

USE OF CONSUMER DATA FOR BEHAVIOURAL ADVERTISING WITHIN MARKETPLACE PLATFORMS

UTILIZAÇÃO DE DADOS DOS CONSUMIDORES PARA FINS DE PUBLICIDADE COMPORTAMENTAL NO ÂMBITO DAS PLATAFORMAS DE *MARKETPLACE*

<https://doi.org/10.55839/2318-8650RevParRPv33n1pa23-43>

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ABSTRACT

Advertising plays an important role in consumer market, as it can awaken previously non-existent needs in the consumer and, due to its too much economic potential, has encouraged the creation and use of various engagement strategies. Some marketplace platforms store consumers' data without proper consent and uses them for the development of advertising according to their behavior. Thus, the issue is based on the absence of regulation regarding such advertising strategy in the Brazilian legal system, since this conduct may violate the privacy of consumers, besides enabling a disproportionate advantage over other suppliers. It seeks to demonstrate what are the legal limits for the development of this practice, as well as to relate the Law of Consumer Relations to the Competition Law, since behavioral advertising unbalances the use of data allowing a non-egalitarian development of the trading system. Therefore, the methodological procedures used for this analysis consist of applied research, with a qualitative and hypothetical-deductive approach and descriptive objective, given to socioeconomic applicability. It is concluded, in view of this, that although behavioral advertising does not yet have a specific regulation in the Brazilian consumer microsystem, when the collection of data is not expressly authorized by consumers, this conduct can be considered

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abusive, based on Article 39 of the CDC, due to the violation of consumer privacy and the configuration of unfair competition.

Keywords: Consumer law. Competition law. Data protection. Behavioral advertising.

RESUMO

A publicidade desempenha importante função no mercado de consumo, pois pode despertar necessidades antes inexistentes no consumidor e, devido ao seu demasiado potencial econômico, tem incitado a criação e a utilização de diversas estratégias de engajamento. Algumas plataformas de marketplace armazenam dados dos consumidores sem a devida anuência e os utilizam tanto para a veiculação de publicidade de acordo com seu comportamento. Assim, o empecimento da questão transita em torno da ausência de regulamentação referente à tal estratégia de publicidade no ordenamento jurídico brasileiro, uma vez que essa conduta pode violar a intimidade/privacidade dos consumidores, além de possibilitar uma vantagem desproporcional em relação aos demais fornecedores. Procura-se, demonstrar quais são os limites jurídicos para o desenvolvimento dessa prática, assim como relacionar o Direito das Relações de Consumo ao Direito Concorrencial, uma vez que a publicidade comportamental desequilibra o uso dos dados permitindo um desenvolvimento não igualitário do sistema de comércio. Por isso, os procedimentos metodológicos utilizados para tal análise consistem em pesquisa aplicada, com abordagem qualitativa e hipotético-dedutiva e objetivo descritivo, dada à aplicabilidade socioeconômica. Conclui-se, à vista disso, que apesar de a publicidade comportamental ainda não possuir uma regulamentação específica no microsistema consumerista brasileiro, quando a captação dos dados não for expressamente autorizada pelos consumidores, essa conduta pode ser considerada abusiva, com fundamento no artigo 39 do CDC, em razão da violação à intimidade/privacidade dos consumidores e à configuração de concorrência desleal.

Palavras-chave: Direito do consumidor. Direito concorrencial. Proteção de dados. Publicidade comportamental.

1 INTRODUCTION

The advertising of products and services online, namely on marketplace platforms, has abruptly facilitated consumer access to content marketed by suppliers; sometimes on websites that have nothing to do with the platforms of the original supplier. In contrast, the social and legal problems of the online environment have grown similarly.

Although cybernetic development positively influences certain practices, this same evolution of technology in the virtual environment may come to hinder the gradual progress of social relations, and sometimes consumption relations. The use of advertising messages that harm the private life and intimacy of consumers using marketplace platforms and other websites has become much more used as a result of the growth of the tools available in the virtual environment; situations that previously appeared to be too complicated and sometimes impossible have begun to be unrestricted in the online consumer market.

Thus, the central concern is the absence of express regulation for behavioral advertising, since it is extremely necessary to guarantee both the protection of privacy and the intimacy of consumer users, as well as the equality among suppliers in the consumer market, avoiding unfair competition. More than that, besides the fact that the legal system still does not have an expressive rule for behavioral advertising, it leaves the use of data for such purposes beyond the consumer's control.

Therefore, this article will be done by means of qualitative research, applied nature and hypothetical-deductive approach, using documents and bibliographic materials, aiming to analyze the current consumers' protection microsystem in relation to certain supposedly abusive advertising. Thus, the objective descriptive nature will be used, adapted to standard research collection techniques, such as doctrinal research and document reading, as well as informative reading by selection, in an interpretative manner (Lakatos; Marconi, 2017).

The structure of this article is divided into 3 topics. The first will define the legal consumption relationship as well as its essential elements, in addition to analyzing the advertising concept.

The second topic will approach the concept of abusive practice and will enter the discussion of behavioral advertising as an artifice based on behaviorist psychology, in addition to addressing the principle of not abusive capture of the consumer.

The last topic will explain the issue of cookies regarding the use of data from consumers using marketplace platforms and websites that have the same principle. It will also demonstrate and relate the abusiveness of behavioral advertising with free competition and the egalitarian development of consumption relations, in addition to demonstrating how behavioral advertising relates to Law no. 12,965/2014, which established the Internet Civil Milestone.

2 MARKETPLACE, ONLINE CONSUMPTION RELATION AND ADVERTISING

The technological development in the cyber environment has brought with it a huge search for adequate information, both from consumers whose demand revolves around the quality and truthfulness of products and services, as well as from suppliers in relation to trade. This search has been constantly facilitated by new online transaction platforms, such as e-marketplaces.

The term used to express all commercial transactions in which parties interact electronically, rather than establishing concomitant and direct physical contact, is electronic

commerce (Klee, 2014). It is characterized by the commercial operations which are carried out by electronic or computer means, that is, the set of cyber communications carried out for advertising or contractual purposes between consumers and their suppliers. Therefore, electronic contracting is the conclusion or agreement through electronic environments or tools (Miranda Serrano, 2012).

The marketplace platform acts as a facilitator between suppliers and consumers in the products and services commerce. It is a means by which various types of advertising can be broadcast. Consists precisely in the online participation in a virtual environment of organizations, companies, communities and/or individuals, which have the objective of commercial exchange and access to the available contents (Pereira, 2001).

2.1 LEGAL CONSUMPTION RELATIONSHIP CONCEPT

The basic criterion used to determine the scope of application of the provisions contained in the Consumer's Defense Code (Brazil, 1990), as well as of all the normatization that makes up the consumer micro system, is the identification of the consumption legal relationship, which is made through the analysis of its elements (Miragem, 2019): subjective, objective and causal.

Depending on this conjecture, it is relevant to start with the definition of consumer, which has four conceptions already expressed in the Consumer's Defense Code (CDC), being one direct (*stricto sensu*) and three of them by equivalence (*lato sensu*) (Alves, 2014). The consumer, in first place, is any natural or legal person who acquires or uses a product or service as a final recipient (Article 2, *caput*, CDC), and also the collectivity of persons, even if indeterminable, who have intervened in consumer relations (Article 2, sole paragraph, CDC). All victims of a damaging event (Article 17, CDC) and all persons, whether or not determinable, exposed to the commercial practices provided for therein (Article 29, CDC), are treated as consumers too.

The direct consumer is considered to be a person who purchases goods or services in order to satisfy his own needs as well as those of his relatives (Lasarte Álvarez, 2007). That is, what really matters for this conceptualization is the usage value assigned to the object. But still, the consumer can be understood, through an abstract notion, as the person who wants a healthy life quality (Lara González; Echaide Izquierdo, 2006). This way, all people are considered consumers, since consumption is one of the facets of life in society.

Focusing on the doctrinal study, the standard consumer is the final recipient who uses or acquires the product or service, but strictly characterized as vulnerable and who does not promote an economic professional destination of the product or service (Miragem, 2019; Bourgoignie, 1992).

However, in relation to the final recipient quality, it is necessary to explain the three theories surrounding the concept of the consumer. On the one hand, the maximalist theory states that products are only goods, since the legislator defined only products and services as the object of consumer relations. Thus the concept of consumer is not restricted to the good, but to the idea of final destination (Paiva, 2015; Netto, 2020; Nunes, 2018; Andrigui, 2010).

On the other hand, the finalist theory, unlike the latter, divides products into consumer goods and production goods, given that the idea of final destination is closely linked to that of consumer goods, while the acquisition or use of production goods is excluded from the scope of the Consumer's Defense Code (Marques, 2004).

The third one, called finalist theory mitigated or deepened, expands the concept of consumer in order to reach the natural or legal person who, although not the final recipient of the product or service, is in a situation of technical, legal or economic vulnerability in relation to the supplier (Brazil, 2019).

Thus reported, the equated or indirect consumer is qualified in three distinct ways. The collectivity of persons (Article 2, sole paragraph, CDC), all victims of the damaging event (Article 17, CDC) and also the persons exposed to commercial practices (Article 29, CDC) as offering, membership contracts, debt collection, database insertions (Benjamin; Marques; Bessa, 2017) and, notably, advertising.

Regarding the concept of supplier, the Superior Court of Justice states that the qualifying criteria to properly recognize an individual, legal entity or a depersonalized entity as a supplier of products or services are objective; it is essential only that it performs a certain activity in the consumer market for remuneration (Brazil, 2004), with habituality and formalism in the commercial practice. What characterizes, therefore, the figure of the supplier, even being an individual or legal entity, is the economic activity developed (Larrosa Amante, 2011) – that is, production, assembly, creation, construction, transformation, import, export, distribution or marketing of products or services (Article 3, *caput*, CDC).

The product concept was provided by the Consumer's Defense Code including any goods, movable or immovable, material or immaterial (Article 3, §1, CDC). The product

concept encompasses both consumable and unconsumable goods; referring to absolute as well as relative consumption (Stoco, 2014). Or rather, the product or the consumer good is anything that can be used or purchased in order to satisfy the need and desire of the consumer, the organization or the group (Limeira, 2017).

As an objective element of the consumption relationship, is considered as a service any activity provided in the consumer market, through remuneration, including those of a banking, financial, credit and insurance nature, except those resulting from labor relationships (Article 3, §2, CDC). Unlike the product concept, the legal provision demonstrates the need for remuneration for the service configuration. In other words, as the Superior Court of Justice stated, the concept of service stated in consumerist legislation necessarily requires that the activity be provided for remuneration (Brazil, 2005).

Thus, by means of such definitions, the consumption relationship is composed of three main elements, the subjective, the objective and the causal or finalistic. The first consists of the existence of goods or services included in the consumer relationship, the second of the consumer and the supplier (Salib, 2014; Garcia, 2020), and the third concerns the existence of the final destination of the product or service purchased or used by the consumer.

In view of this, the understanding of all elements of the consumption legal relationship enables the applicability of consumption rules (Vandin; Matioli, 2014). Once defined, then, it is necessary to understand the importance of the equivalent consumer as such in Article 29, *caput* of the Consumer's Defense Code in relation to his exposure to advertising, which is referred to in several articles of the aforementioned Code – Article 6, item IV; Article 30, *caput*; Article 33, *caput*; Article 33, sole paragraph; Article 35, *caput*; Article 35, item I; Article 36; Article 37 etc. (Brazil, 1990).

2.2 ADVERTISING

In the consumer market there are categories of rules and principles aimed at controlling trade practices which are part of the consumer relations scope. One of the most relevant commercial communication practices is the offer, whose proposal to provide a product and/or service can be carried out in three specific categories: presentation, information and, mainly, advertising (Almeida, 2009).

Advertising is an incitement to buy services and products by making them known to the greatest number of people (Reyes López, 2012). It is an essential tool for the provision of

information to consumers, so that such information allows them to make an appropriate selection of products and services (León Arce; Moreno-Luque Casariego; Aza Conejo, 1995).

Although the Consumer's Defense Code did not define advertising explicitly, in a meta-legal definition, it is possible to state, briefly, that advertising consists of a set of mechanisms designed to inform the public and, at the same time, convince and persuade them with in order to the acquisition or use of products and / or services (Santos, 2000).

The fundamental purpose of most advertising is to persuade consumers. However, few campaigns have a theory (or start from empirical data) in order to substantiate messages which seek to change attitudes, behaviors or habits. They depend solely on intuitive beliefs and the creativity of the advertising provider. From this perspective, the theoretical-conceptual framework of behavioral psychology has contributed with empirically tested principles which have been applied in advertising, increasing its effectiveness (Bator; Cialdini, 2000). In other words, the colors used in the designer, the font size, the structure of the ad and the location in which the advertising is announced are essential for consumer acceptance.

However, when the proper study about neuromarketing (Bridger, 2018), especially in relation to the consumer behavior within the advertising system, is not carried out, it can result in the abusiveness of advertisements, given that alternative and illegal means may be used to capture the consumer, such as behavioral advertising.

All individuals exposed to advertising are considered legally consumers and, therefore, deserve due protection because of their vulnerability (Tartuce; Neves, 2018). The Consumer's Defense Code states that all persons determined or not, exposed to the practices provided for therein are equivalent to consumers (Article 29, *caput*, CDC). Thus, everyone who sees the ad is considered a consumer.

Advertising has become an unrestricted mechanism for capturing consumers in e-commerce, specifically through marketplace platforms, which have tools that store users data for future advertising purposes.

3 ABUSIVENESS OF THE BEHAVIOURAL ADVERTISING PRACTICE

The plurality of products offered by a wide range of suppliers was only possible because of the advantages established by the mass consumer society in order to optimize the process of satisfying consumers' needs. However, due to excessive competition from suppliers,

in an attempt to capture potential consumers, they use abusive advertising strategies based on capture techniques with no theoretical basis and no legal backing.

The consumer market is constantly bombarded by engagement techniques that offend the principles of consumer protection. Thus, advertising tools border on the illegal and can be considered abusive in relation to the consumer in the exercise of freedom of initiative (Article 170, *caput*, Federal Constitution). Advertising aimed at optimizing sales is the result of general freedom of action. However, the supplier may not incur the abuse in view of the regular exercise of the right; after all, the abuse of the right constitutes an illicit act, as an expression of the Civil Code itself (Article 187) in the civil sphere (Brazil, 2002) and the Consumer's Protection Code (Article 39, *caput*) in the consumption regulation bias (Brazil, 1990).

Abusive practice require manifestly excessive advantage to the detriment of the consumer (Oliveira, 2017). It is also qualified as a conduct, an action or simply a posture, usually at the pre-contractual stage, which infringes the consumer's right. In that case, it is the failure to respect consumer law that makes the practice abusive (Nunes, 2018). Thus, considering behavioral advertising, the abusive practice may be characterized when it disrespects certain rights or principles extracted from the Consumer's Defense Code, as the vulnerability principle (Article 4, item I, CDC) and sometimes from the Federal Constitution, such as the right to privacy (Article 5, item X, Federal Constitution) (Brazil, 1988).

With regard to consumption principles, there is the Article 4 of the Consumer's Defense Code, with the provision about the National Policy on Consumer Relations. More specifically, the item VI of that Article states the prohibition and repression of all abuses in the consumer market, including unfair competition and the misuse of inventions and industrial creations of trademarks, trade names and distinctive signs, which may cause damage to consumers. Such provision fits perfectly in the parameters of behavioral advertising.

Furthermore, the Consumer's Defense Code prohibits all misleading or abusive advertising (Article 37, *caput*, CDC), and it is considered abusive, among others, discriminatory advertising of any nature, which incites to violence, exploits fear or superstition, takes advantage of the child's lack of judgment and experience, disrespects environmental values, or is capable of inducing the consumer to behave in a manner that is harmful or dangerous to his health or safety (Article 37, §2, CDC).

However, it can be seen that the legislator has established only a general definition with regard to the abusiveness of advertising. In other words, one can note that the expression

"among others" means exemplification and allows the interpretation that the species of advertising, listed in the Code, considered abusive, constitute only some examples.

This means that it is a merely exemplary list (*numerus apertus*) (Casado, 2006; Fernandes Neto, 1999), and do not cover all the possibilities (*numerus clausus*). Thus, the legislator did not seek to predict all kinds of abusive advertising, but to leave it open to future possibilities extracted from everyday life, making room for the characterization of different types of abusive, as in the case of behavior advertising.

3.1 NO ABUSIVE CAPTURE OF CONSUMER PRINCIPLE

The increase in the number of consumers and the need to protect them are related to the growth of the brands and the gradual investments of suppliers in the development of the advertising market, since the end of the 19th century, as a result of the industrial revolutions and the development of the goods production process, multiplied nowadays by the informational, digital and cyber revolution.

Such revolutions gave rise to a new class of goods, digital goods. Defined as the digital heritage of every internet user, it means that every active social media person has his respective digital asset which needs to be effectively protected, considering that at any time the user may pass away or become unable to manage their networks and end up suffering violations of his digital assets. Qualified as goods of financial value and goods of emotional value, they refer to their economic value, by mentioning music, videos, photos, inbox messages, digital libraries, online games, virtual currencies, among others (Landim, 2018).

With the cyber evolution, then, the online universe has gradually become the new platform for information propagation and commerce and although the capture of the consumer is part of the essence of advertising activity, while aiming to attract his interest to the object (product or service) of the ads, this purpose cannot be achieved at any cost. The limits imposed by the civil, constitutional and consumption legal system must be respected, in addition to the principles whose ethical nature is ensured, such as those established by the Brazilian Advertising Self-regulation Code (Brazil, 1980).

The existence of certain advertising practices that deliberately invade the intimacy and privacy of consumers (Article 5, item X, Federal Constitution) has become a matter of extreme relevance in the legal environment. Practices such as insistent telemarketing calls (Article 1,

sole paragraph, of Law no 6,260/2011) (Natal, 2011) or sending cell phone torpedoes (SMS) at any time of day and night (Anatel, 2007) were regulated by considering that they tried to capture consumers through abusive techniques. Advertising practices such as these constitute a real abuse of the supplier's rights by having as a basic principle only the capture of a consumer who is being harassed disproportionately.

The Non-Abusive Capture of the Consumer aims to avoid the overkill on the search for the consumer, which occurs when he is bothered exhaustively at any time of the day or night, disregarding any concern with privacy or intimacy, by placing at his expense a constant situation of potential consumption. There is no reference to seeking the consumer's attention through the use of fully legitimate advertising, which respects his right to choose (Dias, 2017).

In addition to the general provision concerning the efficient curbing and repression of all abuses in the consumer market, including unfair competition (Article 4, item VI, CDC) qualified as one of the Principles of the National Policy on Consumer Relations, advertising communication which disrespects is related to the rights to privacy and intimacy enshrined in the Federal Constitution (Article 5, item X) can easily be qualified as an abusive practice, provided in the Consumer's Defense Code, based on the expression. "entre outras" (among others) (Article 39, *caput*, CDC). More specifically it can be considered a kind of abusive advertising (Article 37, §2, CDC).

In order to start the discussion about this form of advertising, behavioral advertising is an offense to the Principle of Non-Abusive Capture of the Consumer, since such technique uses an illegal capture and storage of information about the consumer, since it can corrupt or disseminate their digital goods in an unrestricted way. For this reason, it also ends up violating intimacy and private life by sending him advertising messages chosen specifically through information captured illegally online by cyber mechanisms often present on marketplace platforms.

3.2 BEHAVIOURAL ADVERTISING AND BEHAVIOURAL PSYCHOLOGY

There is considerable empirical evidence on the mechanisms by which advertising would influence consumers, described by Ehrenberg, Barnard, Kennedy and Bloom (2002) in addition to Sharp (2010), allied to the practice of the advertising professionals in order to engage consumers so that they could enjoy the products or services advertised. However, the issue

transitions around the need to capture new consumers and the limits of the advertising legal regulation.

It is noticeable that science is more than a mere description of events as they occur, but an attempt to discover their order and to show that certain phenomena are orderly related to others (Pereira, 2018). No practical technology can be based on science until relations, attitudes or behaviour have been definitively discovered. Therefore, the function of empirical advertising studies is to guarantee the engagement of consumers through the analysis of their supposed patterns of behavior with the help of science, here referred as neuromarketing (Bridger, 2018).

Science not only describes, it foresees, as well as deals not only with the past, but also with the supposed future. If the methods of science are to be used in the field of human affairs, it must be assumed that behaviour is orderly and determined (Skinner, 1938, 1953). Thus is born the matrix of psychological doctrine called behaviorist, which develops behavioral psychology, used several times to predict behaviors and condition human attitudes (Figueiredo, 2014) in various social spheres and, sometimes, in the legal, as in the consumer market by advertising communication.

As a result of technological evolution combined with studies in the field of social psychology, behavioral advertising may be being used unrestrictedly within many internet marketplace platforms. In this way, on the internet, it is possible to carry out with some ease the personification and the contextualization of the advertising, both based on the online behavior of the consumer. The first occurs when the advertiser delivers advertising messages related to the information extracted from the database it has on the user accessing the website (Scherkerkewitz, 2014). While the second consists of the publication of advertisements referring to the content of the page being accessed, so that the advertising fits the supposed interests of the consumer (Peguera Poch, 2013).

When the advertiser uses the contextualization and customization to convey the advertising messages it configures behavioral advertising. The development of this practice is related to the specific destination of messages for certain consumers. It is based on a database built on their interests, commonly generated without any kind of authorization or even consent from users, being characterized on a basis of behavioral targeting (Smith, 2015).

The development of behavioral advertising occurs using specific information about the behavior of certain people, collected by specialized algorithms (cookies), with the purpose of directing ads with an approach more appropriate to the specifications of the user. However, this

practice should be considered abusive and illegal if the database on which it is based has been fed without the authorization or consent of the consumers, since it violates their privacy and/or intimacy by improperly gathering information, as can be understood from a general analysis of the provisions of the Law of Cookies in Portugal (Portugal, 2012).

4 USE OF DATA FOR BEHAVIOURAL ADVERTISING

The cyber environment is a propitious environment for the proliferation of practices such as behavioral advertising, which is why it is a much sought-after source for collecting data that will enable more reliable profiles of consumers constructed with informations about their online habits. Thus, based on the analysis of the research that has been carried out, the websites that have been visited and the content consulted, the computerized system develops a consumer profile and then, from a database, specific advertising messages are developed that have more chances to fit the personal interests of the consumers chosen (Escola Nacional de Defesa do Consumidor, 2010). Thus, such generic navigation profiles that are created from informations about the user routine online, have an immense commercial value in the market (Martínez; Martínez, 2013).

4.1 USE OF *COOKIES*

The origin of the digital space has made possible economic and social benefits, namely the greater control of financial markets or the exchange of information on research of diffuse interest. However, through all the information collected and made available in the databases connected to a network, the internet has become a fragile space for the user, precisely because it contains information from all levels of knowledge; from the most individual and private to the most collective and public (Pinheiro, 2013).

Thus, although the development of technological science is characterized by the search for social welfare, sometimes the countless resources of the platforms, available to the supposedly lay public, make possible damages resulting from the variety of possibilities that exist in the virtual environment, which denotes the need to create legal instruments that regulate and guide the judgment of facts when necessary.

There is a need for normative production regarding the online security issues established by the State, although the governmental conjuncture itself is associated with the

search for information about malicious individuals (e.g. involved in crimes) or regarding the suspension of certain applications services of common use because of specific cases investigations. In this respect, the responsibility for the evaluation of a given site or marketplace platform on the security for insertion of personal data should left to the citizen, in order to avoid damages by the simple misuse of the tools (Paesani, 2014).

Nevertheless, the user does not have the ability or proper competence to evaluate whether or not his data is being stored by the platforms' mechanisms. Therefore, due to the vulnerability of the user (qualified and characterized here as a consumer for being part of the consumption relationship provided by the behavioral advertising) the Law of Cookies in Portugal was decreed on August 29, 2012, which provides that any site in European territory must warn and obtain consent from users before using cookies. Thus, considering the need for protection of this data, specific legislation regulating the subject began to appear, as in the case of Brazil, where the General Data Protection Law was created (Law no 13.709/2018).

The problem with this issue is not only the obligation to accept the terms relating to the collection and use of data, but also the advantage that the supplier who uses behavioural advertising has within the consumer market to the detriment of other suppliers who strictly follow the legal rules. In other words, it is not because a country does not yet have a specific regulation for compliance that the legal principles should be disregarded, namely, the guarantee of intimacy and privacy (Article 5, item X, Federal Constitution), the economic order (Article 170, *caput*, Federal Constitution), free competition (Article 170, item IV, Federal Constitution), the abusive advertising prohibition (Article 37, *caput*, CDC), the restraint and repression of damaging acts practiced against consumers (Article 4, item VI, CDC), among others.

4.2 FAIR ADVERTISING PRINCIPLE AND UNFAIR COMPETITION

Information about consumers' internet browsing habits, their purchases and other online and offline activities is collected, combined, used and shared often instantly and invisibly in today's cyber reality. For this reason, the government must take care of the issue of capturing personal information from consumers through websites and seemingly harmless registrations, in addition to the excessive dissemination of unsolicited advertising messages (Dias, 2017), since these types of conduct can be considered a kind of abusive capture of consumers.

However, the difficulty of the issue becomes greater when the principle of advertising loyalty is examined. This principle is intended to protect two distinct aspects set forth in the

Federal Constitution as general principles of economic activity: consumer protection (article 170, item V) and free competition (article 170, item IV). Therefore, advertisers should not employ any technique that could cause confusion or imbalance between the products and services of other suppliers (e.g, when a given product is placed on the consumer market with a packaging very similar to that of another product that is already in circulation); they should also not use any subterfuge or strategy for consumer deception by taking advantage of their vulnerability or even cause discredit in relation to competing suppliers or their products and services (e.g., when an advertising communication containing degrading statements about a given product, service or business society is broadcast) (Alves, 2014).

In addition, the supplier is also failing to comply with such constitutional principles (Article 170, items IV and V) when it uses behavioral advertising to be ahead of other advertising suppliers, since this strategy allows advertising to be specific to a particular consumer by sharply increasing the chances of product or service adherence, thus unbalancing the full egalitarian development of internet commerce.

In relation to the principle of advertising loyalty in Competition/Consumer Law, the normative provision contained in Article 4 of the Brazilian Advertising Self-Regulation Code determines that all advertisements must respect the principles of fair competition generally accepted in the business world (Brazil, 1980). In other words, the mentioned Code specifically observes the constitutional principle of free competition (Article 170, item IV) with regard to the spread of advertisements. Thus, there should be no sponsorship by the supplier that would deliberately hinder the egalitarian development of competitors' activities.

4.3 REGULATION RELATED TO THE USE OF CONSUMER'S DATA WITHIN THE INTERNET CIVIL MILESTONE

In Brazil, the Internet Civil Milestone was established by Law no. 12,965/2014 (BRAZIL, 2014). It is considered to be a basic standard, since it establishes general parameters regarding guarantees, principles, rights and duties regarding the use of the cyber environment. In addition, it determines guidelines that the government must follow (Teixeira, 2015).

In the first place, the aforementioned Law provided access to the internet as fundamental to the healthy exercise of citizenship. Secondly, it determined that the user/consumer has the right to clear and complete information about the collection, use, storage, treatment and protection of his personal data. According to the Article 7, item VIII, the use of

it will be for purposes that: a) justify their collection; b) are not prohibited by law; and c) are specified in service contracts or in terms of use of internet applications (Brazil, 2014).

In addition, the Internet Civil Milestone explicitly ensured that consumer legislation can be applied in the cyber environment, considering that, according to the Article 7, item VIII, there will be the application of consumer protection rules in consumption relations carried out on the internet (Brazil, 2014). Thus, the duty to inform the consumers what is done with their data refers to applications and websites operating as suppliers within the online consumer market, *e.g.* in the case in which informations about the searches made on the internet by a particular user are captured and these informations are passed on to third parties for the purpose of creating specific advertisements, the user in question must be aware of these facts (Lima, 2016).

As a result of the huge system of collecting data on user behavior on the internet, behavioral advertising is inserted after the consumer/user performs a search on a product in a search engine on the internet. The user is then bombarded by several specific advertisements of the researched product while browsing several other sites (Lima, 2016), even if he has not conducted any previous research on the specific product in question.

Furthermore, the Internet Civil Milestone also established the user's right to express consent on the collection, use, storage and processing of personal data, which shall take place in a manner that is detached from the other contractual clauses (Article 7, item IX). However, in most cases, contracts are presented to consumers in small text boxes accompanied by a checkbox stating "I accept the terms of the site". In theory, it means that the consumer has agreed to all the rules contained in the contract defined unilaterally, as a subscription contract made by the owner of the internet domain (Lima, 2016).

In any case, the suppliers operating in the virtual environment have the duty to guarantee to the consumers the security of their data collected for the execution of the virtual transactions so they won't be used for purposes other than those agreed upon, nor passed on to third parties without prior express authorization (Mattos, 2012).

It is a violation of the right to privacy to maintain unrestricted databases relating to consumption and the transfer of information without the awareness or express authorization of consumers, in respect to the provided in Article 5, item X of the Brazilian Federal Constitution (Brazil, 1988). In the electronic sphere, however, this protection of privacy is seen as more utopian than real (Salib, 2014).

5 CONCLUSION

When identified as a consumption relationship, considering the possibility of the consumer's equivalent configuration of article 29 of the Consumer's Defense Code, behavioral advertising should be controlled by the Brazilian legal system so that the intimacy and private life of consumers can be properly guaranteed within the marketplace platforms and other websites that use the strategy.

Therefore, the use of the data for the purposes of such advertising, while facilitating the specificity of the advertisements which are directional to certain consumers, entails the abusive capture of the consumer and harms several constitutional rights (e.g. privacy and intimacy, article 5, item X, Federal Constitution). Moreover, it may harm the consumer market as a whole by taking into account egalitarian development within supplier relations, promoting unfair competition.

The Consumer's Defense Code has not yet expressly regulated behavioural advertising as a form of advertising communication which is used in the cyber environment and which may harm both the consumers and the suppliers. However, although the Code is still omissive, it is possible to regulate this type of activity by the consumer protection and defense microsystem, since the lack of specific provision regarding behavioral advertising does not totally prejudice the regulation.

This occurs because all advertising species are subject to the principles established by the Consumer's Defense Code and, even more, if in certain cases it is not sufficient, it is also possible that the regulation is guided by the principles contained in the Brazilian Advertising Self-regulation Code, as well as in the General Data Protection Law.

Behavioral advertising is developed using customization and contextualization of advertising activity and, moreover, consists of the advertising individually disseminated on the basis of the data collection from behavioral profile of each consumer.

However, although the issue has so much deliberation and information, the Consumer's Defense Code does not yet have a specific regulation on it. Therefore, the way in which the data are collected, i.e. whether or not they disregard the private life and intimacy of consumers, will be decisive in considering the abusiveness of the advertising practice in question.

The constitutional principles ensured the private life and the intimacy of the consumer/citizen/user (Article 5, item X, Federal Constitution). The Civil Code provides that the abuse of rights, in this case, of the supplier, constitutes an illegal act (Article 187). The Consumer's Defense Code prohibits the abusive practices of the supplier (Article 39, *caput*, CDC) and enables the configuration of behavioral advertising within the list of abusive practices (Article 37, §2º, CDC). Finally, the rights of the Internet Civil Milestone (Article 7, item VIII and item IX, Law no. 12.965/2014) have a direct relationship with behavioral advertising, as they deal with the collection and ways of using consumer information, configuring thus, its abusiveness.

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Submetido em 17.03.2024.

Aceito em 10.06.2024.