetitive commercial practices in the advertising field, comparative advertising is addressed in a specific section of the Brazilian Advertising Self-Regulation Code (Article 32, section 7). Comparative advertising, although considered a lawful marketing practice, has boundaries that must be observed to avoid being considered unfair conduct subject to punishment.

In practical terms, advertisers are allowed to use comparison between products and services of competing brands if it aims objectively to inform the consumer, does not promote confusion between competing brands, and does not harm the image of third parties.

Non-compliance with the above-mentioned regulatory provisions, whether regarding misleading, abusive or comparative advertising, can lead to sanctions simultaneously at civil, criminal or administrative levels.

At the criminal level, liability occurs under the terms of the CDC, which, aiming to prevent and punish deceptive or abusive advertising communications, considers such conduct as crime against consumer relations. For cases involving misleading or abusive advertising, Articles 66–68 prescribe sanctions of imprisonment and fines for those who make, promote communication or even sponsor the offer. The imposition of penalties for such cases varies according to criminal magnitude due to the practice of illicit activity.

Moreover, as regards comparative advertising, non-compliance with the principles and limits described in the Brazilian Advertising Self-Regulation Code may lead to the classification of advertising as a crime of unfair competition. This is under the Brazilian Industrial Property Law (Law No 9,279/96),³¹ which, by protecting intellectual assets such as trademark registration, provides, in Article 2, section V, repression of unfair competition and stipulates, in Article 195, sanctions from three months to a year's imprisonment or fines.

At the administrative level, liability is through Article 50 of the Brazilian Advertising Self-Regulation Code. The provision stipulates sanctions for violations of the rules established in the Code, such as warnings and recommendations to modify or correct the advertisement.

At the civil level, once again the CDC is prominent, which provides for counter-advertising, consisting of the dissemination a new advertisement, at the offender's expense (Article 60, heading), with the aim of undoing the harm caused by the previously harmful advertising.

Finally, regarding civil liability, based on Articles 18–20 of the CDC, consumers harmed by the dissemination of illicit advertising may seek judicial protection of their right to compensation for damage caused.

Although Brazilian legislation does not yet specifically address the metaverse, there is a solid regulation which bans misleading or abusive advertising, as well as unfair commercial practices, regardless of the support in which the material is disseminated, so that practices that violate the limits established by the legal system are subject to the above-mentioned sanctions.

31 Law No 9,279/96, Brazilian Industrial Property Law (LPI), [1996].



Case law

In case number 1002167-94.2021.8.26.0047,³² the plaintiff, the owner of a commercial establishment, had his business defamed on social media by a former client. Seeking the removal of posts that did not align with reality, as well as compensation for moral damages, the court deemed his demands well-founded, understanding that:

'Although social media is a reality, with increasing adoption and expansion, as evidenced by discussions and growth about the metaverse, users must consider that the virtual world brings consequences just like in the physical world. Constructive criticism of an establishment is permitted, and even if a case of dissatisfaction is reported, the user must qualify their statements so as not to offend the third party who is the subject of the discontent and who does not even have an opportunity to present their side of the story.' (Emphasis added).

Jurisprudence

This concerns an unnamed appeal against the judgment that dismissed the case, without resolving the merits, due to lack of standing. In this case, the plaintiff/appellant downloaded the game Garena FreeFire through the virtual platform of the defendant/respondent (Google Play). However, the plaintiff/appellant was banned from the game by the game administrator (Garena), meaning their account was blocked, for alleged use of illicit means to win matches (hacks – unauthorised program use). Given these factual premises, the defendant/respondent's lack of standing to respond to the obligation to unlock the plaintiff/appellant's account is evident, as they have no control over the settings of the game in question. Furthermore, any moral damages resulting from the wrongful blockage cannot be attributed to the defendant/respondent, according to Article 13 of the CDC, which states that the seller of another's product is only liable for the product/service if the manufacturer is not identified, which is not the case here, as the manufacturer is identified. Accordingly, it is readily apparent that the requested judicial relief is not conceivable in theory, due to a glaring lack of correspondence between the parties in the substantive relationship and the procedural relationship. The appeal is acknowledged and not granted.³³



3. Are there any relevant policies, strategies and regulations aiming to promote consumer protection in the metaverse in your jurisdiction?

It is important to highlight that platforms offering access to the metaverse are considered 'internet application providers' and fall within the legal framework of the Brazilian Civil Framework of the Internet, (Law 12,965/2014 or MCI),³⁴ the legislation responsible for establishing the principles, guarantees, rights and duties for internet use in Brazil.

As provided in Article 7, section XIII of the MCI, such application providers must observe consumer protection laws in the provision of their services. In other words, by specific legal provision, consumer activities carried out through the digital environment are also subject to compliance with the CDC, the principled basis that guides the consumer legal microsystem in Brazil.

In addition to the CDC, concerning consumer protection in online environment, Decree No. 7,962/2013 was established, also known as the Brazilian E-commerce Decree,³⁵ which regulates e-commerce in Brazil, establishing rules for the offer and sale of products and services over the internet.

It is worth noting that when dealing with the metaverse, access itself is considered a consumer relationship, considering the internet application services offered by providers. But, in addition to this, the environment allows other consumer relationships to take place, for example, from the use of the experience for retail, to the e-commerce activities.

Additionally, it is essential to highlight the role of the LGPD,³⁶ which is aimed at protecting the sensitive information of natural persons. It applies to any operation involving the processing of private data carried out in Brazil, especially concerning consumer relationships. This includes the collection, storage, use and sharing of consumer data.

32 TJSP. Verdict. Process No 1002167-94.2021.8.26. 0047; Judge-rapporteur: Marcela Papa Paes; Judgment date: 13 December 2021.

33 TJDF. Judgment. Process No 0730505-49.2019.8.07.0016; Judge-rapporteur; Soníria Rocha Campos D'Assunção; Judgment date: 28 November 2019.

34 Law No 12,965, Civil Framework of the Internet (MCI), [2014].

35 Decree No 7,962/2013, Brazilian E-commerce Decree, [2013].

36 Law No 13,709/2018, Brazilian General Data Protection Law (LGPD), [2018].

Therefore, under the current Brazilian legal framework, transactions carried out through the metaverse, whether for the acquisition of goods or the enjoyment of services, are subject to the provisions of the CDC, as well as the Brazilian E-commerce Decree and the LGPD.



4. What is the minimum information that should be provided to consumers? Who are the stakeholders responsible for providing this information?

The right to information is one of the fundamental rights ensured by the CDC to consumers, playing a crucial role in consumer relations. In Article 6, section III, the CDC establishes as a basic consumer right the obtaining of adequate information about different products and services, whether about form or content. Consequently, correct specifications are required regarding quantity, characteristics, composition, quality, applicable taxes and price, including any potential risks that such products or services may pose.

Regarding offers, Article 31 of the CDC stipulates that:

‘the offer and presentation of products or services must ensure correct, clear, precise, conspicuous, and in Portuguese language information about their characteristics, qualities, quantity, composition, price, warranty, expiry dates, and origin, among other data, as well as about the risks they pose to the health and safety of consumers.’

Regarding electronic commerce, such minimum information is complemented by Article 2 of the Brazilian E-commerce Decree, which sought to define the content and extent of the supplier’s duty to inform, establishing that it must provide:

‘I – corporate name and registration number of the supplier, if any, in the National Register of Natural Persons or the National Register of Legal Entities of the Ministry of Finance; II – physical and electronic address, and other necessary information for its location and contact; III – essential characteristics of the product or service, including risks to the health and safety of consumers; IV – breakdown, in the price, of any additional or incidental expenses, such as delivery or insurance costs; V – complete terms of the offer, including payment methods, availability, manner, and deadline for service execution or product delivery or availability; and VI – clear and conspicuous information regarding any restrictions on the enjoyment of the offer.’

In addition to these provisions, the Decree emphasises the need for the supplier to provide a contract summary with all the necessary information for the full exercise of the consumer’s right to choose (Article 4, section I), as well as adequate and effective means for the exercise of the right of withdrawal (Article 5).

The MCI also establishes, in Article 7, sections VIII and XI, that internet application service users are ensured the publicity and clarity of any usage policies, as well as clear and complete information regarding the collection, use, storage, processing and protection of their personal data.³⁷

According to the STJ, the right to information is directly related to the freedom of consumer choice, so those with full knowledge of the product or service offered are responsible for providing the necessary clarification to the consumer so that they can make an informed decision regarding what is being offered for sale in the market (REsp 1.515.895 and REsp 1.364.915).³⁸

In this sense, it is the basic, essential duty of the supplier to inform adequately and permanently about the product or service offered (Article 8), as well as all aspects of the contract. This duty is intrinsic to consumer relations. Failure to fulfil the duty to provide adequate information may result in the civil liability of the supplier for any moral and/or material damages caused to consumers based on Articles 18 to 20 of the CDC.

Moreover, in the criminal level, Article 66 of the CDC establishes as a crime against consumer relations ‘making false or misleading statements, or omitting relevant information about the nature, characteristic, quality, quantity, safety, performance, durability, price, or warranty of products or services,’ punishing the offence with three months to a year’s imprisonment and a fine.

37 Law No 12,965, Brazilian Civil Framework of the Internet (MCI), [2014], Art 7, s XI.

38 STJ Judgment REsp 1,515,895; Minister-rapporteur: Humberto Martins; Judgment date: 20 September 2017. STJ Judgment REsp 1,364,915; Minister-rapporteur: Herman Benjamin; Judgment date 23 March 2021.



In summary, a supplier that fails to fulfil the duty to inform will violate a basic consumer right, which applies to any type of product or service offered, regardless of the support in which the consumer relationship occurs. The CDC establishes the basis of this obligation, supplemented by the Brazilian E-commerce Decree and the MCI regarding electronic commerce and internet application services.

Jurisprudence

PURCHASE ON MARKETPLACE

‘In enumerating, in an exemplary list, the rights of consumers, Article 6, IV, of the CDC provides: “consumers have the following basic rights: [...] IV – protection against misleading and abusive advertising, coercive or unfair commercial methods, as well as against abusive practices and clauses imposed in the supply of products and services.” In complementary fashion on the subject, Article 37, CDC asserts:

Article 37. All misleading or abusive advertising is prohibited. Section 1. Any form of advertising information or communication, whether wholly or partially false, or in any other manner, even by omission, capable of misleading consumers as to the nature, characteristics, quality, quantity, properties, origin, price, and any other data about products and services, is misleading. [...] Section 3. For this code, advertising is misleading by omission when it fails to inform about an essential data of the product or service. The plaintiff proves, through the documents on pages 20 and onwards, that she was induced to purchase the product believing she was acquiring an external hard drive, a disk drive for data storage. This conclusion is drawn from the specifications presented by the defendant, which even indicate the product’s storage capacity (1 TB). Nonetheless, upon arrival of the product at the plaintiff’s residence, she discovered that it was an external hard drive case. The plaintiff was thus misled, and the contract accorded between the parties should be rescinded, and the plaintiff should be reimbursed for the entire investment made.³⁹

Conar’s decision

The claim above, present in an advertisement on the Livelo website, attracted the interest of a consumer, who only upon completing the purchase was informed that medicines were not part of the promotion. Livelo presented a defence alleging that it signalled through banners that the promotion’s regulations should be consulted and that therein is information about restrictions. It also explained that medicines were excluded from the promotion to avoid stimulating consumption without a medical prescription and that the claim has already been changed, removing the mention of ‘health products’.⁴⁰

The rapporteur fully supported the consumer’s complaint and proposed the alteration of the original advertisement, being unanimously supported.



5. Are there any relevant policies, strategies or regulations applicable to platform-to-consumer relationships in your jurisdiction? What are the main obligations of the platform providers?

There are relevant regulations applicable to digital platforms, including those aimed at offering products or services. The main legislation is the MCI, which is responsible for establishing norms for the operation of internet application providers, including email providers, hosting providers, online service providers (OSPs) and content providers such as social media apps.⁴¹

39 TJSP. 1015364-68.2021.8.26.0451. Procedure of the Special Civil Court. Special Civil and Criminal Court. Judge Mauricio Habice, 13 January 2022.

40 Conar, Representation No 021/22. Councilor- rapporteur: Marcelo Migliori Chamber: Seventh Chamber, March 2022.

41 Frederico Meinberg Ceroy, ‘The concepts of providers in the Marco Civil da Internet’ (Migalhas), see www.migalhas.com.br/depeso/211753/os-conceitos-de-provedores-no-marco-civil-da-internet, accessed 5 February 2024.

It is worth noting that, as stipulated by the MCI, Brazilian legislation must be mandatorily respected by any foreign company that offers services to the Brazilian public, even if it does not have a branch in Brazil (Article 11, section 2). Therefore, regardless of whether the company is international, if its services are offered to the Brazilian public, it must comply with the regulations provided in Brazil's legal system.

Furthermore (as highlighted in the response to Question 4) Article 7, section XIII, of the MCI, states that by offering their services, platform provider companies must observe consumer protection and defence norms. In other words, by specific legal provision, they are also subject to compliance with the CDC.

In this regard, the discussion regarding the liability of commercial establishments for products sold by third parties deserves attention. Recently, Brazil's judiciary has established important interpretations relating to the liability of marketplaces for the sale of products on their platforms. According to such decisions, marketplaces are not required to conduct prior monitoring of products made available by sellers on their platforms. Moreover, marketplaces are not responsible for damages caused to consumers because of the products offered, provided they have not received a commission for the sale.

When the marketplace derives financial benefits from the products sold on its platform, it becomes considered an integral part of the supply chain.⁴² Accordingly, the marketplace assumes joint liability for the defects and faults presented by the products.

The LGPD also plays an important role in regulating the activities of digital platforms. This is because it is responsible for specifically safeguarding the protection of sensitive information of natural persons, applying to any operation involving the processing of private data carried out in Brazil, especially regarding consumer relations.

In terms of obligations, there are several duties established for application provider companies to operate in compliance with Brazilian legislation. Among the main ones provided in the MCI, Article 7 required:

- preserving the inviolability of users' intimacy and privacy (s I);
- preserving the inviolability and confidentiality of users' internet communications flow, except by judicial order, as provided by law (s II);
- preserving the inviolability and confidentiality of users' stored private communications, except by judicial order (s III);
- obtaining express consent regarding the collection, use, storage, and processing of personal data, which must be highlighted separately from other contractual clauses (s IX); and
- ensuring the publicity and clarity of any usage policies (s XI).

The LGPD establishes the foundations for the responsible and ethical treatment of user data, which is crucial in interactions between digital platforms and consumers. An example of these principles that guide the use of customer data on digital platforms can be seen in Article 18, which establishes the data subject's right to confirm the existence of processing of their data, access their data, correct them, anonymise them, block them, or eliminate unnecessary, excessive or unlawfully processed data.

Failure to comply with legal provisions can result in civil, criminal or administrative sanctions against the provider company. For example, Article 12 of the MCI determines that non-compliance with duties to protect records, personal data and private communications may result in a warning; fine; temporary suspension of activities; or prohibition from exercising activities.

This is also established by the LGPD, which, in Article 52, provides for administrative sanctions: in addition to the possibility of a warning and fine, this includes:

- publicising the violation after its occurrence has been duly investigated and confirmed (section IV);
- blocking of the personal data related to the violation until its regularisation (section V); and
- the elimination of the personal data related to the violation (section VI).

It is worth noting that the application of sanctions under the LGPD depends on an investigation in an administrative procedure to be conducted by ANPD.

⁴² STJ. AgRg in AREsp: 232849; Minister-rapporteur: Ricardo Villas Bôas Cueva. Judgment date: 23 September 2014.



In addition to the above mentioned provisions, Article 186 of the Brazilian Civil Code (Law No 10,406/2002) applies to the civil liability of platforms.⁴³ This legal provision determines that whoever, by voluntary action or omission, negligence or recklessness, violates a right and causes damage to another, even if exclusively moral, commits a wrongful act and is subject to judicial compensation.

Consequently, if the platform provider company violates users' rights – whether they are provided for in the MCI, CDC or LGPD, or even in special or complementary legislation – it may be held civilly liable for the damages caused, with compensation being awarded in moral or material terms.

Finally, criminal sanctions may, for example, arise from providing false information about the quality of a product, which may constitute a crime against consumer relations, as determined by Article 66 of the CDC. The CDC also provides for administrative sanctions, such as fines imposed by the Brazilian Protection and Consumer Protection Foundation (PROCON), by its set of rules and regulations (CDC, Article 56, section I, and Article 57).⁴⁴



6. Are there alternative dispute resolution mechanisms available for consumers in your jurisdiction? How are they implemented in the metaverse?

Yes, in Brazil, there are alternative methods of dispute resolution, such as mediation, conciliation and arbitration, which contribute to dejudicialisation by providing efficient, cost-effective and rapid resolution of disputes.

At an administrative level, a notable case illustrating an alternative dispute resolution mechanism in consumer matters is the [consumidor.gov](http://consumidor.gov.br) website,⁴⁵ an initiative of the National Consumer Secretariat (Senacon) aimed at bringing clients and companies closer to attain earlier conflict resolution. The website operates by allowing customers to submit complaints directly onto the platform and currently boasts participation from major players in the banking, aviation, hospitality, and retail sectors among its registered companies.

In addition to reducing costs associated with judicial processes, the consumidor.gov platform provides companies with greater visibility, while also empowering consumers to lodge consumer-related complaints against these corporations.

Also in Brazil, PROCON offers free conciliation and mediation services between consumers and suppliers to resolve conflicts arising from consumer relations in the administrative sphere. Therefore, the agency acts in negotiating agreements through remote or in-person hearings aimed at resolving complaints lodged by consumers directly with the companies concerned.

Regarding arbitration, its application in consumer relations is more complicated. This is because the CDC establishes in Article 51, section VII that the compulsory arbitration clause in contracts for the supply of products or services is void. Therefore, as a rule, the obligation of arbitration does not apply to adhesion contracts in consumer relations, due to consumer vulnerability.

As for the application of alternative methods of conflict resolution in the metaverse, it is worth noting that Law No 13,105/2015 (Brazilian Civil Procedure Code), in its Article 193, authorises the practice of procedural acts through video conferencing or other technological resources for real-time transmission of sounds and images.⁴⁶ Consequently, there is legal support for the execution of such sessions through digital immersion.

Indeed, although it is not yet a common practice in the Brazil's judiciary, there have already been such experiences. In 2022, the Federal Regional Court of Paraíba (JFPB) held the first real hearing in Brazil in an immersive and hyper-realistic virtual environment. It was a conciliation session in which the parties, represented by their respective 3D customised avatars, reached an agreement, ending a process that had been ongoing since 2018.⁴⁷

43 Law No 10,406/2002, Brazilian Civil Code (CC), [2002], Art 186.

44 Law No 8,078, Consumer Protection Code (CDC), [1990], Art 56, s I, and Art 57.

45 Consumidor, (2024), see www.consumidor.gov.br/pages/principal/?1707944725807, accessed 14 February 2024.

46 Law No 13,105/2015, Brazilian Civil Procedure Code (CPC), [2015] Art 193.

47 'Federal justice in Paraíba holds first real hearing in Brazil in the metaverse', (Federal Regional Court of the 5th Region, JFPB Social Communication Section, 2022), see www.jfpb.jus.br/index.php/noticias/leitura-de-noticias?id=16221369, accessed 5 February 2024.

In summary, although the holding of conciliation and mediation hearings through the metaverse is authorised by law, Brazil has not made significant progress in realising projects that would make this environment a tool for the promotion and access to justice, being still an emerging topic.

7. Are there any upcoming policies, strategies or regulations that will impact digital marketing in the metaverse in your jurisdiction?

In recent years, Brazil has witnessed the growth of projects and policies designed for digital advertising.

For example, in 2023, the Consumer Protection Commission of the Chamber of Deputies of Brazil approved a bill to increase the penalty for abusive or misleading advertising. The initiative aims to amend the CDC to provide imprisonment ranging from two to six years and a fine (Bill 518/19).⁴⁸

Furthermore, Conar has noted an increase in complaints involving advertising by digital influencers, coinciding with the growing popularity of social media in Brazil. In response to this trend, Conar has developed the Advertising Guide for Digital Influencers.⁴⁹ The Guide, prepared by the Digital Advertising Working Group, defines advertising by influencers as a message intended to promote the consumption of goods and/or services, carried out through hiring by the advertiser and/or agency.⁵⁰

As previously highlighted, the regulation of digital advertising applies to all advertising, regardless of the medium in which it is carried out. Therefore, even though such policies do not specifically mention the metaverse, they will affect how advertising brands can position themselves and promote their products and services in this virtual environment.

8. Are there any upcoming policies, strategies or regulations that will impact consumer protection in the metaverse in your jurisdiction?

The consumer protection system is constantly developing in Brazil, especially considering emerging technologies which challenge boundaries outlined in current legislation. Regarding the metaverse, in 2023, Bill No. 2,175⁵¹ was submitted for consideration by the Chamber of Deputies.

The objective of the bill is to create a regulatory framework for the metaverse and establish principles, guidelines and rules for the use and conduct of legal transactions in this virtual environment, ensuring free access, protection of user rights, technological development, and protection of copyright, intellectual property, and e-commerce rights.

Although the initiative by Federal Deputy Rubens Pereira Júnior is pioneering, the text of the bill introduces few innovations, as it brings principled provisions and reinforces predictions already outlined in other legislation. These include the CDC, MCI and LGPD, which, as previously mentioned, apply to relationships established through the metaverse without the need for specific legislation.

The bill is currently under review and will be examined by the Committees on Science, Technology, and Innovation and Constitution and Justice and Citizenship

48 'Commission approves project that increases penalties for misleading or abusive advertising' (Agência Câmara de Notícias, Chamber of Deputies of Brazil, 2023), see www.camara.leg.br/noticias/960783-comissao-aprova-projeto-que-eleva-pena-para-publicidade-enganosa-ou-abusiva/#:~:text=A%20iniciativa%20altera%20o%20C%3%B3digo,Projeto%20de%20Lei%20518%2F19, accessed 29 January 2024.

49 'Advertising Guide for Digital Influencers' (Conar, 2021), see http://conar.org.br/pdf/CONAR_Guia-de-Publicidade-Influenciadores_2021-03-11.pdf, accessed 29 January 2024.

50 'Conar's Advertising Code of Ethics for Influencers' (Meio & Mensagem, 2022), see www.meioemensagem.com.br/comunicacao/o-codigo-de-etica-publicitaria-do-conar-para-influenciadores/#:~:text=O%20c%3%B3digo%20of%20C%3%A9tica%20of%20Conar%20for%20influencers%20also%20clarifies,some%20remunerate%20A7%20for%20that%20exposure%20A7%20A3o, accessed 29 January 2024.

51 Federal Senate of Brazil, Bill No 2175, of 2022, see www25.senado.leg.br/web/atividade/materias/-/materia/154307, accessed 5 February 2024.



In the scenario of regulating digital markets in Brazil, Bills No 2,768/2022 and 2,630/2020 stand out.⁵² They aim to regulate the activities of digital platforms, being one of the main topics on the legislative agenda. These texts have significant potential to affect the digital ecosystem as a whole and the legal relationships arising from it, including consumer relations.

52 Chamber of Deputies of Brazil: Bill No 2768 (2022), see [www.camara.leg.br/propostas-legislativas/2256735](http://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2337417#:~:text=PL%202768%2F2022%20Inteiro%20teor,Projeto%20de%20Lei&text=Disp%C3%B5e%20sobre%20a%20organiza%C3%A7%C3%A3o%2C%20o,2014%20e%209.472%20de%201997; Bill No 2630 (2020) <a href=), accessed 5 February 2024.

Liability and insurance

Alan Campos Elias Thomaz *Campos Thomaz, São Paulo*

Juliana Sene Ikeda *Campos Thomaz, São Paulo*

Filipe Starzynski *Campos Thomaz, São Paulo*

1. Are there any relevant policies, strategies and regulations applicable to liability on the metaverse in your jurisdiction?

There are no specific regulations regarding liability. There are only bills being analysed and discussed which deal with the metaverse.

2. Are there any relevant policies, strategies and regulations applicable to insurance for damages caused on the metaverse in your jurisdiction?

Although there is no specific legislation regarding the metaverse in Brazil, some laws can be applied to ensure the compensation for damages. These are:

- *Civil Code (Law No 10,406/2022)* – establishes rules of civil liability, including liability for damages caused by products and services. These rules may be applied to hold developers and users accountable for damages caused.
- *Brazilian Civil Rights Framework for the Internet (Law No 12,965/2014)* – provides for the principles, guarantees, rights and duties for the use of the internet in Brazil, establishing the responsibility of service providers, including metaverse platforms, in relation to the content generated by their users. Metaverse platforms must implement effective content moderation measures to identify and remove illegal content such as hate speech, violence and child pornography. However, it is important to balance content moderation with ensuring freedom of expression and avoiding arbitrary censorship.
- *Consumer Defence Law (Law No 8,078/1990, CDC)* – establishes specific rules for consumer protection, which can be applied to protect consumers in the event of poor service provision. The CDC guarantees that products and services meet quality and safety standards, protecting consumers from abusive practices and damages. In cases involving the consumer, liability is ‘objective’, which means that companies that offer a service or participate in the consumption chain up to the end consumer can be held liable, regardless of the intention to cause the damage or the existence of fault.

3. What are the applicable-to-the-metaverse ‘civil’ liability/tort liability rules in your region/country? Who are the responsible stakeholders in the case of damages?

Although there is currently no specific legislation on the metaverse, both the provider of the metaverse system and the user can be held liable and suffer sanctions, based on and interpreting by analogy the legislation below:

- *Civil Code (Law No 10,406/2022)* – establishes rules of civil liability.
- *Consumer Protection Law (Law No 8,078/1990)* – if the Consumer Protection Code is applied, the platform and AI systems may be held liable when they participate in the consumer chain and in the process of selling and delivering products, and may have to compensate for damage caused to consumers



by defects relating to the provision of services, as well as by insufficient or inadequate information about the risk or enjoyment of the product/service.

- *Brazilian Civil Rights Framework for the Internet (Law No 12,965/2014)* – provides for the principles, guarantees, rights and duties for the use of the internet in Brazil, establishing the liability of service providers, including metaverse platforms, in relation to content generated by their users. This law, while establishing that agents will be held liable according to their activities, regulates that the internet connection provider will not be held civilly liable for damages arising from content generated by third parties (users), unless after a court order it fails to adopt the appropriate measures to, for example, make the content identified as infringing unavailable, within the technical limits of its service. The issue of liability for digital platforms has been heavily debated.
- *General Data Protection Law (Law No 13,709/2018)* – establishes rules for the processing of personal data, including those collected by an AI system, ensuring the right to privacy, transparency, and non-discrimination. The legislation also created ANPD, which is responsible for the protection, implementation and enforcement of the law, allowing the authority to impose sanctions when applicable. In cases involving both AI and personal data, ANPD can impose sanctions and penalties, warning, a fine or data blocking.
- *Criminal Code (Decree-Law No 2,848/1940)* – Criminal liability in cases involving AI presents challenges related to culpability and intent. In Brazil's legal system, criminal liability is subjective, requiring proof of fault or intent by the agent. However, in situations involving AI and metaverse platforms, it may be difficult to attribute fault to an autonomous system. Therefore, it is crucial to assess human involvement in the creation, control, and monitoring of AI, as well as the existence of intentional unlawful conduct by individuals responsible for the system. In these cases, the sanction depends on the type of crime.



4. How are liability rules enforced in the metaverse in your jurisdiction? Who are the responsible stakeholders in the case of damages?

As mentioned above, there is currently no specific legislation on the metaverse. Liability can be determined on the basis of the following legislation:

- Civil Code (Law No 10,406/2002);
- Brazilian Civil Rights Framework for the Internet (Law No 12,965/2014);
- Consumer Protection Law (Law No 8,078/1990);
- General Data Protection Law (Law No 13,709/2018); and
- Criminal Code (Decree-Law No 2,848/1940).



5. What are the roles of intermediaries and gatekeepers when it comes to enforcement of rights and liability?

Although there is no specific legislation dealing with the metaverse, intermediaries and gatekeepers can be sued under the laws mentioned above. The size of the intermediary's risk will depend on compliance and conformity with the laws; their participation or competition in the damage; and their participation in the offer of the product/service, if it constitutes a consumer relationship.

6. What are some relevant insurance topics regarding the metaverse in your jurisdiction?

Bill No 2,175/2023, also known as the Metaverse Regulatory Framework, establishes principles, guidelines and norms for the use and conduct of legal transactions in this virtual environment. The bill is currently under review by the Committee on Science, Technology, and Innovation (CCTI) in the Federal Senate.

7. Are there any relevant policies, strategies and regulations applicable to criminal liability on the metaverse in your jurisdiction?

As mentioned above, there is currently no specific legislation on the metaverse. Criminal liability can be determined in accordance with the Criminal Code (Decree-Law No 2,848/1940) and amendments from the Cybercrime Law (Law No 12,737/2012).

8. Are there any upcoming policies, strategies or regulations impacting liability (civil/tort/criminal) on the metaverse in your jurisdiction?

As mentioned above, Bill No 2,175/2023.

9. Are there any upcoming policies, strategies or regulations impacting insurance on the metaverse in your jurisdiction?

As mentioned above, Bill No 2,175/2023.



Jurisdiction and governance

Alan Campos Elias Thomaz *Campos Thomaz, São Paulo*

Juliana Sene Ikeda *Campos Thomaz, São Paulo*

Filipe Starzynski *Campos Thomaz, São Paulo*

Q 1. Are there any upcoming policies, strategies or regulations setting out rules on how to identify the governing law on the metaverse?

Bill No 2,175/2023, also known as the Metaverse Regulatory Framework, establishes principles, guidelines, and norms for the use and conduct of legal transactions in this virtual environment. The Bill is currently under review by the Committee on Science, Technology, and Innovation (CCTI) in the Federal Senate.

Q 2. Are there any upcoming policies/strategies/regulations setting out rules on how to identify the jurisdiction on the metaverse? Is there any case law or are there any decisions by a regulator regarding determining jurisdiction on the metaverse in your jurisdiction?

Bill No 2,175/2023, also known as the Metaverse Regulatory Framework, in its current text under analysis, provides that legal transactions carried out in the metaverse involving users domiciled in Brazilian territory will be subject to Brazilian jurisdiction and must comply with laws and regulations applicable in Brazil. It also establishes that the determination of jurisdiction will be based on the user's domicile, in accordance with the Civil Code and other applicable rules. In cases where there is a conflict of laws, the legislation most favourable to the user will be applied, respecting the principles of public order and national sovereignty. Furthermore, the parties involved in legal transactions carried out on the metaverse may establish, by means of a contractual clause, the jurisdiction and applicable legislation, in compliance with the legal provisions.

Based on case law, the Internet Act, the LGPD and consumer protection laws, courts in Brazil have consistently acknowledged the Brazilian jurisdiction to decide about internet services that are either offered to Brazilians or used by individuals located in the Brazilian territory. Also, based on the Brazilian Criminal Code, Brazilian courts have jurisdiction to decide on crimes if the effects of the crime are perceived in the Brazilian territory. Therefore, based on the current statutory and case law, in most cases Brazil would have jurisdiction to decide about facts occurred in the metaverse, provided that: (1) a service is offered to Brazilians; (2) the effects are perceived in Brazil; or (3) the individual using the metaverse is located in Brazil.

Q 3. What are the competent regulators and government bodies tasked with ensuring compliance with the applicable laws on the metaverse in your jurisdiction?

Although there is still no specific law, we can mention the following: BCB, the Public Prosecutor's Office and the judiciary.

4. Are there any available dispute resolution mechanisms in your jurisdiction?

Brazil has several dispute resolution mechanisms, which can vary depending on the type of conflict and the parties involved. Some of the main mechanisms are:

- *Judicial* – Brazil's judicial system is made up of state, federal and specialised courts in different areas of law.
- *Arbitration* – an alternative dispute resolution method in which the parties involved agree to submit the dispute to one or more arbitrators, who will issue a binding decision. In Brazil, the Arbitration Law (Law No 9,307/96) regulates this procedure, which is commonly used in commercial and business disputes.
- *Mediation and conciliation* – mediation is a process in which a neutral mediator helps the parties reach a mutually acceptable agreement. In conciliation, a third party helps the parties reach an agreement and can suggest solutions to the conflict.
- *Administrative procedures* – some disputes can be resolved through administrative procedures, such as public tenders, bids and complaints to regulatory bodies.

5. How is the arbitration implemented on the metaverse in your jurisdiction?

Although there is no specific law, we consider that the application should follow the Arbitration Law (Law No 9,307/96).

6. Are there any upcoming policies, strategies or regulations regarding determining governing law and jurisdiction on the metaverse in your jurisdiction?

As discussed above, there is Bill No 2,175/2023.