

## RESOLUTION 01/2019 COMMUNICATION/DISCLOSURE VEHICLE

Associadas  
Fundadoras



Associadas  
Institucionais



The Superior Council of the CENP Standard Rules, considering the consultation formulated by two of its founding entities (which resulted in a legal opinion prepared by the office Sampaio Ferraz Advogados - doc. attached), in compliance with the provisions of Article 4, Law No. 4.680/65 and given the prior understanding of the entity (within the methodology of the CENP - Media system), approves this Resolution:

**First** - Without prejudice to the time-honored recognition of the existing Disclosure or Communication Vehicles, and being indispensable for the identification of vehicles arising as a result of technological development, CENP declares and recognizes, in a consolidated manner, as Disclosure or Communication Vehicles, for the purposes of the legislation in force, any and all individual legal entity that has received revenues from its ability to transmit advertising messages, among which the following media/general categories shall be considered:

- CINEMA;
- INTERNET-SEARCH;
- INTERNET-SOCIAL;
- INTERNET-VIDEO;
- INTERNET-AUDIO;
- INTERNET DISPLAY AND OTHERS;
- NEWSPAPER;
- MAGAZINE;
- PAY TV;
- OOH/MIDIA EXTERIOR;
- RADIO;
- OPEN TV.

**Second** - Whenever questioned by any competent, administrative or judicial authority, CENP will use the above consolidated listing of media/categories as to the recognition of the types of Disclosure or Communication Vehicles available in the Brazilian market to advertising agencies for advertising contracted by private and/or public advertisers.

São Paulo, July 16, 2019.

**Approved by the Superior Council on July 16, 2019.**

## LEGAL OPINION

In consultation with the Legal Department of CENP, in response to a question received by two of its founding entities, Associação Brasileira de Agências de Publicidade [Brazilian Association of Advertising Agencies] - ABAP and Federação Nacional das Agências de Propaganda [National Federation of Advertising Agencies] - FENAPRO, with the following content:

*“The Brazilian Association of Advertising Agencies (“ABAP”), and the National Federation of Advertising Agencies (“FENAPRO”), entities representing the Brazilian advertising agencies, founders of CENP, come before you submit and request the following:*

- 1. The Advertising Agencies act by order and account of their advertising clients - legal entities under private and public law - according to the provisions of Article 3 of Law No. 4.680/65, which governs the advertising activities they carry out, having, therefore, legal and ethical commitments both in what they do and in what they perform on behalf of the advertising companies that contract them;*
- 2. Relations with third parties are doubly divided, first with service providers, selected in the market for quality/price, and with communication and disclosure vehicles, indicated for the placement of advertising material by criteria that must obey technical norms, based on media research, and well defined by the Standard Rules of Advertising Activity, whose contracts are only made after previous and express authorization of the client-advertiser;*
- 3. In the relationship with communication and disclosure vehicles, in addition to the universe of the traditional offer bringing together the most different media (printed, audiovisual, among others), the agencies are faced with other possibilities to advertise, also the most diverse, especially more recently under the internet;*
- 4. The legislation governing the advertising activity left “to class entities and bodies, thus considered the local and regional civil associations of advertising as well as the trade unions of advertisers” the attribution of recognition of the disclosure vehicles, these being “for the purposes of this Law, any visual or voice means of communication capable of transmitting advertising messages to the public” (Article 4 of Law No. 4.680, June 18, 1965). More recently, Law No. 12.232 of 2010 referred in this context to “innovative forms of advertising communication” in item III of paragraph 1 of its Article 2;*
- 5. Needless to say that CENP, because it brings together the national entities representative of the three sectors of activity - Agencies, Vehicles and Advertisers - is entitled to clarify, in terms of Article 4 of Law No. 4.680/65, mentioned above, which communication and disclosure vehicles operate in the advertising market, according to technological evolution, and all those who compete with each other shall comply with any laws and norms applicable to all with the same qualification, in an isonomic way, avoiding regulatory or competitive asymmetries with regard to the commercialization of advertising spaces;*
- 6. In view of the foregoing, the signatory entities request CENP to examine the current market and technological context, in the case of agents that advertise, by positioning*

*themselves as to the recognition or not of agents acting exclusively in the field of the internet in general in the legally prescribed qualification for Vehicles, as well as any others, if any;*

*7. Finally, it is requested to inform about this consultation and the answer that is made to all the founding entities of the CENP for knowledge and possible contributions on the material under discussion.*

*That's what we asked for."*

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## **I - LEGISLATION AND SELF-REGULATION ON THE DEFINITION OF COMMUNICATION AND ADVERTISING VEHICLES**

01.) Basically, the question raised refers to the interpretation about the applicability of the Brazilian advertising model to new situations arising from technological evolution, especially with regard to the so-called "Communication or Advertising Vehicles", mentioning provisions of Law No. 4.680/65, which, from a normative point of view, established the central frames of this Brazilian model.

02.) This Law, in fact, brings definitions for "advertising agency", consecrating the full service model (that is, the agency that integrally studies, conceives, executes and distributes advertising to the vehicles by order and account of advertising clients), and for "Disclosure vehicles", in this case, limited to the scope of application of this Law:

*"Article 3 The Advertising Agency is a legal entity, ... VETOED..., and specialized in the advertising art and technique, that, through specialists, studies, designs, executes and distributes advertising to the disclosure vehicles, by order and account of advertising clients, with the purpose of promoting the sale of products and services, disseminating ideas or informing the public about organizations or institutions placed at the service of the same public.*

*Article 4 For the purposes of this Law, any means of visual or voice communication capable of transmitting advertising messages to the public, provided that they are recognized by the class entities and bodies are disclosure vehicles, thus considered the local and regional civil associations, as well as the advertising unions."*

03.) It is soon seen that the definition of advertising agencies and disclosure vehicles (for the purposes of the Law) is given by the activities performed by them. In the case of agencies, the set of activities of "studying, designing, executing and distributing to the vehicles" advertising by order and account of advertisers. In the case of disclosure vehicles, its definition is broad because it refers to "any visual or voice communication means" that are "capable of transmitting advertising messages to the public". That is, the definition in this case takes into account the potentiality of a particular vehicle advertising media.

04.) What happened is that the Law itself, in its Article 5, also defines advertising, thus complementing the two definitions of the agents that are related:

*“Article 5 Advertising is understood as any paid form of dissemination of ideas, merchandise or services, by an identified advertiser.”*

05.) For Law No. 4.680/65, therefore, advertising is defined by 04 characteristics: a) it must be a paid communication; (b) the communication shall disseminate ideas, goods or services; c) the person interested in the broadcast must be an advertiser and d) this must be identified. It should be noted that the remuneration of advertising is the general rule, but there are cases of exchange or even free space/time assignment by Vehicles due to some particularity, which does not disqualify the parties involved as such, in such cases, be advertising.

06.) Thus, although there is no definition of “advertiser” or “advertiser client” in Law No. 4.680, it is implied that he is the main interested in the publicity, which remunerates the placement, regardless of the conditions set forth in Article 11 for a specific remuneration of advertising agencies and agents, which is fixed by the Vehicles (the discount or commission). With regard to the consumer, the advertiser is the one who identifies himself in the message, directly or through his brands.

07.) This Law was regulated by Decree No. 57.690/66, which reproduces the legal definitions referred to above in its Articles 6, 10 and 2, respectively. It was innovated in the decree by establishing a definition also for advertisers, although succinctly and only making explicit what already figured indirectly in the Law:

*“Article 8 Clients or Advertiser are considered to be the entity or individual that uses the advertisement.”*

08). It was precisely in the light of this whole normative context that, in 1998, the Standard Rules on Advertising Activity brought definitions based on legal norms, both for agents and for the advertising activity itself:

**“Advertising:** *it is, according to the terms of Article 2 of Decree No. 57.690/66, any remunerated form of dissemination of ideas, goods, products or services by an identified advertiser.*

**Advertiser or Client:** *it is, according to the terms of Article 8 of Decree 57.690/66, company, entity or individual that uses the advertisement.*

**Advertising Agency:** *it is, in accordance with Article 6 of Decree No. 57.690/66, a creative and producer of printed and audiovisual content specialized in the advertising methods, art and technique, through professionals at its service who study, design, execute and distribute advertising to Communication Vehicles, by order and account of Advertiser Clients with the purpose of promoting the sale of goods, products, services and image, disseminating ideas or informing the public about the organizations or institutions they serve.*

**Communication Vehicle or, simply, Vehicle:** *it is, according to the terms of Article 10 of Decree No. 57.690/66, any means of visual, voice or audiovisual dissemination.”*

09.) The Self-Regulation Advertising Code, which disciplines the activities of CONAR and brings a definition of advertisement, can also be mentioned in the same sense:

*“Article 18*

*For the purposes of this Code:*

*a. the word advertising is applied in its broadest sense, encompassing any kind of advertising, regardless of the medium that disseminates it. Packaging, labels, leaflets and point-of-sale material are forms of advertising for this purpose. The word advertisement only covers, however, advertising made in space or time paid by the Advertiser;*

*b. the word product includes goods, services, facilities, institutions, concepts or ideas that are promoted by advertising;*

*c. the word consumer refers to any person who may be affected by the advertisement, whether as final consumer, intermediate public or user.”*

10.) From the above, as regards vehicles, which is the specific subject of the consultation formulated by the national agencies, it is perceived that the definition of the legislator, accompanied by self-regulation, is quite broad, encompassing a multiplicity of possible agents within this category.

11.) In fact, when considering the original agreement of the Standard Rules of Advertising Activity and the constitution of the CENP, by its founding entities of Vehicles, such a variety is already observed, since there are national entities representing agents acting with broadcasting (radios) as well as sounds and images (television), pay-TV, newspapers, magazines and billboards.

12.) All these agents are Vehicles, for the purposes of Law No. 4.680/65, due to the fact that *“they are capable of transmitting advertising to the public”*. As regards the aspect of potentiality, it is notable that pay-TV initially had a much smaller volume of advertising insertions and, in some programs or channels, there was not even advertising, but the possibility of advertising was increasingly exploited, and it is unequivocal that it is a Disclosure Vehicle. Something that also seems to occur with the beginning of tests per part, for example, streaming service providers (such as Netflix, among others) of advertising insertion in its series and other audiovisual content available in a non-linear way.

13.) Given the first set of Disclosure Vehicles whose entities founded the CENP, it is also perceived that its heterogeneity must necessarily recognize that not all Disclosure Vehicles (for the purposes of Law 4.680/65) are simultaneously press vehicles or social communication media in the most traditional sense, since not all of them include advertising transmitted to the public in a wider context of own content produced by the Vehicle itself or acquired and packaged (news or entertainment). This is the case of billboards, which simply carry advertising, without simultaneously delivering another service to the public. The term “media” itself refers to the mediation activity performed by Vehicles, which transmits the discourse of sources, information (ascertained by own means or not) and opinions to the public, and can also transmit to the target audience a producer of goods or services (an advertiser) your advertising message. In the latter case, the medium is itself a “service.”

14.) According to this understanding, press vehicles or the social communication media convey opinions, news (= editorial information, ascertained by journalistic criteria) and possibly entertainment, as well as advertising commercials (= commercial information, provided by advertisers). The “Disclosure Vehicles” as a genre also include, strictly speaking, those who only broadcast advertising messages and depend on the license of the authority to provide the service.

15.) Traditionally, Disclosure Vehicles are often also Press or Media vehicles that function as a “two-sided platform or market”, having two distinct groups of consumers or customers to whom different products or services are provided.

16.) Thus, a Vehicle such as a television, a newspaper or a magazine offers news content, information, soap operas, entertainment to a group of consumers or customers and **simultaneously** offer to potential advertisers interested in reaching these groups of consumers by broadcasting their ideas, goods or services, advertising spaces, actually selling the attention they can capture from their readers or viewers. In fact, even in cases of Disclosure Vehicles that do not offer editorial content, there is also a two-sided platform, in a certain sense, because in the case of billboard mentioned above, the advertiser(s) are on the one side and on the other are those who are affected by the messages, being also necessary to capture their attention somehow. In this context, it should also be noted that advertising itself is also seen as a source of information/content (including integrating the constitutional principle of freedom of expression, in the case of freedom of commercial expression).

17.) The idea of a two-sided platform or market, which has been worked on for decades in literature and economic theory by authors like David Evans, is undeniably applicable to so-called traditional vehicles, but also to Disclosure Vehicles in general. In either case, there may be different formatting for the financing of the two-sided platform or market, with one of the consumer groups being allocated all the funding and offering the other group free of charge what they want (as is the case of radios or open television, for example), but there may also be a distribution in some proportion of such costs or revenues (for example, in pay-TV where subscriptions are paid by subscribers and paid advertisements by advertisers).

18.) In fact, there are several very different forms of advertising that do not involve the use of press vehicles or social media stricto sensu, such as the distribution of flyers, posters, the traditional figure in the center of some cities like São Paulo of the “sandwich men” who simply, through cardboards next to the body, offer space for advertising of stores located in the vicinity of where they are located and even the use of cars with loudspeakers as is common in the corners of the country.

19.) In all of these cases, the 04 characteristics identified above in the definition of advertising are potentially present (there is communication in a remunerated rule, which diffuses ideas, goods or services, by identified advertiser). Therefore, because all of these cases involve the ability to disseminate advertising to the public, we are faced with Disclosure Vehicles, for the purposes of Law No. 4.680/65, even if it is not a press or media vehicle in all cases.

20.) In the last decades, reality has evolved and other means have emerged capable of publicizing advertising, that is, new Disclosure Vehicles. It should be

pointed out that even advertising vehicles that are already active and recognized, with technological development, have also made other platforms available, sometimes to their advertising clients, such as newspapers and magazines, which have always been the printed media from a country, but today also actively participate in the digital ecosystem, offering time/space for online advertising.

21.) Within the scope of the CENP and the self-regulation of advertising, this is very evident when considering the entry, alongside the founders entities, of other Vehicle entities to its staff, such as ABMOOH and Fenapex. These are entities that congregate new Vehicles operating in out-of-home media and billboard advertising, such as the advertising of buses, airports, restaurants, airplanes, subways, bus stops, among others, and as mentioned in the previous paragraph, such Vehicles can also be active within the Internet.

22.) In requesting admission to the CENP and the latter, through its Executive Board, to admit the participation of such entities in a self-regulatory body that deals precisely with the advertising market, it was recognized, of course, that such entities brought together new Vehicles. This is because the national representative entities that joined the CENP do not have ad agencies as well as advertisers themselves (as these are not a good category because advertisers are not “by nature” advertisers, that is, they produce and offer consumers other goods and services, and eventually are advertisers, and in addition, vehicles and agencies themselves may also make announcements of the services they provide to their potential customers. In addition, the advertiser entity in CENP is Associação Brasileira de Anunciantes [Brazilian Association of Advertisers] - ABA).

23.) The recognition of the multiplicity of disclosure vehicles available to advertisers is also present in the doctrine, often mentioning authors specializing in advertising:

*“Communication vehicles, in turn, are the means available to advertisers to advertise to consumers. Also called media, which derives from the Latin media (plural medium) and means “ways”, the vehicles, in the definition of J. B. Pinho, are basically divided into three: printed media (newspapers, magazines and billboards); electronic media (radio, open and subscription television, cinema) and, more recently, interactive media (internet). The latter (interactive), besides being an increasingly growing option of advertising media, represents a mixed media and sales system. Billboards, which in Portuguese means outdoor or external advertising, consists of printed media that includes lights, panels or posters. It is also common to check what has been called a busdoor, panel fixed to the side or the back of the buses, nowadays also observed in subways, taxis, company cars and delivery trucks.*

*Armando Sant'Anna, in turn, divides the media into: i) visual vehicles (to be read or seen), which include press (newspapers, magazines and specialized periodicals), billboard, direct advertising (flyers, leaflets, letters, catalogs and similar) and exhibitions (displays, shop windows and exhibitions); ii) hearing vehicles (to be heard), such as the radio and loudspeakers; (iii) audiovisual vehicles (to be heard and viewed), which include television, cinema and audiovisual (slides or VT); and (iv) functional vehicles (to perform specific functions) such as samples, gifts and competitions.*

*The right choice of vehicle is decisive in reaching the target audience. The advertising campaign may involve one or more vehicles. The use of various means of communication to achieve an advertising goal is technically called a multimedia advertising campaign (or media mix or cross media). (...)*” (Magalhães Dias, Lucia Ancona Lopez, Publicidade e Direito: Enganosa, Abusiva, Infantil, Digital, Comparativa. 3<sup>rd</sup> edition 2018, pages 36-37).

24.) That is to say, the question posed in this Consultation appears to be uncontroversial, since the concepts present both in legislation and in self-regulation for the disclosure Vehicle are clear and comprehensive, leaving space to fully embrace new Vehicles that emerge due to technological developments.

25.) In this regard, in the case of AT.39740 involving Google Search (Shopping), the European Commission, in addition to recognizing that Google's main revenue is advertising, also spoke about search engines as a two-sided platform:

*“(7) Google’s business model is based on the interaction between the online products and services it offers free of charge and its online advertising services from which it generates the main source of its revenue.*

(...)

*(159) Second, offering a service free of charge can be an advantageous commercial strategy, in particular for two-sided platforms such as a general search engine platform that connect distinct but interdependent demands. In two-sided platforms, two distinct user groups interact. At least for one of these users groups, the value obtained from the platform depends on the number of users of the other class. General search services and online search advertising constitute the two sides of a general search engine platform. The level of advertising revenue that a general search engine can obtain is related to the number of users of its general search service: the higher the number of users of a general search service, the more the online search advertising side of the platform will appeal to advertisers.”*

26.) Now, therefore, the importance of the (free and independent) measurements and metrics of online advertising in terms of scope, which is nothing more than a hearing assessment, something common and necessary in Disclosure Vehicles, since prices to advertisers are certainly evaluated and influenced by such data.

27.) Incidentally, this orientation of the 1965 legislator was reiterated recently in 2010 with the enactment of Law No. 12.232, which provides for general rules for public bidding and contracting of advertising services provided through advertising agencies. This Law expressly affirms the complementary applicability of Law No. 4.680 to biddings of advertising agencies, thus incorporating the definitions that have been in existence for decades, but also reinforces the openness to disclosure vehicles and even other means that have arisen or will arise due to the technology and its advances, if not only vehicles and other means of dissemination, but also highlighting new forms of advertising communication by virtue of new technologies:

*“Article 2 For the purposes of this Law, advertising services means the set of activities carried out in an integrated manner that have as their objective the study, planning, conceptualization, conception, creation, internal execution, intermediation and supervision of external execution and the distribution of advertising **to vehicles and other means of disclosure**, with the purpose of promoting the sale of goods or services of any nature, disseminating ideas or informing the general public.*

*Paragraph 1 In the contracting of advertising services, the relevant specialized services may be included as complementary activities:*

*(...)*

*III - the creation and development of **innovative forms of advertising communication, in line with new technologies**, aimed at expanding the effects of advertising messages and actions.”*

28.) It should be noted that this Law 12.232 is from 2010, only 08 years ago, and that at that time the use of digital media was already on the rise in the Brazilian and worldwide advertising market.

29.) Therefore, **there is no doubt about the characterization as disclosure Vehicles, for the purposes of Law No. 4.680/65, of any and all agents acting on the Internet, regardless of the technology, the format, the medium used, essentially importing that they are “capable of transmitting advertising to the public”, considering the legal characteristics mentioned above that allow us to recognize that is facing “advertising”. It matters little whether the service provided to the advertiser employs bits, paper or ether. If disseminates advertising, it is a vehicle.**

## **II - A FALSE CONTROVERSY AND THE INITIATIVE OF INTERNET DISCLOSURE VEHICLES TO DISORDER, REJECTING ITS IDENTITY**

30.) In the light of the previous section, the consultation of the national agencies of advertising might seem innocuous. However, a judicial discussion has been identified that provides a concrete example of how the issue may, in fact, be relevant.

31.) In Case No II. 583.00.2007.222035-6 instituted by a company called Hotlist Webmarketing Ltda. against Google Brasil Internet Ltda. Among other issues, we discussed the qualification or not of Google as a Disclosure Vehicle especially for the purposes of applying Law No. 4.680/65 and the attribution or not to the author of a discount paid for advertisement.

32.) In spite of the fact that there was no definitive final pronouncement of the Judiciary, as far as it was possible to obtain information, the parties entered into an agreement is worth transcribing a relatively long stretch of Google Brasil's challenge of

February 6, 2008, pages 20-22, which brings his arguments and the assertion that it was not considered Vehicle:

*“VI - NONEXISTANCE OF THE RIGHT TO THE COMMISSION*

*82. As will be demonstrated below and may be subject to possible probationary deferral, in the remote hypothesis of this Court overcoming the preliminary of absence of state jurisdiction on the issue, it is certain that the Hotlist is not entitled to the commission called standard agency discount.*

*83. This is because, despite the regulation of advertising agency activities, Hotlist does not effectively have such right within its commercial relationship with Google BR, either because it exercised a contractual option that did not contemplate such gain, or because such imposition would represent its enrichment because it has received such commission from the advertisers themselves. Let's see.*

*84. In relation to advertising agencies, Article 3 of Law 4.680/65 establishes the following requirements for its characterization: a) it must be in the form of a legal entity; b) must be specialized in advertising art and technique; c) through specialists, studies, designs, executes and distributes advertising; d) provides its services by order and account of advertisers clients.*

*85. Thus, an advertising agency must have sufficient structure to fulfill all those requirements. In particular, it must have in its framework professional registered as an advertiser, capable of effectively studying and designing advertisement for the benefit of its client, based on the technical and artistic knowledge it holds.*

*86. The creation and intellectual production of the campaigns themselves must be carried out by the agencies, as well as the selection of the vehicles in which the advertising will be carried out, using studies, fundamentals and technical analysis for their choice.*

*87. In addition to determining the characteristics of advertising agencies, Law 4680/65 and its regulations also establish some basic parameters regarding the remuneration due to advertising agencies. Although article 11 of the aforementioned law establishes in fact the prediction of a commission, it is certain that **only the advertising agencies certified by the CENP are entitled to perceive a remuneration.***

*88. In fact, the CENP, by means of the same Standard Rule of Advertising Activity invoked by the Author, establishes that only advertising agencies that obtain from CENP the Certificate of Technical Qualification (item 2.5.1 of the Standard Rule) are entitled to the 'Agency discount' AND IT IS CERTAIN THAT THE COMPANY WHO HAS THE CERTIFICATE IS NOT THE AUTHOR, but its partner, called Roi Marketing de Resultados.*

*89. It should be noted that the Cooperation Agreement attached to page 50 is res inter alios acta and, of course, it cannot be relied on against third parties, either Defendant itself or CENP. Therefore, for this first reason, the Author cannot have the alleged right to the commission called standard agency discount.*

90. On the other hand, it should be pointed out, on the basis of the principle of legality, that:

a) the provisions of the Standard Rule are self-regulatory and are not characterized as cogent standards;

b) in this way, can reach only those entities that voluntarily submit to their regime, **and Google BR is not part of this regime, since it is not a vehicle for communication, but merely an advertisement dealer;**

c) such provisions of the Standard Rule, even if they were cogent, deal exclusively with the remuneration owed by advertisers to advertising agencies.

91. It is worth mentioning the opinion of the former Minister of the STF, Paulo Brossard, in which he questions the legality of Decree 4.563/02, since, in the way it amended Article 7 of Decree 57.690/66, it violated the constitutional principle of the hierarchy of norms for modifying Article 11 of Law 4.680/65 'the decrees in question, while intending to amend Law 4.680 were insubstantial *ab initio*, and insubsistent continued'.

92. Thus, in principle, **there are no legal grounds underpinning the cooperative application of item 2.5 of the Standard Rule on any and all entities involved in advertising, nor with a mere advertisement dealer which cannot even be characterized as a vehicle of communication as is the case of Google BR.** Compliance is voluntary and results from the agents' perception that self-regulation, as negotiated with one another, is favorable to them."

33.) In the same court case, however, there are two documents that contradict, at least in part, Google's argument:

- first, the Google AdWords Agreement - between Google Brasil Internet Ltda. and, as Advertiser, the telephone operator TIM and, as agency, Hotlist Webmarketing Ltda., between August 6, 2007 and October 8, 2007, in which, in practice, Google becomes a Vehicle, when presenting option that implies payment of commission for the agency, this commission being "owed under local law":

*"Billing Form - Agency. Subject to the terms of the applicable law, if this Agreement is entered into by an Agency, acting as an attorney, representative or otherwise acting on behalf of an Advertiser also defined in the Insertion Order ("Advertiser"), the billing form hereinafter may apply at Google's sole discretion. OPTION 1. Google will send to the Agency or the Advertiser an invoice indicating the net contract value (i.e., commission due to the Agency already deducted) to be paid by the Advertiser. In this case, the Agency acknowledges and agrees that the Advertiser will be responsible for paying the commission due under local law. OPTION 2. **Google will send the Agency or the Advertiser an invoice indicating the gross contractual value to be paid by the Advertiser. In this case, Google will be responsible for paying the commission due under local law.** OPTION 3. Google will send the Agency an invoice indicating the net contract value to be paid directly. In this case, the Agency will be responsible for paying the full invoice amount to Google."*

- Secondly, the 6<sup>th</sup> Amendment to the Articles of Association of Google Brasil Internet Ltda. (CNPJ/MF No. 06.990.590/0001-23, NIRE 35.219.399.203), of December 7, 2006, which, when describing the corporate purpose of the company, precisely uses the verb “vehicular” to refer to commercials which markets:

*“CORPORATE PURPOSE*

*Clause 2a. The Company's purpose is to market, support and provide Internet-related products and services, including search and **ad serving** services, as well as other Internet programs, products, services and applications. The Company may participate in other companies as partner or shareholder”.*

34.) Therefore, it seems to contradict the statements before the Judiciary in the context of the Hotlist process and the official documents that appear in the same process indicating the placement of ads as a corporate purpose of Google and that Google itself admits to pay the commission due under local law, that is, Brazilian legislation.

35.) But it's not just. Before the competition authorities, after the manifestation in which it claims not to be a Vehicle, but merely a reseller of ads, on more than one occasion Google has been trying to sustain not only that it commercializes advertising for Advertisers (which has been confirmed in responses from advertisers to official letters, in particular in the first administrative process mentioned below), being therefore a Vehicle, but that competes with all other Vehicles, either online or offline:

- Defense of Google in Administrative Proceedings before CADE No. 08700.005694/2013-19, pages 40-43:

*“96. Google faces strong competition for its advertising services from both online and offline sources. One of the determining factors of how advertisers allocate their spending is return on investment (‘ROI’). The higher the ROI, the more an advertiser is willing to invest in a specific platform or site.*

*97. Advertisers have an incentive to adjust their portfolios to maximize their ROI, and advertising companies are aware that all forms of advertising, both online and offline are in constant competition to capture advertising investment: ‘Internet advertising does not happen in a vacuum. When it comes time to budget, advertisers need to decide where to invest their marketing money to get the most return on investment. Internet advertising is just one of several media outlets and it has to compete for that money with other media, such as television, newspapers and direct mail’ (K. Weide, Market Analysis, US Internet Advertising 2007-2011 Forecast and Analysis, at 5, IDC Report - June 2007).*

*98. Because the advertiser's goal is to identify the combination of different advertising formats and targeting technologies that will maximize ROI, advertisers mix and contrast different ad formats, targeting technologies, and sales channels.*

### **1. Sponsored Search Compete with Other Forms of Online Advertising**

99. Text ads offered by Google, alongside search results, compete with other forms of online advertising, including display and rich-media ads on third-party sites. From the advertiser's point of view, ads are replaceable because they serve the same purpose: to increase sales of the advertiser's product or service. For example, as users spend more and more time on social networks, the ability of these platforms to attract advertising from other sources on the Internet increases. In Brazil, according to ComScore, as of March 15, 2013, 36% of consumers spent the largest percentage of their time on social media sites.

(...)

### **2. Online Advertising competes with Offline Advertising**

103. In addition to other forms of online advertising, Google advertisers typically advertise on various media, including offline. As such, Google faces competition from other forms of advertising such as television, radio, newspapers, magazines and billboards. While the means of measuring offline advertising performance and ROI may differ to some extent from online, these differences are diminishing as offline advertising increasingly adopts digital technology (e.g. digital panels, digital television, digital radio), which provides the same or a similar measurement, such as those provided for in online mode.

104. The allegedly higher level of reporting and accountability currently available in online advertising and allegedly different pricing mechanisms should therefore not be seen as an indication that offline advertising constitutes a separate market. In fact, when deciding how to allocate advertising spend, the relative cost of various types of ads and ROI are the most important factors in choosing the media. In addition, switching between the different types of advertising is technically simple because ads are usually drawn in digital format.

105. Although the differences between the various types of advertising occur mainly in the type of media (web pages versus newspapers, versus television), they are similar in their objectives. In each case, the advertiser is trying to attract customers to their stores and sites in order to build their brand and make sales. Advertising is increasingly measured through ROI, regardless of channel, and ROI measurement for online and offline advertising allows the advertiser to easily allocate spend across multiple channels immediately to produce the highest return.

106. As a result, Google competes with all forms of advertising to deliver the best ROI to the advertiser. Defining the market narrowly as 'sponsored search' would not adequately address these competitive pressures that Google faces. In addition, given the ability of advertisers to easily change spending among all advertising alternatives, it is clear that Google has no market power."

- Form of Notification to CADE of the Concentration Act No. 08700.003373/2013-80 (Google Inc. acquiring equity interest in Vevo LLC) on April 12, 2013:

*“Google is a US company that offers free online search services to its users through its search engine. Google also provides space for online advertisements on its own website as well as on partner websites. All of its revenue comes from the provision of online advertising space.*

*(...)*

*Considering the activities developed by Google and VEVO, the Applicants understand that one of the markets affected by the operation is the “provision of online advertising space”.*

*While there is a wide variety of formats in which ads can be made available (e.g., search text based, page context based, static advertising, rich media ads, classified ads, mobile device and emails ads) are all fully interchangeable.*

*Advertisers take all these forms of advertising into account when planning a campaign, and respond to changes in the total cost of one type of advertising over another by re-allocating expenses between them.*

*Applicants act at different levels of the advertising industry. Advertising consists of the public promotion of goods or services through a wide variety of media: television, radio, print, billboards, mobiles, internet, etc. All of these advertising media (including online and offline media) compete with each other for the choice of advertisers.*

*In fact, when an advertising campaign is developed, media planners take into account every means to determine how best to bring public attention to a good or service. In this way, the amount allocated in different advertising media should be considered fungible: the investment is allocated in an advertising medium, often to the detriment of other means of communication. Each advertising media can have its strengths and weaknesses for a particular audience, product or market segment, but they all have the same purpose. There are a number of providers that offer online and offline advertising services.*

*In any event, considering that CADE has adopted a narrower understanding of this market in the past, the Applicants, for the purpose of this analysis, will adopt a more conservative approach and limit the analysis to the online advertising market.”*

36.) It seems that the controversy or the excitement about Google, therefore, has been overcome, because given its most recent statements, there is no way to not consider it a Disclosure Vehicle, under the terms of Law No. 4.680/65, after all, as it asserts to CADE, all its revenues came from the commercialization of advertising space. Nowadays there is no possible disguise in this hypothesis: evidently it is a Disclosure Vehicle, for the purposes of Law No. 4.680.

37.) In light of the above, it is also worth noting the incidence of ISS, under the terms of Supplementary Law No. 116/2003, amended by Supplementary Law

No. 157/2016, which expressly included in the list of services subject to taxation “17.25 - *Insertion of texts, designs and other advertising and publicity materials, in any media (except in books, newspapers, periodicals and in the form of sound broadcasting services and of sound and images of free and open reception)*. In a statement to its associates, issued on 01/12/18, IAB-BR clarified:

*“Thus, with the amendment of LC 116/2003, municipalities are now legally authorized to charge the ISS for services of insertion of advertising and publicity materials carried out by online vehicles, as well as by indoor media companies (advertising placement in lifts, malls, subways, etc.) and by billboard vehicles. It is worth remembering that the publicity carried out in newspapers, magazines, radio and open TV remains untaxed, given the immunity provided in Article 150, subsection VI, letter d, of the Federal Constitution.”*

38.) Lastly, it should be noted that although this section has taken as an example the largest Internet Advertising Disclosure Vehicle, Google, evidently the considerations discussed here apply to all its competitors operating in the digital ecosystem marketing virtual advertising time or space for advertisers.

### **III - CONCLUSION**

39.) In sum: it seems to us that the legal definition of a Disclosure Vehicle, which was accompanied by both the regulatory decree and the rules of self-regulation, is clear and allows us to deal with the different species of potential Vehicles, identifying which are characterized as Disclosure Vehicles.

40.) Obviously, they may have agents who seek to disguise themselves for any reason, including, for example, trying to evade compliance with local law, which Google says above requires payment of commission (or rebate) to advertising agencies.

41.) However, within the scope of the Brazilian advertising market, insofar as CENP, as a self-regulatory entity that protects the Standard Rules of Advertising Activity, which are harmonious with the legislation, admits in its staff, as founding entities, or as adherent entities, national entities representing agents that “are able to distribute advertising to the public”, for the effects of Article 4 of Law No. 4.680, there is already, as a category, the recognition and identification of which are Disclosure Vehicles, since even among the older Disclosure Vehicles they also began to act as vehicles in the scope of the Internet.

42.) At first, it is not necessary that the aforementioned recognition and identification mentioned by the legislator be individually carried out, after all to date there has never been this type of approach with regard to all vehicles that operate in the advertising market.

43.) However, given any controversies, it is understood that CENP can edit a Resolution that clarifies the categories of Disclosure Vehicles available today to Advertisers and Agencies, although not in an exhaustive way, seeking to delimit all types of



advertising distribution to the possible public (possibly exemplifying with some of the main Vehicles for each type of advertisement).

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These are our considerations. We remain at your disposal for any clarification.

São Paulo, September 21, 2018.

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