9

Personalized Pricing in Brazil

Bruno Meyerhof Salama and Leda Batista da Silva

In an unprecedented ruling, in 2018, the Brazilian Consumer Protection Authority[1] applied a fine to a popular online travel company named Decolar.com for allegedly favouring foreign consumers over Brazilian residents during the 2016 Olympics held in Rio de Janeiro. The accusation was that Decolar.com had offered hotel reservations at different prices according to the consumer's location as identified through their internet protocol address, or IP address.

To our knowledge, this is the only case thus far in Brazil that reviewed the practice of charging different prices from different consumers based on their specific characteristics.[2] Within the consumer law field of study, this case brings a number of questions, especially whether personalized pricing could be viewed as an abusive practice. Besides that, it could also raise questions in other fields of law, especially whether antitrust law and data privacy law would pose limits to personalized pricing.

This chapter addresses these questions by building on our previous writings on the topic[3] and discussing how price personalization is (or could be) addressed in the Brazilian legal system. We start with a brief overview of constitutional law, then move on to a review of the aforementioned Decolar.com case, which was tried under consumer law, and in doing that we highlight, in particular, certain questions that have been left unanswered by consumer authorities. We then move to antitrust law and to the regulation of data privacy, discussing the

[1] Departamento de Proteção e Defesa do Consumidor (DPDC), da Secretaria Nacional do Consumidor (SENACON).

[2] See OECD, Directorate for Financial and Enterprise Affairs, Competition Committee. Personalised Pricing in the Digital Era: Background Note by the Secretariat, 2018. Available at: https://one.oecd.org/document/DAF/COMP(2018)13/en/pdf.

[3] Bruno Meyerhof Salama and Leda Batista da Silva, A Personalização de Preços na Era Digital: critérios para investigação concorrencial (Price Personalização in the Digital Era: Criteria for Antitrust Investigation). Revista do IBRAC, 1, 2022, p. 6. Available at: www.ibrac.org.br/UPLOADS/PDF/RevistadoIBRAC/Revista_IBRAC_1_2022.pdf.

matter according to Brazilian law and doctrine.[4] Focal points include the possibility of collecting and processing data under the Brazilian Data Protection Law and a discussion about how price personalization would fare under existing competition laws given the ways in which the Brazilian antitrust authority (the Administrative Council for Economic Defense – 'CADE') tends to look at price discrimination cases.

We adopt the OECD definition of 'price personalization' as 'a form of price discrimination that involves charging different prices to consumers according to their willingness to pay' (although not necessarily equal to it).[5] For the OECD, the estimation of consumers' willingness to pay may take into account data voluntarily offered by consumers, such as their date of birth and address, data directly observed by the company, such as previous purchases, search history, and 'likes' on social networks, in addition to data inferred from consumer behaviour, such as income, risk profile, political ideology, and hobbies, among others.[6]

We adopt this definition first and foremost because it aligns with the way in which the topic of price personalization has and probably will continue to be approached in Brazil. This definition offers a framework that allows Brazilian authorities to distinguish price personalization from other price discrimination practices such as dynamic pricing (in which case the price discrimination factor does not reside in the characteristics of the specific consumer but on market dynamics such as supply and demand conditions), target advertising (whose purpose is to increase the probability that groups of consumers will purchase a product based on their preferences and assumed or verified behaviours), and price steering (where there is a manipulation of search results to align more expensive products to consumers who are willing to pay more), among many others.

4 See, for instance, discussions on price personalization and price discrimination in: QUINELATO, Pietra Daneluzzi. Preços Personalizados à luz da Lei Geral de Proteção *de Dados: visibilidade econômica e juridicidade* (Editora Foco, 2022); MENDES, Laura Schertel; MATTIUZZO, Marcela; FUJIMOTO, Mônica Tiemy. *Discriminação algorítmica à luz da lei geral de proteção de dados. Tratado de proteção de dados pessoais* (Forense, 2021); SALAMA, Bruno Meyerhof; LIMA, Leda Batista da Silva Diôgo de. A *Personalização de Preços na Era Digital: critérios para investigação concorrencial*. Revista do IBRAC, 1, 2022, p. 6; BERGSTEIN, Lais; TRAUTWEIN, José Roberto Della Tonia. *Discriminação e Diferenciação de Preços nas Relações de Consumo*. Uberlândia: Revista da Faculdade de Direito da Universidade Federal de Uberlândia, 47(1), jan./jun. 2019, pp. 136–156; LORES, Clovis; SANTOS, Marcel Medon. *Big Data, Geopricing and Geoblocking*, in The Future of Antitrust/Priscila Brolio Gonçalves (IBRAC, 2020); PEREIRA NETO, Caio Mário da Silva; RENZETTI, Bruno Polonio. *Big data entre três microssistemas jurídicos: consumidor, privacidade e concorrência*, in Defesa da concorrência em plataformas digitais [recurso eletrônico]/Caio Mário da Silva Pereira Neto (organização) (FGV Direito SP, 2020); BISELLI, Esther Collet Janny Teixeira. *Discriminação de Preços na Economia Digital*, in: Defesa da concorrência em plataformas digitais [recurso eletrônico]/Caio Mário da Silva Pereira Neto (organização) (FGV Direito SP, 2020); Alexandre de Moraes. *Direito Constitucional* (Atlas, 2002).

5 See p. 2.

6 See p. 11.

9.1 THE BRAZILIAN LEGAL FRAMEWORK MOST RELEVANT FOR PRICE PERSONALIZATION – OR THE LACK THEREOF

There is no specific provision in Brazilian statutory law dealing with personalized pricing. The legal discipline would then follow from more general categories.

9.1.1 *General Overview*

At the heart of the Brazilian Constitution, one finds principles related to human dignity, equality, and non-discrimination; likewise, consumer protection is treated as a fundamental right (Articles 1, III, 3, IV, 5, caput, and XXXII, 170, V, among others).[7,8] At the same time, the constitutional value of free initiative, which is the foundation of the Brazilian republic and its economic order (Articles 1, IV, and 170, caput and IV of the Brazilian Constitution),[9] protects economic freedom, a constitutional value that has been reinforced recently by the enactment of Law 13,874 of 2019, also known as the Economic Freedom Law.

This duality highlights the basic tension underlying the problem of price discrimination at large and price personalization, in particular. On one hand, the principles of free initiative, free competition, and free exercise of economic activity suggest viewing personalized prices as prima facie legal. Human dignity, equality, non-discrimination, and consumer protection suggest otherwise.

Against this backdrop, scholars tend to approach the problem of constitutionality with two considerations in mind. The first is employing the cannon of reasonableness

[7] Free translation into English as follows:

Article 1: The Federative Republic of Brazil, formed by the indissoluble union of the States and Municipalities and the Federal District, constitutes a Democratic State of Law and is founded on: III – the dignity of the human person.

Article 3: The fundamental objectives of the Federative Republic of Brazil are: IV – promote the good of all, without prejudice of origin, race, sex, colour, age, and any other forms of discrimination.

Article 5: Everyone is equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, freedom, equality, security, and property in the following terms: XXXII – the state shall promote, in accordance with the law, consumer protection.

Article 170: The economic order, founded on the appreciation of human work and free initiative, aims to ensure a dignified existence for all in accordance with the dictates of social justice, observing the following principles: V – consumer protection.

[8] Same for international treaties in which Brazil is a part of, such as the UN's Universal Declaration of Human Rights and the American Human Rights Convention.

[9] Free translation into English as follows:

Article 1: The Federative Republic of Brazil, formed by the indissoluble union of the States and Municipalities and the Federal District, constitutes a Democratic State of Law and is founded on: IV – the social values of work and free enterprise.

Article 170: The economic order, founded on the appreciation of human work and free initiative, aims to ensure a dignified existence for all, in accordance with the dictates of social justice, observing the following principles: IV – free competition.

and proportionality to discrimination issues in general, asking whether specific conducts are 'reasonably proportional to the intended objective'.[10] Reasonableness and proportionality are invoked, for example, to uphold the legality of having the state charge different tax rates from taxpayers depending on their income (and, thus, the ability to pay). Similarly, in most cases insurance companies are authorized to price insurance policies based on characteristics such as age, for instance, but reasonableness and proportionality are also sometimes invoked to prohibit certain types of price discrimination, such as pre-existing health conditions.

The second is to break down the analysis into the specific cannons employed in each field of law, whether consumer, data protection, and antitrust rules. Factual considerations such as the expected effects for consumer welfare and access to products alongside, perhaps, effects on economic development will inform both the broader, quasi-philosophical constitutional approach as well as the discussions at the level of consumer, data protection, and antitrust laws.

9.1.2 *Consumer Law Perspective*

The Brazilian Consumer Protection Code (Law 8,078 of 1990) recognizes the consumer as the 'vulnerable' party in transactions, calling for governmental protection (Article 4, I and III).[11] It also lists transparency (clear and proper information), freedom of choice, equality in hiring, and protection against abusive commercial methods as basic rights (Article 6, II, III, and IV).[12]

[10] See, for instance, considerations brought by Alexandre de Moraes. *Direito Constitucional* (Atlas, 2002). In its original in Portuguese: '(…) os tratamentos normativos diferenciados são compatíveis com a Constituição Federal quando verificada a existência de uma finalidade razoavelmente proporcional ao fim visado' (p. 58).

[11] Free translation into English as follows: 'Art. 4. The National Consumer Relations Policy aims to meet the needs of consumers, respect their dignity, health and safety, protect their economic interests, improve their quality of life, as well as the transparency and harmony of consumption relations, in compliance with the following principles: I – recognition of consumer vulnerability in the consumer market; III – harmonizing the interests of those participating in consumer relations and making consumer protection compatible with the need for economic and technological development, in order to make viable the principles on which the economic order is based (art. 170 of the Federal Constitution), always with based on good faith and balance in relations between consumers and suppliers'.

[12] The comprehensive list is as follows (free English translation): 'Art. 6. The basic consumer rights are: I – the protection of life, health and safety against the risks caused by practices in the supply of products and services considered dangerous or harmful; II – education and dissemination on the adequate consumption of products and services, ensuring freedom of choice and equality in hiring; III – adequate and clear information about the different products and services, with correct specification of quantity, characteristics, composition, quality, incident taxes and price, as well as about the risks they present; IV – protection against misleading and abusive advertising, coercive or unfair commercial methods, as well as against abusive or imposed practices and clauses in the supply of products and services; V – the modification of contractual clauses that establish disproportionate installments or their revision due to supervening facts that make them excessively onerous; VI – the effective prevention and repair of property and moral, individual, collective and diffuse damages; VII – access to

 https://doi.org/10.1017/9781009367912.013

Article 39 of the Brazilian Consumer Protection Code sets down examples of abusive practices, such as tie-in sales, refusal to sell,[13] and, closer to the subject at hand, the practices of 'demanding from the consumer a manifestly excessive advantage' and of 'raising the price of products or services without just cause' (item X). It is also worth noting that some practices are deemed a criminal offence in Brazil under Law 8,137 of 1990, such as 'favoring or preferring, without just cause, a buyer or customer, with the exception of consumer delivery systems through distributors or resellers' (Article 7, I).[14]

The practice of discriminating prices for different consumers exists and is not, historically, necessarily illegal in the country. In Brazil, like in many other countries,

judicial and administrative bodies with a view to preventing or repairing property and moral damages, individual, collective or diffuse, ensuring legal, administrative and technical protection to those in need; VIII – the facilitation of the defence of their rights, including the reversal of the burden of proof, in their favor, in civil proceedings, when, at the judge's discretion, the allegation is credible or when he is hyposufficient, according to the ordinary rules of experience; IX – (Vetoed); X – adequate and effective provision of public services in general; XI – the guarantee of responsible credit practices, financial education and the prevention and treatment of situations of over-indebtedness, preserving the existential minimum, under the terms of the regulations, through the review and renegotiation of the debt, among other measures; XII – the preservation of the existential minimum, under the terms of the regulation, in the renegotiation of debts and in the granting of credit; XIII – information about the prices of products per unit of measurement, such as per kilo, per liter, per meter or per other unit, as the case may be. Single paragraph. The information referred to in item III of the caput of this article must be accessible to the person with a disability, subject to the provisions of the regulation'.

13 The comprehensive list is as follows (free English translation): 'Art. 39. The supplier of products or services is prohibited from, among other abusive practices: I – condition the provision of a product or service to the provision of another product or service, as well as, without just cause, to quantitative limits; II – refuse to meet the demands of consumers, to the exact extent of their stock availability, and also in accordance with usage and customs; III – send or deliver to the consumer, without prior request, any product, or provide any service; IV – take advantage of the weakness or ignorance of the consumer, in view of their age, health, knowledge or social condition, to impose their products or services; V – demand from the consumer a manifestly excessive advantage; VI – perform services without prior budget preparation and express authorization from the consumer, except those resulting from previous practices between the parties; VII – pass on derogatory information, referring to an act practiced by the consumer in the exercise of his rights; VIII – place, on the consumer market, any product or service that does not comply with the standards issued by the competent official bodies or, if specific standards do not exist, by the Associação Brasileira de Normas Técnicas or another entity accredited by the National Council of Metrology, Standardization and Quality Industrial (Conmeter); IX – refuse the sale of goods or the provision of services, directly to anyone willing to acquire them upon prompt payment, except in cases of intermediation regulated by special laws; X – raise the price of products or services without just cause; XI – Device included by Provisional Measure nº 1.890-67, of 22 October 1999, transformed into item XIII, when converted into Law nº 9.870, of 23 November 1999; XII – fail to stipulate a period for the fulfilment of its obligation or leave the setting of its initial term at its sole discretion; XIII – apply a formula or readjustment index different from that legally or contractually established; XIV – allow a greater number of consumers to enter commercial or service establishments than the maximum number set by the administrative authority'.

14 Free English translation as follows: 'Art. 7. The following constitutes a crime against consumer relations: I – to favor or prefer, without just cause, a buyer or customer, with the exception of consumer delivery systems through distributors or resellers Penalty – detention, from 2 (two) to 5 (five) years, or a fine'.

students and senior citizens have access to discounts on movie tickets, insurance companies often price their car insurance services based on gender and age, and so on. There are limits, of course. For instance, in 2017, charging different prices to men and women at nightclubs became illegal,[15] but in that same year the practice of charging different prices based on the method of payment (credit, debit, cash) was considered legal[16] after heated debate. Up until then, the majority of case law considered charging different prices based on the method of payment illegal and abusive, but the final say was drafted into law based on the view (supported by studies of the Brazilian Central Bank and other authorities) that distinguishing prices depending on the method of payment would bring benefits to low-income consumers, who do not use credit and debit card mechanisms, in such a way that the absence of such discrimination could lead to a cross-subsidy of people of lower income to people with greater access to credit.[17]

Much of the debate regarding the benefits or harm to consumers in these examples resonates with the discussion involving personalized pricing. In this context, a recent case law[18] lit the flame of discussions involving personalized prices and what could be considered a 'just cause' for discriminating between consumers. This is, thus far, the only case in Brazilian case law we are aware of that discussed specifically the legality of personalized prices.

The investigation was initiated in 2016, when Booking.com filed a complaint with the Brazilian Department of Consumer Protection and Defense (a governmental agency within the Ministry of Justice) against its competitor Decolar.com, an online travel company active in Brazil. According to Booking.com's complaint, Decolar.com had charged different prices from consumers as a function of their geographic location at the time of the Rio de Janeiro Olympics. The complaint submitted simulations carried out on Decolar.com's website, which showed different prices being charged depending on the country where the search was based. In particular, Booking.com's simulations suggested prices charged to consumers located in Brazil were up to 29 per cent higher than prices charged to Argentinian consumers.

[15] Case number 0704451-91.2017.8.07.0001 TJDF (Tribunal de Justiça do Distrito Federal e dos Territórios, Brasília-DF) further reaffirmed by Technical Note 2/2017/GAB-DPDC/DPDC/SENACON issued by the Brazilian Department of Consumer Protection and Defense.

[16] Law 13,455 of 2017.

[17] See Explanatory Memorandum (*Exposição de Motivos*) No. 00053/2016 of Provisional Measure (*Medida* Provsória), No. 764/2016, which preceded Law 13,455 of 2017.

[18] Proceeding n. 08012.002116/2016-21. The proceeding is being reviewed under legal confidentiality (*segredo de justiça*) and the only publicly available document so far is DPDC's decision (Technical Note n. 92/2018/CSA-SENACON/CGCTSA/GAB-DPDC/DPDC/SENACON/MJ), available at: www.cmlagoasanta.mg.gov.br/abrir_arquivo.aspx/PRATICAS_ABUSIVAS_DECOLARCOM?cdLocal=2&arquivo=%7BBCA8E2AD-DBCA-866A-C8AA-BDC2BDEC3DAD%7D.pdf. The defence and accusation arguments summarized herein were extracted from the report described in such a decision. The same accusations were also brought by a State Civil Court (*Inquérito Civil* nº 347/2016-0004691124) and a Public Civil Action (*Ação Civil Pública* nº 0018051-27.2018.8.19.0001).

Decolar.com denied the practice of geopricing, arguing in its defence that (1) it lacked influence in setting pricing rates, since these rates were determined by the hotels directly on the platform; (2) the price differences were a consequence of different platforms being used by customers (namely Decolar.com in Brazil and Desapegar.com.ar in Argentina, which despite belonging to the same economic group were independent from one another), and (3) the Brazilian and foreign consumers would be subject to different legal regimes that impacted pricing (such as tax issues, for example, in addition to different exchange rates).[19]

After approximately two years of investigation, the Brazilian Department of Consumer Protection and Defense dismissed Decolar.com's arguments (the authority's counterarguments will be detailed later), and found the company guilty of geopricing.[20] Authorities deemed that geopricing would violate 'basic rights' of consumers (those listed in Article 6 of the Consumer Protection Code, mainly items II, III, and IV, that is, respectively, the rights to equality in hiring, information, and protection against abuses of all kinds).

According to the decision, the right to equality in hiring would entail non-discrimination without 'reasonable reason'. The decision distinguished the Decolar .com case from charging different prices as a result of different freight conditions, since the latter would be justified by different transportation costs. For the authority, '*a consumer in Brazil or in another country seeks, through the same means – the Decolar website – the same service – accommodations in hotels. The service is provided in the same place, at no additional cost to the supplier, and without any other cost or reasonable reason influencing the price. It is noted, therefore, that Decolar uses only one piece of information – geographic location – to discriminate prices for the same product*'.

The decision added that '*the right to information entails it shall be adequate, clear and unequivocal (quantity, characteristics, composition, quality, price, risks) about the different products and services offered to the consumer*' and, when dealing with the principle of consumer protection against unfair commercial methods, understood that such a principle '*aims to guarantee the consumer is not dishonestly deceived by the supplier, conduct that can be practiced by those who take advantage of the vulnerability of the consumer*'.

After considerations regarding these principles, the decision moved on to analyze the potential abusiveness of the conduct. Here, it focused on item X of Article 39 of the Consumer Protection Code, which prohibits '*raising the price of a product or service without just cause*'. According to the decision, '*the practice of pricing accommodation differently, based only on the geographic location of the consumer, is exactly*

[19] Arguments extracted from the report of the decision. The defence is not public and the proceeding is being reviewed under legal confidentiality.

[20] It is worth mentioning that Decolar.com was also accused of hiding the availability of accommodations to Brazilian consumers in favour of foreign consumers, conduct which was named 'geo blocking'.

a case of raising prices without just cause'. It is interesting to note the assertiveness of this sentence, which will be further discussed.

Absence of just cause in Decolar.com's practice of charging different prices according to the geographical location of the consumer was grounded as follows. First, the exchange rate differences would not characterize the inequality that Decolar.com wanted to prove, since it should be enough for the consumer to change, in the search engine, the currency in which he/she wants to see the accommodation offer, so that '*if two consumers, one in Brazil and the other abroad consulted the offer in dollars, both should see the same value*'. Moreover, the tax burden could not justify a higher price either – since Decolar.com's website shows the price of the service without taxes, fees, and charges – and that the different legal regimes to which Brazilian and foreign consumers are subject to would also not constitute 'just cause' since this does not affect the contracted price. Therefore, for the decision, there was abusiveness in the conduct performed by Decolar.com, insofar as Decolar.com extrapolated its legitimate right – in other words, the company has the right to price its products/services, but the way it was priced (through the use of geographic location to personalize the price) would have made this action abusive.

In its own words, the decision found that '*Decolar can price the services offered on its platform as it sees fit. Although the company does not set the price itself, as it claims, since the amount to be paid for the accommodation is given by the hotel, it is clear that Decolar has the right to show these prices on its platform and, thus, carry out its business activity as is common in the market. However, when pricing – or allowing hotels to price – the accommodation service according to the user's geographic location, Decolar acts in such a way as to extrapolate the right to price (or to allow the service to be priced) in accordance with market practices. Indeed, it is not justified, nor is it usual practice, to establish different prices for services that are provided in the same place and under the same conditions to any consumer who is willing to pay for those services*'. The authority also affirmed that '*favoring (or disfavoring), as well as discriminating on account of ethnicity, geographic location or any other characteristic extrinsic to the commercial relationship imbalances the market and consumer relations*'.

Finally, the authority also noticed that Decolar.com's privacy policy was not clear or sufficiently informative, since it never disclosed to consumers that their IP would provide the company with data that could be used to discriminate price.[21]

Decolar.com appealed from the decision, but the Brazilian authority reaffirmed, in 2022, its understanding that the company had violated the consumers' right to

[21] The decision makes reference to the following extract of Decolar.com's privacy policy (free translation into English): '"9. Use of the Website. Bear in mind that when accessing Decolar's website, we automatically receive information about you and your computer. For example, we receive information from cookies (see definition later), web beacons (idem), about your browser and operating system, about the websites accessed, the links, your computer's IP address and the website you closed before joining ours. Decolar uses the information collected mainly to improve the user experience and our service". Source: comercial.decolar.com/br/confidentiality, captured on October 17, 2016'.

complete, free, and useful information and that it had extrapolated its legal right to set prices (according to Articles 4, *caput*, I and III; 6, II, III and IV; 39, II, IX and X of the Brazilian Consumer Protection Code).[22] Nevertheless, the fine applied to Decolar.com was significantly reduced from the original amount of BRL 7.5 million to BRL 2.5 million (or approximately USD 1.5 million to USD 500,000) due to two extenuating circumstances applied to Decolar.com: it was its first offence and it had adhered to the Consumidor.gov.br platform.[23]

It should be noted that the Decolar.com consumer decision left some questions unanswered. The first one could be summarized as follows: in the end, are personalized prices *per se* illegal under Brazilian consumer law? In principle, the Decolar.com decision and the legal basis invoked by the Brazilian consumer authority in the investigation that resulted in the conviction of the company would seem to suggest that price personalization would not be considered per se illegal under a consumer law perspective. This is because the decision reasons that any wrongdoing would depend on the absence of a 'just cause' for the price personalization.

This is relevant especially because Article 39, X, of the Brazilian Consumer Protection Code adopts as abusive the conduct of 'raising the price of products or services without just cause' – and, for such reason, the decision adopts 'just cause' as a determinant in assessing whether the price increase constitutes an abusive practice.

On closer look, however, the decision appears less clear and price personalization seems to have received the contours of a presumed illegality. It all has to do with the way in which the criteria of 'just cause' and 'abusiveness' were discussed in the decision.

First, it is important to note how the authority addressed the defence argument brought by Decolar.com that it had no influence over the prices charged by hotels (i.e., the argument that hotels were the ones that exclusively priced their services directly on Decolar.com's platform). The authority did not seem to have fully or deeply investigated whether this statement was true or not (for the purposes of attributing responsibility for the conduct of personalized prices), merely stating that by '*pricing – or allowing hotels to price – the accommodation service according to the user's geographic location, Decolar acts in such a way as to extrapolate the right to price (or to allow the service to be priced) in accordance with market practices*' – almost as if attributing strict responsibility for the personalization conduct.

The following passage of the decision also illustrates such presumed illegality contours, when the authority states that: '*it is not justified, nor is it usual practice, to establish different prices of services that are provided in the same place and under the same conditions to any consumer who is willing to pay for these services*', and also when it bluntly says that '*the practice of pricing accommodation differently, based*

[22] See earlier pp. 11–13.

[23] A free online platform that allows consumers to file complaints and try to resolve matters with suppliers. When a supplier adheres to the Consumidor.gov.br platform, it must comply with certain obligations in the attempt to resolve the dispute.

only on the geographic location of the consumer, is exactly a case of raising prices without just cause' and that '*favoring (or disfavoring), as well as discriminating on account of ethnicity, geographic location or any other characteristic extrinsic to the commercial relationship imbalances the market and consumer relations*'. The idea behind such sentences seems to reflect a position by the Brazilian consumer authority that any differentiation in prices would (or should) be viewed as an abusive practice, regardless of harm to the consumer (which appears to have been implicitly assumed in price personalization strategies).

Noticeably, the problem could also be a function of brevity because only four relatively small paragraphs were dedicated to specifically discussing whether or not the reasons raised by the Decolar.com constituted 'just cause'. The fact remains, however, that the way in which the analysis was carried out may lead to the interpretation that, in the government's view, the simple fact of charging consumers different prices would be illegal – with very few exceptions (such as freight, listed by the decision as a reasonable justification for charging different freight rates based on the location of the consumer as it impacts the cost of transport).

Also, despite references to the broad concepts of impartiality, justice, and material equality, the analysis carried out by the decision of 'just cause' focused only on the justifications raised by Decolar.com regarding specific criteria of the tax regime and exchange rates (as summarized earlier). Nothing however was ventilated about the actual effects of the practice or its potential economic justifications. For example, the decision could have, but did not, discussed if there could be any economic justification for charging less from foreign consumers – say, to promote tourism in the country by attracting foreign tourists to other regions of Brazil besides Rio de Janeiro.[24]

Ultimately, it would be premature to reach a conclusion on this topic as of now. First, because although this is a very important decision, it may not necessarily be the decisive interpretation on this.[25] In addition, this is a single case, reviewed from the perspective of only one specific authority. Moreover, the decision does not discuss relevant international studies and precedents regarding price personalization (such as OECD's memorandum on the matter, for instance),[26] and, since then, national and international discussions on the subject have evolved.

As a final point, the Consumer Protection Authority's conviction was also premised on the argument that Decolar.com was at fault for having failed to disclose to consumers that their IP would be used to price discriminate. That begs the question of whether a sufficiently informative disclosure would serve as a valid defence. If the policy had been clearer and more transparent, would this have been enough to

[24] It is worth mentioning, though, that public records show that Decolar.com did not seem to have raised such detailed justifications to justify the practice.

[25] The same conduct is also being reviewed by the Public Prosecutors' Office of the State of Rio de Janeiro (case nº 347/2016-0004691124) and is also the subject of a Public Civil Action initiated by this authority (case nº 0018051-27.2018.8.19.0001, which is being treated under legal confidentiality).

[26] See OECD 2018, supra note 2.

rule out the 'abusive' potential of the conduct? Would compliance with transparency requirements avoid characterization of 'abusiveness' under Article 39 of the Brazilian Consumer Protection Code? Would the company need to specifically state that the personalization resulted in higher prices for some and lower prices for others? Would consumers need to grant express consent to the personalization, or would notice be sufficient? And would the company need to offer them an opt-out option?

It is hard to predict exactly how these questions will be answered. For instance, Article 2 of Decree no. 7.962/2013 (which regulates e-commerce in Brazil) establishes that '[e]lectronic sites (…) must make available, in a prominent and easily visible place, the following information: […] IV – detailing, in the price, any additional or incidental expenses, such as delivery or insurance'. With that in mind, one could argue that the additional price resulting from the personalization (if higher) would have to be informed and detailed – even though, to be sure, this law mentions 'expenses', yet personalization is not an expense.

Other fields of study in Brazilian law, such as data protection and antitrust rules, may help to shed some light on this topic. As discussed later, consent seems to be a very important feature of data treatment (although not the only criteria), and full and clear information on what specifically is the data being collected and for what purpose might eventually be a form of best practice for price personalization.

9.1.3 *Under a Data Protection Perspective*

Other studies[27] have also discussed the boundaries of price personalization vis-à-vis the constitutional values of intimacy and privacy, including the secrecy of correspondence and communications (Article 5, X, XI, and XII of the Brazilian Constitution)[28] and, more recently, the constitutional 'right to the protection of personal data, including in digital media' (Article 5, LXXIX,[29] included in 2022 in the list of fundamental rights and guarantees). Data protection is also affected by Law 12,965 of 2014, which establishes the principles, guarantees, rights, and duties for the use of the internet in

[27] See vast research carried out by Pietra Daneluzzi Quinelato in her book *Preços Personalizados à Luz da Lei Geral de Proteção de Dados: viabilidade econômica e juridicidade* (Editora Foco, 2022).

[28] Free translation into English: 'Art. 5. Everyone is equal before the law, without distinction of any kind, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, freedom, equality, security and property, in the following terms: X – the intimacy, private life, honor and image of people are inviolable, ensuring the right to compensation for material or moral damage resulting from their violation; XI – the house is an inviolable asylum for the individual, no one being able to enter it without the consent of the resident, except in the case of flagrante delicto or disaster, or to provide help, or, during the day, by court order; XII – the secrecy of correspondence and telegraphic communications, data and telephone communications is inviolable, except, in the latter case, by court order, in the cases and in the manner established by law for the purposes of criminal investigation or criminal procedural instruction'.

[29] Free translation into English: 'Art. 5, LXXIX – the right to protection of personal data is ensured under the terms of the law, including in digital media'.

the country, and by Law 13,709 of 2018 (Brazil's Data Protection Law), which was enacted in 2018, although most of its articles have only come into force in 2020.

Brazil's Data Protection Law is based on the respect of privacy; informative self-determination; freedom of expression, information, communication and opinion; inviolability of privacy, honour, and image; economic and technological development and innovation; free initiative, free competition, and consumer protection; as well as human rights, the free development of personality, dignity, and the exercise of citizenship by natural persons (Article 2, I to VII) and is applicable to acts carried out in the country or somehow related to it (Article 3). Brazil's Data Protection Law also rests in dialogue with the Consumer Defense Code in cases of violation of the data subject's rights in the context of consumer relations (Article 45).

The Brazilian Data Protection Act defines 'personal data'as information able to identify an individual, including those used to form a consumer's behavioural profile (Articles 5, I and 12, §2).[30] This means that personal information gathered within the context of formulating personalized prices would also be covered by the data protection rules.[31] The digital platform is considered by law as the controller of the personal data (Article 5, VI), defined by law as that agent 'responsible for decisions regarding the processing of personal data'. The operator (Article 5, VII) is the agent that performs the processing of personal data on behalf of the controller. Controller and operator are collectively referred to as 'treatment agents' (Article 5, IX) and 'treatment' is defined as 'all operations carried out with personal data, such as those referring to the collection, production, reception, classification, use, access, reproduction, transmission, distribution, processing, archiving, storage, elimination, evaluation or control of information, modification, communication, transfer, diffusion or extraction' (Article 5, X).

Price personalization is not explicitly foreseen (or prohibited) by the Brazilian Data Protection Law, which authorizes data processing provided that certain principles and rules are complied with. More specifically, all personal data processing operations must follow the following principles (Article 6): good faith, purpose (carrying out the processing for legitimate, specific, explicit, and informed purposes to

[30] Free translation into English: 'Art. 5 For the purposes of this Law, it is considered: I – personal data: information related to an identified or identifiable natural person'. 'Art. 12. §2 For the purposes of this Law, data used to form the behavioral profile of a certain natural person, if identified, may also be considered as personal data'.

[31] When dealing with the general form of personalized prices, the exception provided for in article 4 is not applicable, which determines that (free translation into English): 'This Law does not apply to the processing of personal data: I – carried out by a natural person for exclusively private and non-economic purposes; II – carried out exclusively for: a) journalistic and artistic purposes; or b) academics, applying arts. 7 and 11 of this Law; III – carried out for the exclusive purposes of: a) public safety; b) national defence; c) State security; or d) investigation and repression of criminal offences; or IV – coming from outside the national territory and which are not the object of communication, shared use of data with Brazilian treatment agents or object of international transfer of data with another country other than the country of origin, provided that the country of origin provides a degree protection of personal data adequate to the provisions of this Law'.

the holder, without the possibility of further processing in a manner incompatible with those purposes), adequacy (compatibility of the treatment with the purposes informed to the data subject, according to the context of the treatment), necessity (limitation of the treatment to the minimum necessary for the fulfilment of its purposes, with the scope of the relevant data, proportional and not excessive in relation to the purposes of data processing), free access (guarantee, to the holders, of easy and free consultation on the form and duration of the treatment, as well as on the completeness of their personal data), data quality (guarantee, to the holders, of accuracy, clarity, relevance,and updating of the data, according to the need and to fulfil the purpose of its treatment), transparency (guarantee, to the holders, of clear, precise, and easily available information about the processing and the respective processing agents, observing commercial and industrial secrets), security (use of technical and administrative measures able to protect personal data from unauthorized access and accidental or unlawful situations of destruction, loss, alteration, communication, or dissemination), prevention (adoption of measures to prevent the occurrence of damages due to the processing of personal data), non-discrimination (impossibility of carrying out the treatment for illicit or abusive discriminatory purposes), responsibility, and accountability (demonstration, by the agent, of the adoption of effective measures capable of proving the observance and compliance with the rules of protection of personal data and, including, the effectiveness of these measures).

Therefore, good faith and transparency are key principles when discussing personalized prices and data treatment. Only the necessary data should be processed, with legitimate, specific, explicit, and informed purposes for the holder, and transparency regarding the processing of the data, its scope, and the treatment agents is paramount.

Although the principle of non-discrimination may seem, at first sight, an impediment to the practice of price personalization, this is not necessarily true. What this principle intends to prevent is that personal data be processed for the purpose of discriminating against an individual or group of individuals within a potentially discriminatory and pre-judgmental context.

In this sense, Brazilian doctrine[32] points out that the discrimination to be avoided refers to biases in the programming of algorithms responsible for profiling consumers and calculating reserve prices, and can occur due to statistical error, the use of sensitive data, unfair generalization, and abusive correlation, or discrimination that limits the exercise of rights (e.g., inferring that the location of a peripheral region, by itself, decreases a consumer's reserve price could be discrimination, as well as factoring race in the ability to pay could be racial discrimination).

32 See, for instance, Pietra Daneluzzi Quinelato. *Preços Personalizados à luz da Lei Geral de Proteção de Dados: visibilidade econômica e juridicidade* (Editora Foco, 2022) and MENDES, Laura Schertel; Marcela MATTIUZZO; Mônica Tiemy Fujimoto. *Discriminação algorítmica à luz da lei geral de proteção de dados*. Tratado de proteção de dados pessoais (Forense, 2021).

In this line, Article 5, II, of Brazil's Data Protection Law considers 'sensitive personal data' that 'personal data about racial or ethnic origin, religious conviction, political opinion, union affiliation or organization of a religious, philosophical or political nature, data referring to health or sexual life, genetic or biometric data, when linked to a natural person'. And the processing of sensitive personal data can only occur with the consent of the holder (or in specific situations that seem not applicable to personalized prices).[33]

It is worth noting that Brazil's Data Protection Law, when dealing with the principle of non-discrimination in its Article 6, IX, chose to mention not only unlawful discriminatory purposes (that is, practices prohibited by law that are necessarily unlawful) but also abusive ones (which expands the range of interpretation beyond the illegal, extending to the hypotheses of excessive or immoderate handling of data).

In addition to complying with the principles mentioned earlier, for it to be considered lawful, the processing of (non-sensitive) data must be supported by one of the following hypotheses, which will confer legitimacy to the data treatment (Article 7): (1) by receiving consent by the holder; (2) for compliance with a legal or regulatory obligation by the controlling shareholder; (3) by the public administration, for the treatment and shared use of data necessary for the execution of public policies provided for in laws and regulations or supported by contracts, agreements, or similar instruments; (4) for carrying out studies by research body, ensuring, whenever possible, the anonymization of personal data; (5) when necessary for the performance of a contract or preliminary procedures related to a contract to which the data subject is a party, at the request of the data subject; (6) for the regular exercise of rights in judicial, administrative, or arbitration proceedings; (7) for the protection of life or physical safety of the holder or third party; (8) for the protection of health, exclusively, in a procedure carried out by health professionals, health services, or health authorities; (9) when necessary to meet the legitimate interests of the controller or a third party, except in the event that the holder's fundamental rights and freedoms prevail that require the protection of personal data[34]; or (10) for credit protection.

[33] Article 11. The processing of sensitive personal data may only occur in the following cases: I – when the holder or his legal guardian consents, in a specific and prominent way, for specific purposes; II – without providing the holder's consent, in cases where it is indispensable for: (a) compliance with a legal or regulatory obligation by the controller; (b) shared treatment of data necessary for the execution, by the public administration, of public policies provided for in laws or regulations; (c) conducting studies by a research body, ensuring, whenever possible, the anonymization of sensitive personal data; (d) regular exercise of rights, including in contracts and in judicial, administrative and arbitration proceedings, the latter pursuant to Law No. 9,307, of 23 September 1996 (Arbitration Law); (e) protection of life or physical safety of the holder or third party; (f) health protection, exclusively, in procedures carried out by health professionals, health services, or health authorities; or (g) guarantee of fraud prevention and the security of the holder, in the processes of identification and authentication of registration in electronic systems, safeguarding the rights mentioned in Article 9 of this Law and except in the event that the holder's fundamental rights and freedoms that require the protection of personal data prevail.

[34] There is significant debate on what exactly 'legitimate interest' would mean given the breadth of the concept. Interesting to note that this provision (among others) is not applicable when

However, several scenarios listed earlier – such as (2), (3), (4), (5), (6), (7), (8), and (9) – seem not to make sense in the context of personalized prices. For this reason, we consider consent as a key factor for defining the personalization as legal under the Brazilian Data Protection Law. But how to reconcile transparency and consent with the practice of personalized prices will certainly be a great challenge for companies willing to adopt such practice, since studies[35] have demonstrated that consumers tend to disapprove the practice of price personalization. That begs the question of whether business may not after all decide to avoid price personalization as a matter of social norms, marketing, and reputation, as opposed to liability under the law.

9.1.4 *The Antitrust Perspective*

On previous writing,[36] we have also discussed how personalized pricing could upset Brazilian antitrust rules. Although there is no specific provision regarding personalization, the Brazilian Antitrust Act (Law 12,529 of 2011) sets forth that it can be an antitrust offence 'to discriminate against purchasers or suppliers of goods or services by fixing different prices, sales operating conditions or provision of services' if it has the potential to produce the following effects: harm free competition or free enterprise; control a relevant market; arbitrary increase profits; or abusively exercise a dominant position (Article 36 *caput* and X[37]). To be noticed, the specific wording of Brazilian antitrust law on price discrimination is broader than some other jurisdictions since it specifically makes reference to purchasers and suppliers, including final consumers.

Therefore, although there is no specific antitrust provision related to personalization, and because personalization is a form of discrimination, the antitrust approach to the concept of 'price discrimination' will most certainly be very relevant in the discussion of how the authority could or should address price personalization.

As mentioned earlier, so far, there is no antitrust case on price personalization in Brazil. Although public information suggests that the dockets of the case involving

dealing with sensitive data (meaning that this hypothesis will not validate the legality of the data treatment).

35 See, for instance, p. 132 of European Commission. *Consumer Market Study on Online Market Segmentation through Personalised Pricing/Offers in the European Union* (Publications Office of the European Union, 2018). Disponível em: https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/aid_and_development_by_topic/documents/synthesis_report_online_personalisation_study_final_0.pdf

36 See earlier note n. 3.

37 Free English translation of Law No. 12.529/2011: 'Art. 36. The acts under any circumstance, which have as object 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 enterprise; II – to control the relevant market of goods or services; III – to arbitrarily increase profits, and/or IV – to abusively exercise a dominant position. §3 The following acts, among others, to the extent in which they configure the hypothesis set forth in the caput of this article and items thereof, shall characterize violation of the economic order: X – to discriminate against purchasers or suppliers of goods or services by fixing different prices, sales operating conditions or provision of services'.

Decolar.com were sent to CADE, there are no public records regarding any actual CADE investigation. But we believe that if an investigation of that sort were to happen, CADE would likely follow the 'rule of reason' standard as applicable to unilateral practices – which is essentially a case-by-case analysis in which the authorities examine whether that particular case has the potential to generate anticompetitive effects in the Brazilian market taking into consideration, for instance, the existence of market power and the rationale of the practice (as opposed to a 'per se' analysis).[38]

This means that, in line with the understanding's on price discrimination,[39] the practice of price personalization would not be deemed itself illegal since the application of Article 36 of Law 12,529 requires the demonstration of the harmful effects (even if only potentially) to the market. Therefore, to carry out an antitrust investigation, the following steps would likely be necessary:

(1) Analysis of the practice itself and its feasibility by identifying and classifying the practice under §3º, X, of Article 36. This means that in addition to identifying the price differentiation, authorities would need to demonstrate that such differentiation is not based on costs, that the company has at least the ability in theory to access the data necessary for the personalization (for instance, has access to data and personnel available for the data treatment targeting personalization) and also demonstrate that the product/service is not subject to arbitration.

(2) Definition of the relevant market where the practice took place and assessment of the market power of the investigated company. Under the rule of reason, the lack of market power of the investigated company is a very strong defence argument (this is because a company with minimal market share, even if it were to engage in personalization, would not probably have the ability to generate anticompetitive effects to the market).

(3) Weighing, on a case-by-case basis, the positive and negative effects generated by the practice. This is usually the last step of the antitrust analysis of unilateral practices subject to the rule of reason, carried out after the authority

[38] The evidentiary requirement that authorities must meet is more stringent when applying the rule of reason standard compared to the per se standard. This is because, in the former case, authorities are tasked with showing that anticompetitive effects were or could have been generated in the market. In these situations, investigated companies often rely on arguments centred around the absence of market power and the promotion of efficiency as their defence. Conversely, under the per se standard, the mere presence of the practice itself holds significant influence in determining its illegality.

[39] See, for instance, Administrative Proceeding nº 08700.002600/2014-30 involving price discrimination (Companhia de Gás de São Paulo/Petróleo Brasileiro SA), which understood that for the practice to be considered illegal, the following would need to be verified: dominant position of the entity responsible for the price discrimination; damage (even if only potential) to competition; and absence of economic justification for the practice. See also the vast study carried out by Esther Collet Janny Teixeira Biselli. *Discriminação de Preços na Economia Digital*. In: Defesa da concorrência em plataformas digitais [recurso eletrônico] / Caio Mário da Silva Pereira Neto (organização) (FGV Direito SP, 2020).

managed to prove (i) and (ii). To better illustrate this point, one could think as an example the hypothetical case of an airline company that personalized prices to understand the willingness to pay for each customer not to obtain the higher profit and exploit customers, but for the better efficiency of the flight (accommodating a higher number of passengers and wasting less fuel, for instance). If the company manages to prove that it charged one customer more than the other because the first one was more willing to pay and him/her paying more allowed the company to charge the second customer less, and this resulted in a better and more efficient allocation of resources, at the end of the day, this *could* be a justification under the rule of reason – although one could not disregard the extreme difficulty in proving this.[40]

Thus, for an antitrust conviction, antitrust authorities would need to verify, in practice, the potential for generating anticompetitive effects to the market. As a result, we believe that an investigation that were to conclude that price personalization took place in a competitive market where the company in question did not have market power would probably view the practice as legal – mainly because without market power, the possibility of the practice generating harmful effects to the market is difficult to conceive. For instance, it is hard to imagine a supplier in a highly competitive market being able to sustain a higher personalized price in detriment to the consumer.

In line with this understanding is the OECD's premise that personalized pricing may be typically pro-competitive and often enhances consumer welfare – which means it has potentially fairer distributional effects and may generate increase in production and consumption, incentives for innovation, and more competition among players – provided that certain structural conditions are not met (such as those that could favour the abuse of a dominant position or allow the exploitation of consumers) and when carried out in a transparent and non-disloyal way. Conversely, at least in theory, personalized pricing could be interpreted as illegal under an antitrust perspective if carried out by a firm with significant market share, to the detriment of consumers, under which scenario could be considered an abuse of a dominant position generating harmful effects to the market.

In any case, consumers are not the only point of reference under antitrust law in Brazil (although antitrust is mainly driven by the consumer welfare principle, the authorities need to consider the effects generated to the market as a whole and not only consumers, which opens the door to efficiency arguments serving as a valid defence).

CADE's Department of Economic Studies (relying on reports from other jurisdictions) has already recognized that personalized pricing can generate ambiguous

[40] It is important to note that this difficulty also occurs with other practices in Brazil – predatory pricing, for instance, is extremely hard to convict mainly because it is hard to prove anticompetitive effects under the rule of reason.

effects and that 'the authorities will have to understand the processes well and calibrate their analysis to measure the extent to which the negative effect outweighs the expansion effect and is harmful to consumers in general'.[41]

Finally, personalized prices could also have a positive effect on competition insofar as it can discourage price collusion since personalized pricing dynamic goes against the strategy of maintaining equal prices among competitors and also foster innovation.

9.2 FINAL REMARKS

Under the Brazilian legal framework, there is no definitive interpretation of what could be considered an unlawful or abusive price personalization. How the rights granted by Brazilian laws are being implemented is another point that will need to be closely monitored – for example, whether a privacy policy with vague language could be considered as complying with the consent requirement under Brazil's Data Protection Law and whether there is room for the consumer to completely opt-out from the collection of data. The combination of existing consumer, antitrust, and data protection laws seems to suggest that the practice of price personalization would not be per se illegal, calling for a case-by-case approach. Beyond that, three aspects emerge as particularly relevant:

1. Transparency and consent. The higher the disclosure, the stronger the defence. Information that the prices or discounts offered are personalized reduces risks of liability. Information about how these discounts are calculated further reduces such risk – although considerations about trade secrets can possibly be used to justify not disclosing such calculations. Clarity in the messages to consumers should be another relevant aspect in reducing liability. Despite that, several studies have already indicated that consumers, in general, have severe concerns with respect to personalized pricing. Therefore, the challenge for companies to reconcile the requirements of transparency and consent with the practice of personalized prices should not be ignored.
2. Liability in one field does not determine liability in the other fields. In particular, the application of the rule of reason should be more important in antitrust than in consumer law and data protection law. The relative weight of each field of law in each market should be relevant for enforcing and implementing price personalization strategies.
3. Personalized pricing must be carefully distinguished from those cases that violate other types of constitutional principles against non-discrimination. In this sense, companies wishing to implement personalized prices must actively create control mechanisms to prevent algorithms from being fed with prejudice inputs regarding race, ethnicity, gender, and others.

[41] Free translation from the original in Portuguese.