LEGISLATION AND STANDARDS OF ADVERTISING IN BRAZIL
SUMMARY

REGULATION, AND SELF-REGULATION AND COMPLIANCE OF ADVERTISING IN BRAZIL

SAMPÃO FERRAZ ADVOGADOS

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GOOD RESULT OF LAWS AND SELF-REGULATION IN BRAZILIAN
ADVERTISING

This is the first volume of CENP Documents series addressing issues related to legislation and self-regulation of Brazilian advertising - since the beginning in 1957, and the approval of the Code of Ethics for Advertising Professionals, to this day, 60 years later, when favorable decision by CADE court ensured the implementation by CENP of Advertising Activities Standards is encouraged by the legal framework.

The purpose of this paper is to present the complex but beautiful and harmonious system combined and also sustained by laws, codes of conduct and best practices that ensure many benefits to advertising carried out in the country.

Reading this document will allow those interested in knowing the grounds and the reasons for each legal and normative instrument, their essential points, and especially evaluate further the benefits to their activity and specific business within the advertising industry.

These laws and standards have been sustained over time other than a powerful ability to fulfill but they respond to the social fact that human activities, both commercial and technical, need guidance standards to allow well-intentioned to meet best practices in benefits to all and themselves, to the extent they provide mechanisms to prevent the individuals in bad faith to corrupt the system and lead to losses for the community, ensuring the best nowadays and look to medium and long term.

In advertising, also this mixed system of governance has proven, over the years, to be a good solution to ensure freedom of economic agents therein, productively and without creating restrictions and bonds that would be counterproductive for everyone.

The beauty of a combined system like ours is the legislation is compulsory on basic and permanent aspects, but limited, and author-regulation standards should deal with the important details without legal restraints and allowing revisions as necessary, as it is voluntarily implemented. Thus, in daily practice, the system adjusts better to dynamic activity by avoiding shaking its foundations - at the risk of generating disasters capable of destroying the very activity with obvious damage to all its members. I just highlight the consequences, positive results arising from the existence and fulfillment of these laws and standards.

Well-positioned and competent observers, both in specific and domestic market, such as neighboring and international viewing areas agree with some phenomena of Brazilian advertising, as remembered below.

We are recognized for systematically being third in quality of the world advertising behind the United States and the United Kingdom. Position is not compatible with the size of our advertising market, which is between the 7th and 9th in the world.

Advertising is an essential pillar for the existence of a set of communication means and channels of enviable standard, either for using essential resources to ensure its freedom and quality, or the characteristics of commercial gaps and spaces favorable to advertisers, generating results, and consumers, who are attracted to smart and well-produced messages.

The rendering of advertising services by the agencies is very high in range and quality, by available resources and the high professional standard.

Nielsen carried out a research in 50 countries around the world in 2009, indicated that Brazil had the highest advertising acceptance level and lower rejection by the audience.

Numerous international brands were launched and consolidated successfully and rapidly with the essential contribution of our advertising. And many successful domestic brands that were able to use the vigorous strength of our propaganda.

This delivery has been possible as Brazilian market is property compensated by high ethical and professional standards - and the ability to attract talents, maintaining continuous and growing technique.

Caio Barsotti
Chairman of CENP
1. REGULATION, SELF-REGULATION AND COMPLIANCE

Advertising activity in Brazil has a special regulatory system that governs and regulates its existence and operation. It has legal rules issued by the State - Federal Laws # 4.680/65 and 12.232/10, Federal Decree # 57.690/66, modified by Decree # 4.563/02. Advertising is included in the chapter on Social Communication of the Federal Constitution (art. 220), which ensures freedom of expression and prohibits prior censorship, establishing also that only the Government can legislate on commercial advertising (art. 22, XXIX).

Trade relations area has standards recognized and freely agreed by agents of the advertising market, through agencies and domestic associations representing advertising agencies, vehicles and advertisers. They are: (i) of the Professional Code of Ethics of Advertising, becoming legal in 1965 (Art. 17 of Law #. 4.680/65) and (ii) Standard Norms for Advertising Activity, incentive instruments to good practice and ethical respect, since 2002 incorporated to Federal Decree # 57.690/66.

The standards provided for federal law are applicable in every situation, for all agents of the market, and are independent of the acceptance; the self-regulation standards apply to those who want their benefits and are subject to the ongoing commitment of market players, reaffirmed by coexistence in CENP - Standard Executive Council.

Advertising agencies are contracted by advertising companies for the rendering of advertising services defined by law (Full service), ranging from studies and design to brokering advertisements. They are paid by the by advertisers companies for creation, design and production, directly or indirectly. The intermediation of advertising, compensation, pay through contracting parties, results from the discounts established by channels in their price lists, on the contractual value of the broadcasting of advertising. The minimum discount, named standard discount, recommended by the Standard, is 20% for agencies with Technical Qualification Certificate.

Federal law created the discount part of compensation of advertising agencies, which amount is determined by channel (Art. 11 of Law # 4.680/65 and Art. 19 of Law # 12.232/10), prohibiting its granting to those other than agencies (Sole paragraph of art. 11 of Law # 4.680/65). The same article created a commission exclusively for advertising agent, which acts as a broker and has attribution as market study or advertising creation.

Federal law provided act of law to Code of Ethics of the Advertising Practitioners (art. 17 of Law # 4.680/65) and incorporated to the list of legal prohibitions the standard discount transfer to the advertising company (Item I, 8, of the Code of Ethics mentioned).
The agency, regardless of other contractual obligations undertakes, regarding under the standard discount, to maintain permanent study of the media market and to grant to actual communication channels del credere charging on their behalf the accounts for the broadcasting of advertising and transferring the amounts to channels without using thereof, within determined period.

The existence of the standard discount is subject to the payment, by the advertiser, of broadcasting of the advertising. Before this a mere quote as a reference to its amount in the tax accounting document issued by the communication channel.

**Only when the channel is paid the agency shall be entitled to its compensation, then, in fact and in law, becoming a creditor of that amount.** The standard discount is exclusive property of the agency, a fact made clear, in interpretative way, by federal law (Art. 19, Law #12.232/10).

The agency shall negotiate on contracting each media, the best prices and terms of trade on behalf of their advertiser customers. Any trade discount will be reversed on behalf of the advertiser. Otherwise, the agency will be in breach of legal and conventional standards of advertising.

Contractual negotiations between agency and advertiser are free. However, to ensure the contractual balance, the relationship should avoid antieconomic and anti-competitive practices and, for standard discount, comply with the law and prohibit its transfer to third parties, however important the transaction giving rise to that compensation may be.

To negotiate media on behalf of an advertiser, the agency will be accredited thereby at the same communication channel, ensuring the right to act on behalf of the advertising company, also contracting the broadcasting.

**Law 4.680/65 determines, for the agencies, the standard compulsory discount, will be determined by the media channels**

Self-regulation of advertising is voluntary commitment to be undertaken by the advertising agencies, media channels and advertisers adhering to its standards. The self-regulating system facilitates the daily relationship of thousands of agents in operations requiring speed and mutual trust.

Companies and individuals are not obliged to adhere to the self-regulation system, according to Brazilian Constitution, no one is obliged to do or refrain from doing something except by law. The self-regulation environment provided by the standards that created CENP establishes parameters, reference, indications, and recommendations with fast track mechanism aiming at facilitating transactions between agents, making them faster and more foreseeable.

**Briefly:**

The channels agreeing on the Standard ensure they will fulfill the legal obligations to (i) maintain unique and public list of prices being offered for negotiation, to the entire market without restrictions of any kind; (ii) determined all certified advertising agencies and at least 20% standard discount in all advertising forwarded to any advertiser; (iii) make public the discount percentage granted according to its criteria for non-compliance relationships and other assumptions other than those recommended by Standards; (iv) comply with the obligation to broadcast as authorized by the agency.

Advertising agencies agreeing on Standards ensure (i) to maintain permanent physical and qualified personnel structure; (ii) purchase and use media
research according to the market it operates; (iii) ensuring the channels in which they are accredited the actual del credere; (iv) comply with the legal and conventional standards of advertising market.

The advertising companies adhering to the Standards, enjoy a free market, organized and organically facing the effectiveness of advertising communication, ethically, promoting the closeness of producers and service providers to the country’s consumers.

CENP acts on behalf of its founders based on principles through its Ethics Council always in search of a settlement in a conflict between the parties involved, considering the Standards, in clear conciliatory position and mediator. However, when consensus is not achieved, the Arbitration Chambers of the Ethics Council issue a decision that is not punitive to the agent that is in non-compliance consisting only in declaratory warning sent confidentially to representatives of the advertiser and the agency, as well as channels and channels associations associated with CENP.

The declaratory decision on non-compliance aims to warn that certain relationships should affect the freedom, equality, the competitiveness and transparency in advertising market, as it should involve voluntary beach of standards established.

It is also important to note that there is a broad legal and regulatory system of state in respect particularly to advertising activities and the entire normative framework of a general kind applicable to such activities (such as tax and fiscal issued, for example), as well as those of internal range to multinational companies, for example, the Sarbanes-Oxley Act (SOX), the Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, nothing prevents illicit or illegal practiced by agents working in the advertising market are identified and eventually punished by the competent authorities, which is entirely outside CENP sphere of activity, despite the recognition obtained in legal provision of its certification and supervisory role regarding the technical conditions of the advertising agencies (Art. 4, Law # 12.232/10).

It is recommended to read the following documents indicating how it is and basis for performance of self-regulation of advertising, Standards, the relationship bases between the parties and adopted compliance system, as well as summary legislation and standards.

To be in compliance is the best way for ensuring rights and obligations of the parties acting in the Brazilian advertising market.

This document, created aiming the understanding of the compliance standards of commercial relations of advertising, has mere interpretative nature, and has no innovation, which only purpose is to clarify, and does not replace, in case of any doubt or more complex question, the query to the laws and self-regulation standards in their entirety, as well as experts, lawyers and consultants and contractors on all conventional legal aspects applicable to the activities. It indicates, with respect to the Standard for Advertising Activity, which are overseen by CENP, which will mean to be in compliance.

Whether or not in compliance is not confused with ability or no operation in the market, as this freedom, ensured by the constitution, is not - nor could be - removed by the self-regulation or any private entity in custody of self-regulation standards implemented freely.
2. SELF-REGULATION OF ADVERTISING IN BRAZIL

In Brazil, as explained, there are only standards from the State to regulate the activities of advertising agencies, advertisers and the communication channels. Parallel to this legislation (federal laws and decrees), there is a set of agreed standards freely implemented by the agents of advertising market, in order to govern commercial and ethical relationships between them. Among these standards, we will point out the Advertising Activity Standards (1998), which embody the protection of the interests of all economic agents involved in the negotiations in advertising market, whether agencies, channels or advertisers and even the consumers.

Self-regulation and CENP

Self-regulation is the regulation of market, companies or the professions by the very interested operators and economic agents other than the state. To be carried out by the regulated entities differs from the self-regulation, which is carried out by the State. It is a collective regulation other than individual, where its legitimacy is precisely achieved by reaching consensus and majorities aiming at collective interests other than the individual. Moreover, self-regulation presupposes the existence of a collective organization that establishes and monitors a standard set for its members, standards which are voluntarily accepted thereby by taking part in the self-regulation.

The role of self-regulation is to internalize standards behaviors, or accepted uses and customs by regulation, as already performed by the market and the community by monitoring its members to create positive reputation for the group. Self-regulation involves the creation of an additional standards also acts on strengthening of standards determined by the community, State and market. It is a spontaneous private planning system, which is based on reciprocity: individuals recognize the benefits they will earn by adhering to agreed standards.

From an economic point of view, the agents use the self-regulation as it would operate as an important remedy mechanism of market failure, generating more efficiency.

In 1998, Conselho Executivo das Normas-Padrão [Standards Executive Council] (CENP) was established by free agreement between entities representing the main economic agents in advertising market, advertisers (Associação Brasileira de Anunciantes – ABA), advertising agencies (Associação Brasileira de Agências de Publicidade – ABAP and Federação Nacional das Agências de Propaganda – Fenapro) and communication channels (Associação Nacional de Jornais – ANJ, Associação Nacional de Editores de Revistas – ANER, Associação Brasileira de Emissoras de Rádio e Televisão – ABERT, Associação Brasileira de Televisão por Assinatura – ABTA e Central de Outdoor), which later was joined by Interactive Advertising Bureau – IAB Brasil (represents changes and agencies acting in internet) and Associação Brasileira de Mídia Digital Out of Home – ABDOH.

CENP is a no profit civil association, in charge for performing the self-regulation of relations between the economic agents of the advertising market and the promotion of best business practices that encourage the competition for better efficiency and quality, therefore ensure compliance with the Standard for Advertising Activity. It comprises the following bodies: a) General Meeting: is the sovereign body of the organization and has deliberative tasks, comprising the founders and institutional members, which are in good standing with their corporate obligations; b) Executive
Council, is the normative and governing body of the CENP, comprising members appointed by the founding and institutional members; c) Executive Board: administrative body in which three segments of advertising market are represented comprising seven members (one chief executive officer, three vice-presidents and three executive officers); d) Ethics Council: is the competent body for conciliation and mediation as well as arbitration of disputes between agents and market interests on Standard for Advertising Activity, comprising council’ members representing advertisers, advertising agencies and communication channels appointed by the respective bodies; e) Audit Council: is the supervisory body of the CENP, comprising three members elected by the General Meeting, which is liable for supervising the acts of the managers elected by the Executive Council as well as state an opinion on the report and accounts of the Executive Board; f) Advisory Council: acts as advisory body of the Executive Board, for the discussion of issues on advertising, ethics and free competition interest without administrative role.

CENP also has two other bodies: 1) CTM - Media Technical Committee comprising qualified professionals with expertise in agencies, channels and advertisers, in charge for analysis and recommendation of studies accreditation on media information; and 2) the BUP - Single Bank of Price Lists, deposit system enabling the member channels to fulfill the requirement provided for the Regulating Decree of Law # 4.680/65, with public price lists.

The Standard for Advertising Activity: ethical and technical guidelines

This chapter intends to present briefly recommendations on the compliance with the standards arising from self-regulation of advertising activity under custody of CENP, evidently seeking to be guided by and complement state provisions (both federal laws and the decrees listed above). In this context, provisions from so-called Advertising Activities Standards have core role, which can be divided for the purposes of this document, in three parts, according to relationship being dealt by standards: agency, advertisers and channels relationships; agencies and advertisers relationships; agencies and channels relationships.

Agencies, Advertisers and Channels relationship

After an approach to the basic concepts of the advertising market, the first part of the Advertising Activity Standards is concerned with the relationships between agencies, advertisers and channels with regard to the professional and commercial practices. In the commercial sphere, core issues are dealt with in regard to compensation of advertising agencies, among which we refer to the standard discount of agency, which recommends to ensure to the accredited agency and in compliance with the self-regulation standards, at least 20% the media amount paid by advertisers.

At the professional level, the standards implement quality goals for agencies, which should have professional and technical structure and a minimum set of information and media data. Exhibit A classifies the agencies into seven groups according to their annual media revenue.

Briefly, we have:

- The price lists, which channels market their spaces, their time and their services MUST be public and apply interchangeably for business sent thereto by advertisers directly or through agencies.
• The vehicle SHALL NOT offer to the advertiser, directly, advantage or price differing from the one offered by the agency.

• The agency SHALL SUBMIT proposal to the customer as sent from channel.

• The agency MUST charge customers invoices corresponding to the space/time purchased by order and account thereof, undertaking the collection on behalf of the channels to which they MUST transfer on the amounts thus received.

• CENP MUST suspend the Technical Qualification Certificate of agency, when proving it has withheld unduly the amounts.

• Channels and advertisers SHOULD exchange advertising space, time or service freely, directly or through the advertising agency in charge for advertising account under Normative Communication issued by CENP.

• The channels MUST determine the standard discount to be granted to agencies certified by the CENP, on the design, performance and distribution work of advertising developed thereby, recommending the Standard of Advertising Activity at least on 20% for agencies in compliance.

• The agencies MUST reach in turn the quality goals established by the Standard for Advertising Activity and enable the receipt of Technical Qualification Certificate, undertake technical quality obligations (purchase of research in the interest of the activity performed on behalf of its customers) as well as ethical and loyalty obligations in commercial relationships (limits on transfer to advertisers without breach of loyalty to the channels).

• Agencies MUST perform their work, specially media

CENP is liable for carrying out the self-regulation of the relationship between economic agents of the advertising market and the promotion of best business practices between the parties

plans that will be submitted to its customers, technically based on statistical market data, guiding its recommendations by good technique.

• The agency SHALL negotiate a portion of its standard discount with the advertiser, guided by the parameters established in the Advertising Activity Standards, according to the amount of investments in advertising.

• Contracting advertising under uneconomic, anti-competitive is ILLEGAL or creation of unfair competition

Agencies and Advertisers relationship

The second part of the Advertising Activity Standards points out the relationship between the agencies and advertisers, explaining the capabilities required to agencies accredited by CENP and how they shall be preferably contracted. Exhibit B provides for the parameters for negotiating the standard discount to be reversed for the advertiser.

Briefly, we have:

• The agency certified by CENP MUST be qualified to perform full service to advertiser, comprising the following services: a) study of concept, idea, brand, product or service to disseminate; b) Identification and analysis of the audience and the market in which the
idea, brand, product or service find better chance of acceptence; c) identification and analysis of competing ideas, brands, products and services; d) examination of the distribution and marketing system; e) Drafting and performance of the advertising plan; f) contracting the purchase of space/time/service with vehicles on behalf and for responsibility of advertiser, regarding such activities, carry out the collection of those invoices and the payment thereof to the channel.

- The agency MUST work closely with the advertiser so that the advertising plan reaches the intended goals and the advertiser receives the return of investment in advertising.

- The contracting of agency by the advertiser MUST be preferably by written document. Which SHALL state the terms for rendering the services and adjustments agreed by the parties.

- Advertising ideas, parts, plans and campaigns developed by the agency SHALL belong, from the point of view of copyright, to the agency.

- The certified agency SHOULD choose not to be compensated through the standard discount at least on 20%. In such case, the compensation by the advertiser SHOULD be performed through fees or fixed fees. The fee SHOULD be cumulative or alternative to compensation by the standard discount, but shall keep proportional equivalence thereon, and contracting is ILLEGAL of antieconomic, anti-competitive conditions or generating unfair competition.

- In agreements with the government, advertisers of each branch and administrative sphere SHALL be considered as departments of a single advertiser for forecasting purposes of Exhibit B, a standard that provides to such advertisers more advantageous condition.

**Agencies and Channels relationship**

The third part of the Advertising Activity Standards deals with the relationship between agencies and channels.

**Briefly, we have:**

- Incentive plans to the agencies, which are maintained by channels, which offer and acceptance are voluntary, SHALL NOT comprise advertiser, or overlapped technical criteria by the agencies in the drafting and implementation of media planning.

- The agency SHALL acquire space or time specifically for its customer. The channel SHALL NOT therefore sell space or time without the express indication of the name/product of advertiser.

- The agency SHALL charge timely the value of invoices issued by channels against advertisers, transferring these amounts to channels. Misappropriation, subject to legal penalties, is a failure to perform this transfer.

3. SELF-REGULATION, ETHICS COUNCIL AND COMPLIANCE

In the context of advertising self-regulation, CENP’s Ethics Committee is the body that carries out important assignments to reconcile, mediate and arbitrate disputes relating Standards of Advertising activity. Therefore, Council has the jurisdiction to raise, document and decide on proceedings, analyzing whether the conduct of the agents of the advertising market is or is not in compliance with the Standards.
Therefore, this body has a role of great importance, since it provides to agents in conflict or in a non-compliance situation, the possibility, through reconciliation, to return to the compliance condition. In this context, it is important to remember that the Ethics Council only examines the compliance situation of agents based on the Standards, other than disputes on state standards for the advertising activity, as this assignment is under the liability of Judiciary Branch and outside CENP’s authority.

It should be pointed out that the Ethics Council, in self-regulation logic, in which voluntary commitments are undertaken on behalf of goods and values considered relevant throughout a community that regulates itself, was conceived as a dispute solution mechanism always seeking the reconciliation. Thus, it is the first stage of the proceedings before the Ethics Council is carried out in a Conciliation and Mediation Chamber, where the agents have the opportunity to resolve the disputes or existing ethical conflicts between them from the dialogue, a process in which the Ethics Council of CENP, by that Chamber, works as mediator and reconciling party. It is not, therefore, a procedure in which a body superior in hierarchy has the power to punish the agents of the advertising market, but a system designed by agents of the advertising market, so that they, in joint agreement, make a decision. There is, for example, no penalty to be levied on those agents that are in non-compliance with the Standard or any other penalty.

It is just before the failure of attempts to solve by reconciliation or mediation petition is made to Arbitration and Ethical Conflicts chamber. The Ethics Council, when arbitrating disputes, always aims at preservation of best commercial and ethics practices in this respect, by quality, legality and ethics in business relationship between advertising agencies, advertisers and communication channels in accordance with rules set forth thereby and under the Standards. At the completion of this procedure, after all attempts of reconciliation, if the Ethics Council finds that the agency is in non-compliance it should adopt a merely declaratory warning, which will be informed to those in charge for agency and the advertiser involved in the dispute and reporting it to channels and channels associations accredited by CENP.

**Briefly, we have:**

- The Ethics Council of CENP SHALL always seek conciliatory solutions and operate as an instrument of harmony between the agents in dispute and SHALL NOT issue before that any statement.

- Before declaring the non-compliance status and taking the necessary statutory provisions, the Ethics Council SHALL establish procedures in two levels, the Chamber of Reconciliation and Mediation and Arbitration and Ethical Conflicts Chamber, which SHALL always enable the opportunities to be heard to agents and the possibility of reconciliation.

- If, at first, no ethical issue is found, the Chairman of CENP SHOULD recommend that the procedure is archived.

- Through its Reconciliation and Mediation Chamber, the Ethics Council SHOULD aim an agreement between
the agents, so that they return voluntarily to the compliance status.

• If attempts to settle before the Reconciliation and Mediation Chamber proves unsuccessful, continuing the ethical conflict, the procedure should be referred to the Arbitration and Ethical Conflicts Chamber, which members will vote, after always ensuring the opportunity to be heard and exhibitions of the reasons of the parties, to decide whether the agents are in non-compliance status.

• The Ethics Council SHALL NOT establish fines for agents in non-compliance status, neither decide on any issue different from interpretation of the Advertising Activity Standard for lack of authority.

• The performance Ethics Council is handled as confidential, which is known only and solely by those who examine on behalf of CENP the facts found, those who determine and interested parties, and decision is merely declaratory on non-compliance notified to the representatives of the parties in dispute and informing thereto to the channels and channels associations accredited by the CENP.

4. SELF-REGULATION OF THE ADVERTISING MARKET: CENP’s Competition Self-regulation

Professor Tercio Sampaio Ferraz Junior’s opinion

Self-regulation is considered in competition, as a private governance of the agents of certain industries to formalize the control, establishment and setting forth voluntarily accepted rules standards subject to self-coordination.

The role of self-regulation by internalizing standards behaviors, accepted by market and community by monitoring its members to create positive reputation for the group. In other words, the reputation of agents is at stake and will determine in efficient operation of self-regulation. Thus, the regulation provided for in self-regulation also provides an additional standards set as well as operates in strengthening the standards determined by the community, State and market.

Brazilian experience with self-regulation taken to the antitrust authority is relatively small, thus requiring a reference to literature and practices of other countries.

In economic view, the efficient provision of public or collective goods affects the private competitiveness of each company, which is named by Piore and Sabel (1). The out-of-company infrastructure composing industry institutions within the acceptance of the Best (2).

A sector should include a variety of practices among companies and out of companies’ agencies such as commercial associations, apprenticeship programs, joint marketing agreements, regulatory commissions, establishment of rules and standards. Sector institutions should influence the organization of individual companies and their strategies, as well as the collective competitiveness of the sector in respect to other sectors located in other regions. From this point of view, the companies compete as well as cooperate to provide common services to establish the rules of the market game an investment strategies.

There is actually a permanent tension between competition and cooperation.

Best proposed thus two conditions for establishing the balance between competition and cooperation. First, there shall be a clear purpose for cooperation, which means developing and implementing sector strategy that is built from the strategies of individual companies and at the same time, influencing thereof. Second, there shall be a way to monitor and force the individual actions in order to counteract the tendency to free rider behavior.

Among the important elements to analyze the effect of self-regulation is associated with its kind. Spontaneous private regulation systems should generate efficient outcomes. Spontaneous regulations are based on reciprocity: individuals recognize the benefits obtained from submitting to the rules of the group. This is exactly the case of self-regulation in the advertising market: a spontaneous private regulation that to be sustainable shall generate benefits for its participants. Quality standards should reduce customer search costs in non-apparent quality characteristics (3).

In the legal view the possibility to establish agreements, whether horizontal and vertical, between economic agents, is recognized in the international literature and case law.

For example, Germany recognizes by law (GWB, § 28), the possibility of creating Wirtschafts- und Berufsvereinigungen (economic and professional associations). The content of the rules common set forth by such associations usually has a sense of ethical standards, mostly on fair dealing in competition, and accepting rules on pricing (4). The provision on recognition process of these rules by the by competition authority (Bundeskartellamt), however, provided that they comply with the laws, meant that this recognition was not required for the binding effects between the signatories.

The US courts, with regard to the publication of common standards and the issue of ruling on their breach, recognize that at first, all association with requirements to define the members have some kind of limiting rule or criteria and should restrict, at least indirectly, competition in the market.

However, the review the legality of such rules is based in economic legitimacy of the purposes pursued by such association by means of self-regulation, as well as reasonableness and objectivity of the standard rules implemented for the assumed purposes. If the standards are not objective and purposes are not reasonable, the rules will be considered illegal, as they operate as a barrier to entry in market, i.e. a kind of boycott, persuading purchasers not to contract companies that have not reached the standard. In view of these elements, it is seen that the behavior horizontally/vertically combined under self-regulation agreements should always be analyzed based on the rule of reason (5).

REGULATION, AND SELF-REGULATION AND COMPLIANCE OF ADVERTISING IN BRAZIL

Among US case laws deemed relevant in determining the reasonableness therefore recognize the legality of the self-regulation agreement, the following should be indicated:

(a) for an analysis on competition point of view, the agreement shall have some purpose or commercial repercussion, so it should be examined legally (6). In Brazil, although the emphasis was on the ethics (CONAR Case, for example), it is important to have repercussions in the commercial behavior of subscribers (such as the CONAR itself);

(b) defined standards shall be objective, that is, their rules shall be impersonal (7); in this case, the purpose of rules knows the requirement of impersonality, and designed for all participants in the advertising market without exclusions to be regarded as barriers to competitiveness and entry into the competition;

(c) Implemented standards should be accessible to non-members of the agreement (8); i.e; the agreement should be known by entire market;

(d) Purchaser should participate as well as suppliers of products or services, in definition of standards of behavior and judgment from the defined standards (9); i.e. Agreement also has relation effects and should be analyzed as such;

(e) no antitrust breach where regulates self-regulation implements federal safety standards.

i.e; complies with the relevant legislation (10); in this case, the agreement contains principles of law regarding advertising;

(f) the agreement should provide for procedural safeguards against decision that denies approval (11).

Interesting to note that the Federal Trade Commission (FTC) has stated several times, a favorable opinion to the self-regulation, understood by the Court as a practice that helps the agency in controlling the competition.

In a speech during a symposium at the American Bar Association (12) its then-President states that the Court has recognized, for more than a generation, self-regulation as an important complement to its efforts in the consumer protection. Moreover, the existence of state regulation on certain issue does not prevent private agents to organized to set other rules on the issue.

More recently, the Court representative Pamela Jones Harbour ‘s speech summarizes the FTC position as favorable to stimulate always the self-regulation when it is beneficial to consumers, and recognize that some markets are regulated more effectively by their private agents than the state itself. In that speech, the representative lists some markets where this characteristic is found - especially those involving technological development.

In Brazil, one of the few self-regulations taken to authority, made purpose to avoid unfair ethic and

commercial behavior, as CENP (entity encompassing advertising agencies. Channels and advertisers), under CADE for fifteen years has performed a noteworthy work.

CENP

It was founded in 1998 and today is encompasses the following associations: ABA – Associação Brasileira de Anunciantes; ABAP – Associação Brasileira de Agências de Publicidade; ABERT – Associação Brasileira de Emissoras de Rádio e Televisão; ABTA – Associação Brasileira de Televisão por Assinatura; ANER – Associação Nacional de Editores de Revistas; ANJ – Associação Nacional de Jornais; Central de Outdoor; and Fenapro – Federação Nacional das Agências de Propaganda. Also, as the associated institutions: IAB Brasil – Interactive Advertising Bureau Brasil; and ABDOH – Associação Brasileira de Mídia Out of Home.

The main work tool of CENP is the Advertising Activity Standards document, establishing the foundation of the technical capacity of an agency and the ethical relationship to the industry, based on best practices and laws governing the activity.

CENP grants the Technical Qualification Certificate to the Agencies by checking their structure, technical staff, the availability and the systematic use of media research and the fulfillment of the commitments set forth in the Standards. This certification ensures the granting of the "Standard discount" agency in percentage higher than 20%.

In addition, CENP makes the deposit of Individual and Independent lists of the Channel Prices, providing transparency of the offer, in compliance with the provisions of the legislation, and performs the accreditation of studies and research of media institutes, ensuring that researches are reputable.

O Standard discount é subject to payment by the advertiser, of broadcasting of advertising

To achieve its goals, it was established:

1) The channels sell their space, time and services based on prices of publicly known valid for all business with advertisers. Channels are accepted to offer conditions or advantages as this is the type of dealings on their own convenience in the individual negotiations performed.

2) The agencies are contracted by advertisers which choose them for their qualities and virtues. The performance is always on order and borne by the contracting party thus based on excellence of study, creation and is distributed to the communication channels.

3) To perform entirely their assignments, agencies need the recognition by the communication channels, for which they render services indirectly as a result of activity performed on the behalf of their customers, on the charge of the broadcasting amounts, with discretion and accuracy, and deliver these amounts at maturity dates, to communication channels.

4) Regarding the channels, also indirectly, agencies provide an essential technical service to market and democracy, to ensure the plurality of media and freedom of expression through behavior research and studies scientifically, know the market, its means and channels, indicating the communication of advertising messages.

5) According to the Standard, channels, by recognizing the importance of agencies, give preference to work through regarding their advertisers, respecting them and never refusing to serve them directly if they so wish.
6) Advertisers, after all, are the credit holders granted by communication channels, against which broadcasting invoices are issued, and forwarding thereof, when there is a relationship, through the agency, which is entitled to ‘del credere’, that is, the obligation to collect from advertisers and settle the amounts received on invoices with channels.

7) The agency is basically paid by the two services rendered: (a) when creating the advertise and the campaign, using the intellectual and material and the production management which is always carried out by specialized companies, such as video-phonograms producers, for example; and (b) when advertising of its customers-advertisers are broadcasted with the standard discount, to fulfill the commitments to use marketing researches and investments in the studies performed in the media. Channels also consider, by the standards, the standard discount is the recognition by actual del credere of the agencies that are surely liable for low rates of default of customers-advertisers.

8) The outline of agency compensation is carried out in-house services - creation and management of production - by actual cost studies carried out by trade unions of agencies in every state, which respects the diversity of the country and ensures greater reality in indications of reference value.

9) In joint agreement between representative entities of agencies, channels and advertisers, the Advertising Activity Standard provides for the standard discounted at least 20% for agencies certified by the CENP which are in compliance with the self-regulation standards, granted in accordance with Law # 12.232/10, as follows:

   a) On the ”negotiated amount” paid by the customer, the agency withholds 20% for the standard discount and forwards 80% to the communication channel

   b) When the payment is made directly by the customer-advertiser, the channel shall receive its 80% and the agency, also shall receive directly from the advertiser corresponding to 20% for the standard discount.

10) The Standards established the valuation principle of advertiser standing out in market, allowing, according to the level of investment in advertising, up to 5% standard discount to be reversed by the agency to the advertiser, thus enabling the optimization of its communication budget.

11) Standards value freedom of the market, knowing that it begins when the competition between agencies is respected among vehicles, is valued between advertisers and implemented with respect to the consumer. Nothing is static to the Advertising Activity Standard, but it should remain in the narrow field of ethics.

   There is no doubt that in these fifteen years, the market has incorporated the Advertising Activity Standards, recognizing the CENP as the entity that ensures the compliance. Mechanisms were implemented that prevent opportunistic initiatives, presenting uneconomic proposals in order to win over new advertisers or keep them, as this can lead to low quality services and unfair competition.

   In this respect, also deserves mention the fact that the Judiciary branch, when faced with discussion involving adjustments to the Standards, has recognized the important role played by CENP and its authorities:

   The Standard Executive Board - CENP, herein defendant, was created on December 16, 1998, by the advertising market, to ensure the compliance with standards on advertising activity, basic document with recommendations and ethical principles
seeking to ensure the best commercial practice in the relationship between key agents of the Brazilian advertising. Its main manager is an Executive Council with twenty-three (23) representatives of advertising agencies, advertisers, communication channels and federal government.

Besides, the advertising activity standards, issued by CENP, are recognized by law, so Article 7 of Decree # 4.563/2002, makes clear reference to the provisions set forth as "items" by CENP, as argued by the defendant in the defense (see page 118).

CENP’s activities also include, as self-regulatory body of the industry, custody of advertising activity standards, the issue of normative or technical communications to the advertising market and the certification of advertising agencies to raise or maintain the quality of advertising produced in the country. Therefore, the modifications of the standard of the advertising activity being challenged is within the authority of the CENP, as these changes were approved at the Extraordinary General Meeting held on January 5, 2011, to conform to the provisions of Article 19 of Law # 12.232/2010, providing on the general standards for bidding and contracting by the government the advertising services rendered by advertising agencies, among other measures. (Judgment Case # 0208709-51.2011.8.26.0100, 15th Central Civil Court, São Paulo).

It is worth noting that the Brazilian market is known to be competitive. In a recent decision (2013), CADE, examining significant operations presented as concentration act (the operation between Publicis and Omnicom, administrative proceeding # 08700.008058/2013-49), concluded that the Brazilian advertising market is highly spread.

"competition between agencies in different sizes, as agencies considered medium or small-size should achieve big ‘accounts’ (customers with high investment in advertising)." In addition, the statement made by the General Superintendence of CADE in this case concluded that the responses to official letters to competitors and case law support the "existence of small barriers to entry and high rivalry in the market." In the bidding and contracting processes of advertising services in the official levels of Executive, Legislative and Judicial branches, in the three levels of government - federal, state and city, the Law # 12.232, of April 29, 2010, in Congress’ initiative, legitimized the role of CENP as accreditation entity and technical training oversight of advertising agencies, condition required as a prerequisite to participate in the bidding processes and implementation of advertising contracts in the government.

As successful self-regulatory process, one can therefore say that CENP demonstrated for fifteen years, to be qualified to accredit and require from the agencies the technical structures and personnel to ensure to advertisers a good advertising work and to channels the certainty they are designed by advertisers and agencies based on technical criteria. Thus, fulfilling a relevant role in Brazilian market.

*Opinion originally published in "Compliance in Advertising, published by CENP in 2014".*
CADE’S DECISION AND ITS IMPORTANCE FOR BRAZILIAN ADVERTISING

PAPER ORIGINALLY PUBLISHED IN CENP IN MAGAZINE OF MARCH 2017

AGENCY RECOGNIZED THAT THE CENP STANDARDS ARE STIMULATED BY LEGISLATION

At the end of a long and complex process, CADE - Administrative Council for Economic Defense’s Court acknowledged, at its first meeting of 2017 in a unanimous decision that the Advertising Activity Standard implemented by the CENP are supported and encourages by the laws in force in the country, by law in the Constitution. It is the confirmation that the environment of ethical and commercial self-regulation of the Brazilian advertising works, and should not be otherwise, strictly according to the governing laws of our business.

CADE recognized that the state regulatory framework of the industry, in federal law # 4.680/65 and # 12.232/10 and Decree # 57.690/66 with wording of # 4.563/02, besides the wide institutional recognition, allows and encouragement standards of ethical and commercial self-regulation implemented by the market for decades.

The decision confirms the initiative of Advertisers, Agencies and Channels that through the ethical and commercial self-regulation of the Advertising Activity Standard, promotes a business model recognized since the 1950’s, which created and transformed over time Brazilian advertising in one of the world’s most creative and effective according to the general recognition.

The completion of the process in CADE results from work and dedication of many and closes a rich period in learning on acts within the law to enhance the advertising activity while encouraging competition.

CADE scrutinized the Standard and its implementation by CENP over virtually its entire existence. The entity, its founders and associates will follow the self-regulation and best practices on the certainty of acting within the legal framework of activity. Few economic activities are as transparent as advertising. The authority has never questioned the transparency in the relationship or the integrity of the economic agents of the market.

For the lawyer Thiago Francisco da Silva Brito, member of firm Sampaio Ferraz Advogados, which team accompanies CENP since its foundation in 1998, the decision is not a surprise. "The advertising market has legal and regulatory peculiarities
long recognized by the state”, explains Thiago. "Even with regard to the ethical and commercial self-regulation, its origin dates back to the 1950’s, which shows that the competition is subject to state rules and private self-regulation. CADE demonstrates the legitimacy regarding the legislation governing the initiatives activities of agents that seek to expand the competition with each other, setting objective parameters and standards for the Brazilian market and is a recognized successful business model for over 50 years, promoting generation of quality in advertising, increasing the return opportunities for Advertisers, agencies and Communication Channels”.

**Development of process;**

In 1998, at the creation of CENP, its founding entities, ABAP, ABAP, ABA, ABERT, ABTA, ANER, ANJ and Central de Outdoor Center, and Fenapro voluntarily submitted to CADE the Advertising Activity Standards. The ethical-commercial self-regulation agreement was then approved and the entity started its activities.

The administrative process filed in January was opened to investigate the existence of supposed "new facts" related to implementation of the Standards by CENP under Brazilian legislation to protect competition, which were not subject of the previous decision. According to the technical note of opening, as mentioned by the rapporteur member Gilvandro Vasconcelos Coelho de Araújo, in his vote, CENP could be interfering in free pricing of advertising agency services, when determining the so-called "agency discount ".

For nearly twelve years, the investigation of the case was originally performed by the Economic Law Department of the Ministry of Justice (SDE), after that by Superintendence General of CADE. Throughout the proceeding, CENP contributed with the authority through numerous legal, economic opinions, market information and indication of professions in market to be heard, as former presidents of the ABA and ABAP, for example, then authority liable for advertising of the advertiser government.

The decision of CADE’s Administrative Court confirms the understanding adopted in case the SG, Superintendence General of CADE, the Procade, Prosecution office by CADE, and the MPF, Federal Prosecution Service, which three opinions, unanimously, recommended the archive without any conviction or recommendation to CENP.

Two of have recommended to be notified - what has been performed - the Economic Monitoring Department of the Ministry of Finance, for assessment the opportunity to suggest or recommend any adjustment of the legal framework to the relevant agencies.

The rapporteur says, in his opinion, the formation of the CENP, its founders and affiliated entities, noting that it was "created in the context of deregulation of the advertising industry in 1990’s, when the market was looking for a standalone business model". He concludes by writing that is "must be noted that the system has legal support. In this context, deciding on the existence other than competitive risk of establishing uniform parameters to market of 20% compensation, CENP’s commercial practice is endorsed while in for the Laws # 4.680/65 and 12.232/10 and Decrees 57.690/66 and 4.563/2002").

"(...) all practices in PA are supported and encouraged by state rules governing the advertising market since 1965 and also by recent standards"

*Rapporteur member Gilvandro Vasconcelos Coelho de Araújo, of CADE*
CADE’S DECISION AND ITS IMPORTANCE FOR BRAZILIAN ADVERTISING

The rapporteur also mentioned that the creation of CENP and other developments, to be submitted to discretion of Brazilian Competition Defense System, should be considered as an act of good faith to the outcome of the case. He accepted the recommendations of the Superintendence-General and the Federal Public Prosecution Service forwarding to Economic Monitoring Department of Ministry of Finance for the analysis of items recorded in opinion about the aspects that somehow should be considered anti-competitive aspects of the Standards.

Proposals for revision and improvement of Standards occur permanently in CENP, which is a publicly-held entity and seeks to catch up to what happens in the market. They are encouraged and are one of the reasons for the existence of the agency. All members have the opportunity to offers proposals and suggestions that should further improve the quality and reputation of the activity. Everything is discussed and studied.

The archived process started on the initiative of the government agency. The Standards and best practices recommended by CENP were in force until the issue was submitted to CADE and are valid now.

LEGISLATION DEVELOPMENT SUPPORTING THE ADVERTISING ACTIVITY STANDARDS

On a vote submitted to Court, the rapporteur member of issue Gilvandro Vasconcelos Coelho de Araujo, presented a development framework of legal provisions and their application:

**Law 4.680/65, as of 06/18/65**
- Definition of advertising agency, which excludes media bureaux;
- Establishing discount set by the dissemination channels due to advertising agencies (standard discount);
- Prohibiting the transfer of discount to the advertiser or media bureaux.

**Decrees 57.960/66, as of 02/01/1966**
- Definition of basic services that the advertising agency renders to the advertiser;
- Definition of compensation structure based on standard discount, 15% fees on the cost of authorized work which are not commissions and fees for internal special services;
- Establishment of 60 days prior notice for termination of the agreement between customer and agency and provision that the idea is used in advertising is owned by the agency shall not be explored by others.

**Decrees 2.262/97, as of 12/31/2002 to 12/31/02.**
- Removal of reference to the Standards recommended in the 1 Brazilian Congress of Advertising, excluding the basis for setting the standard discount of agency on 20% and the determination of 15% minimum fees due to agency for services to third parties that generate no broadcasting;
- Revocation of provisions on prohibition to transfer to the advertiser, the commission due by broadcasting channels to advertising agency.

**Decrees 4.563/02, as of 12/31/2002**
- Restore legal binding directly to Standards regarding the limits of transfer of standard discount to advertiser; provision on 15% fee on services contracted with suppliers that do not involve in broadcasting; alternatives to compensation by standard discount of agency and use of the standards to contracting with the government;
- It specifically provides on Advertising Activity Standards of CENP.
Law 12.232/10, as of 4/29/2010

- Indication of Federal Law # 4.680/65 as secondary standard to be used in biddings and contracting by the government of advertising services;
- Determination that the advertising services contracted in advertising agencies have certificate of operation technical qualifications issued by CENP.

**TIMELINE OF CADE’S ACTIONS ON CENP AND STANDARDS**

**1998: Concentration Act (AC) # 08.012.010080/1998-52**
Object: The main associations of Advertisers, Advertising Agencies and Communication Channels submitted to CADE, Self-regulation Agreement of Trade and Ethical Relations between Advertisers, Agencies and Channels.
The agreement aimed to adjust the Advertising Activity Standards to the new normative and economic realities in force in the advertising market and marketing in the country, with the creation of CENP.

**Final Decision:** AC converted to Consultation # 60/00.

**2000: Consultation 60/00**
Object: Evaluation by CADE of the adequacy of Self-Regulation Agreement to competition standards in force at the time with recommendations.

**Final Decision:** New document is submitted aiming at fulfilling the recommendations, Court considered unnecessary to examine the merits of changes within the consultation process.

**2001: Administrative Process (PA) # 08012.000890/2001-11**
Object: Economic Law Department (SDE) has requested a full copy of the records of Consultation and filed the administrative proceeding

The proceeding had its documentation completed by SDE, which opinion was against the CENP and referred the case to CADE.
CENP filed, in court, writ of mandamus against the act of SDE. In decision in Writ of Mandamus # 2001.34.00.030048-8, the Federal Judge of the 3rd Federal Court of Judiciary Branch of Federal District, decided to grant writ to CENP, determining to SDE to annul the administrative proceedings. This decision was reversed later, but there had already been an annulment.

**Final Decision:** Annulled proceeding. # 60/00.

**2005: Administrative Proceeding # 08012.008602/2005-0**
Object: This proceeding was filed to verify the presumed performance of anticompetitive acts by CENP after the declaration of annulment by SDE of previous Administrative Proceeding.
The process analyzes only acts, documents and concrete facts allegedly performed or occurred after Consultation # 60/2000, although present in the records. According to SG, they are new facts, awaiting analysis.

**Final Decision:** On 1/18/2017: Case archived.
CADE’S DECISION AND ITS IMPORTANCE FOR BRAZILIAN ADVERTISING

CENP AND CADE
by Tercio Sampaio Ferraz Junior and Thiago Francisco da Silva Brito

In December 2016, CENP completed 18 years. In January 2017, an administrative proceeding at CADE over 10 years of progress investigating the actions of CENP was archived unanimously without any conviction to the entity.

The genesis of CENP, back in 1998 the Standard, which originated the entity, were submitted to the same CADE as an act of concentration under the provisions of heading of article. 54 of Law # 8.884/94. At the time, throughout the proceeding, this was converted from the act of concentration to consultation procedure, culminating in the final decision of the Court in 2000 concluding that self-regulation was a proper institute, protected by laws part of the country's economic development process, and Rapporteur at the time pointed out some recommendations that CADE later clarified they were not mandatory.

Eighteen years later, the General Superintendence of CADE and now the Court attributed to the submission of Standard made in 1998, the qualification of act in good faith of the CENP’s founders. Rapporteur of the case on CADE, the member Gilvandro Vasconcelos Coelho de Araujo, as stated in his vote on the issue: "(...) the creation of CENP - and other developments thereof - was submitted to the scrutiny of the Brazilian Competition Defense System, which should be considered as good faith for the outcome of the case."

The fact is that after the decision of the Consultation, the extinct Economic Law Department - SDE (which assignments now belong to the Superintendence General of CADE) started two proceedings to investigate CENP, the first was annulled and the second it was filed in 2005. In the latter alleged "new facts" were investigated occurring after CADE’s decision on the consultation.

After 10 years of investigation, last year, in 2016, the General Superintendence of CADE issued a final opinion in the administrative process concluding on recommending to CADE's Court the archive of the proceeding without conviction of CENP.

In its conclusion, Superintendence General of CADE has stated regarding the central reason that led to an opinion by the archives of the administrative process: "(...) every practices in PA are supported and encourages by the State provisions governing the advertising market since 1965 and also by recent provisions (Law # 4.680/65, Law # 12.232/10, Decree # 57.690/66, Decree # 4.563/02)."

In that opinion, the Superintendence pointed out "Under the focus of the defense of competition, the merit review of the legality of the conduct target of Administrative Proceedings directly depends on the appreciation of legislation applicable to the advertising industry during the relevant period. The importance of this analysis is the possibility of the State, through its regulatory activity, having the power to elect, at the expense of free competition, other principles and vectors to guide economic activity in a particular industry."

Throughout 2016, after the proceeding has left Superintendence General, both the Prosecution of CADE and Federal Prosecution Service reviewed the case and positioned also by archiving the administrative proceeding, without conviction of CENP. With all unanimous opinions on archiving, the judgment of the CADE’s Court was fast after the issue of opinions, and the board’s decision was also unanimous the other members adhering to Rapporteur.
In his vote, the member basically adopted as reasoning to decide the same positioning expressed previously by the three opinions issued in the case by the other authorities. That is, the main reason for the archive of the administrative proceeding was the recognition of the existence of a legal framework composed of federal laws and decrees that "supports", "approves", "authorizes", "encourages" the performance of CENP and the current model of Brazilian self-regulation at least for the validity of such legislation: "Notwithstanding the possible induction of such conduct that can be implemented through these standards, particularly the standardization requirement of discounts percentage determined by CENP, it must be observed that the system has legal support. In this context, deciding on the existence other than competitive risk of establishing uniform parameters to market of 20% compensation, CENP’s commercial practice is endorsed while in for the Laws 4.680,65 and 12.232,10 and Decrees 57.690,66 and 4.563,02”.

As for an alleged anti-competitive potential of self-regulation standards, it is noteworthy that the positioning of the authorities, also the rapporteur, is inconclusive and based on aspects related to the theoretical perspective of competition law, no economic opinion in the records or documents related to facts that are actually and specifically related to the reality of Brazilian advertising market demonstrating the production of any anticompetitive effects over the past 18 years where CENP operated as self-regulator.

On the contrary, the fact is that over these 18 years there was no production of anti-competitive effects of self-regulation, in our opinion. Brazilian advertising market includes many players competing effectively, whether in the case of advertising agencies of all sizes and specialties, from north to south of the country, for communication channels in different media, and new media that during these 18 years also began to trade advertising space and companies that advertise and compete with each other in different markets.

CADE’s decision became final on January 31, 2017. Thus, CENP’s performance over the last 18 years, guided the application of a self-regulation pioneering model of Brazilian advertising market inter-relating with legal provisions, constituting a complex regulatory framework but harmonious which was considered appropriate to the governing law of the advertising activity, which certainly means an institutional recognition to a successful model.

Regardless of this CADE’s decision, which is internationally recognized as one of the best antitrust agencies, as well as Brazilian advertising market is internationally recognized, competition law now is a very important issue in the country and the world and affects any company that acts in the most different markets. It should not be different in the advertising market, although it is necessary to consider simultaneously the specific legislation governing the activity and industry. In any case, you should always seek to maximize a market with freedom for effective competition, which benefiting economic agents to comply with the laws and self-regulation as well as the community.

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BRAZILIAN LAWS AND STANDARDS ON ADVERTISING

REGULATION OF ADVERTISING IN BRAZIL

We present below an overview of state provisions on advertising. This scenario is not exhaustive, therefore, starting by analyzing the constitutional provisions related to the freedom of expression and manifestation of thought as well as the chapter on social communication. Moreover, provisions of Federal Laws # 4.680/65 and 12.232/10 will be examined, which consist respectively in the regulatory framework of the advertising activity and the main legislation about the bidding and contracting by the government in the advertising area, and will present as well as provisions of Federal decrees # 57.690/66 and 4.563/02, which govern Law # 4.680/65.

BRAZILIAN CONSTITUTION

The Constitution has a number of provisions that are relevant to the exercise of advertising activity, among which can be highlighted the communication freedoms, expression of thought, expression and information, as well as consumer’s rights and the chapter about social communication.

With regard to freedom of communication, the Constitution establishes a set of rights (art. 5, IV, V, IX, XII, XIV combined with the arts. 220-224) that enable the coordination between creation, expression and dissemination of ideas and creation. This set included the freedom of thought (art. 5, IV) freedom of expression (art. 5, IX) and freedom of information. These provisions, for example, result in the existence of the prohibition to censorship. On the other hand, one cannot forget that freedom of commercial expression should also be understood as the logical corollary of free enterprise and free competition (arts. 1 and 170, heading and IV of Constitution), as advertising is nonetheless an economic dimension of the activities of companies in the market.

The consumer’s right was included by the Constitution in the list of fundamental rights through art. 5, XXXII. Moreover, art. 170, V elevates the consumer defense to principle of the economic order. Therefore, it opens up space for the no constitutional legislation ensuring consumer protection. This role is mainly performed by the Consumer Protection Code. In the context of advertising in in area that escapes to CENP’s operation areas, but it should be remembered, there are even provision that advertising should follow certain guidelines, forbidding the exercise in deceptive or abusive manner, which the Consumer Defense Code defines as illegal practices.

As CENP complements legislation on the ethical and commercial relations, CONAR and its Brazilian Advertising Self-Regulation Code complement the constitutional determinations on the content and form of advertising and the Consumer Protection Code.
Furthermore, regarding the constitutional order of culture, the Constitution has relevant provisions for the advertising activity in the chapter "The communication channels" (arts. 220 a 224). Regarding advertising, art. 220, § 4 is particularly relevant, which provides that the commercial advertising of tobacco, alcohol, pesticides, drugs and therapies is subject to legal restrictions and should contain warning about the harms arising from their use.

In other words, the Constitution ensures the protection to the advertising communication, dealing with it as part of the social communication, and forbidding prior censorship also in its art. 22, XIX, Government is solely liable for legislating on commercial advertising.

Read the legislation cited in this topic at:
http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm

LAW # 4.680 OF JUNE 18, 1965

Law # 4.680/65 is the regulatory framework of the Brazilian advertising market provides on the performance of the advertising profession and advertising agent, clearly defining its parts, advertiser, advertising agent, the advertising agency and communication channels. It also establishes rules relating to commissions and discounts payable to advertising agents and the agencies, the agents’ employment contract, and the monitoring and the assessment of penalties for non-compliance with legal provisions.

According to this law, advertisers in regular and permanent basis, carry out technical specialty assignments, in advertising agencies, the broadcasting channels or any company producing advertise. The concept of advertising agents, in turn, includes the independent or third-party professionals which forward advertising to channels on third parties’ account. Advertising agencies, according to the same law, includes legal entities specialized in advertising art and technique, which, through experts, study, design, perform and distribute propaganda for dissemination on customer’s order and account, for the sale of products or services, spread ideas or inform the audience. The communication channels, to the lawmaker, are any visual or sound communication channels capable of broadcasting to the audience, provide that recognized by entities or professional entities.

Regarding commissions, Law # 4.680/65 provides that the compensation is made by means of standard discounts to agencies, which is mandatory and shall be determined by communication vehicles, which shall also establish the remuneration due to the advertising agents as commissions. Both are mandatory and shall be determined by communication channels. Code of Ethics of Advertising Professionals, 1957, states to have legal nature and defines the ethical principles that should guide the advertising, among which the provision on the commission and/or discounts of agency and advertising agents not to be transferred to advertisers. Code of Ethics provides also that channels should have their individual price in public lists and equal for all purchasers.

Moreover, Law # 4.680/65 establishes the provisions for monitoring regarding the compliance with its provisions as well as the penalties to be assessed to such cases. The Ministry of Labor and its regional offices, interested trade unions and professionals associations shall carry out the monitoring. **The provided legal penalties are a fine from one-tenth to ten times the minimum wage, or 10% to 50% of the advertising business amount, in any breach to Art. 11 (commissions or discounts).**

Read the legislation cited in this topic at:
http://www.planalto.gov.br/ccivil_03/LEIS/L4680.htm
BRAZILIAN LAWS AND STANDARDS ON ADVERTISING

LAW # 12.232 OF APRIL 29, 2010

Law # 12.232/10 establishes essentially general provisions applicable to biddings and contracting by Government of advertising services by agencies but also other measures. These standards apply to biddings and agreements with the federal government, states and cities as well as the Executive, Legislative and Judiciary Branches. This law recognizes the validity and effectiveness of Law # 4.680/65 and provides, complementarily, as well as Law #. 8.666/93, to be also be applied to bidding procedures and agreements resulting thereof.

It should be pointed out the provisions in art. 4, § 1st, provides that the technical qualification certificate issued by CENP, or other entity legally recognized also as inspecting and certifying of advertising agencies, is a requirement for an advertising agency to participate in biddings, sign and perform agreements with the government. Also providing in the same article, in addition to certificate advertising agencies should only be contracted when activities are regulated by Law #. 4.680/65.

There are other important provisions that law. Particularly articles 18 and 19 clearly including in the regulatory system governing advertising in the country as a whole, and self-regulation standards are considered clearly as parts of this system, even with regard to its application to bidding and agreements with the government.

As the art. 18 refers to the incentive plans of channels regarding the agencies, regulating the issue as CENP had regulated, stating that it is discretionary and free issue of each channel and does not affect the economic and financial equation defined in bidding and agreement. On the other hand, providing in that regard that the agencies shall always be guided in the choice of the channels in the media plan by research and proven technical data, other than the existence any incentive plan. Failure to comply with this provision is a serious breach of contractual obligations by the contractor agency to be subject to the administrative proceeding, once proving the unjustified behavior, will imply to the assessment of the penalties provided for in the heading of art. 87 of Law # 8.666 of June 21, 1993.

Moreover, the art. 19 provides that, for purposes of interpretation of the governing law, the standard discount amount of agency (terminology of Advertising Activity Standard adopted by the Government), which are due for the design, performance and distribution of advertise, are advertising agency revenue and should not be billed under any circumstances and recorded as revenue by broadcasting channels, if the standard discount is transferred by channel, completing the prohibition of Law # 4.680/65 regarding the transfer to the advertiser, of that compensation determined by channel to the agency.

Finally, worth mentioning in the law, all issues provided for bidding procedures, which must be the "best technique" or "technique and price" shall not be the "lowest price", and the notices shall provide for the price proposal "requirements representative of compensation in force in the advertising market" (art. 6, V). The law details the services rendered by advertising agency, the controls and the legitimate subcontracting.

Read the legislation cited in this topic at:


DECREE No. 57.690 OF 2/1/1966.

Decree # 57.690/66 regulated Law # 4.680/65, and provides on commissions to be paid to advertising agents and discounts due to advertising agencies.

This decree also addresses the issue of professional ethics, noting that the agencies, channels and advertisers are subject to the Code of Ethics of Advertising Professionals. In this context, it lists behaviors that are not allowed and duties that constitute the principles under art. 17 of Law # 4.680/65. Among the prohibited behaviors are publication of texts against public order and morality, disclosure of confidential information relating to advertisers’ business, defamation of competitors or attribution of failures to their products. Among the duties are to disseminate truthful events, deny commissions the people related with the customer and verify the expenses made.


Decree # 4.563/02 has changes on wording of art. 7 of Decree # 57.690/66. It recognizes the benefits brought by private self-regulation, expressly mentioning several provisions of the Advertising Activity Standards as applicable to relations with the advertising agencies in the advertising market, and item 3.5, which refers to Exhibit "B" of such self-regulation standards.

STANDARD OF BRAZILIAN ADVERTISING

Brazilian Advertising Standard established by mutual agreement among Advertisers, Agencies and Communication channels should be known in its entirety in


The Standard are divided into 8 parts:

1. Basic principles
2. Agencies, Advertisers and Channels relationship
3. Agencies and Advertisers relationship
4. Agencies and Channels relationship
5. Channels and Independent Agents Relationship
6. Practices and Operational Procedures of Advertising Activity
7. CENP – Conselho Executivo das Normas-Padrão

CENP’s website (www.cenp.com.br) the free access is granted to all other documents related to the entity (Bylaws, Resolutions and Communications, Regulatory Communications, Regulation and Procedures Standards - Executive Board, Board of Ethics and Media Technical Committee), as well as the applicable legislation fully and all other details of CENP and its activities. The main documents are available in English and Spanish.
CENP - CONSELHO EXECUTIVO DAS NORMAS-PADRÃO

FRAMEWORK

Founders entities
ABA - Associação Brasileira de Anunciantes
ABAP - Associação Brasileira deAgências de Publicidade
ABERT - Associação Brasileira de Emissoras de Rádio e Televisão
ABTA - Associação Brasileira de Televisão por Assinatura
ANER - Associação Nacional de Editores de Revistas
ANJ - Associação Nacional de Jornais
Central de Outdoor
FENAPRO - Federação Nacional das Agências de Propaganda

Associated Entities
ABOOH - Associação Brasileira de Out of Home
IAB Brasil - Interactive Advertising Bureau
FENAPEX - Federação Nacional da Publicidade Exterior

Adhering/Accredited Professionals
APP Brasil - Associação dos Profissionais de Propaganda
Grupo de Atendimento de São Paulo
Grupo de Planejamento Brasil
Grupo de Mídia de São Paulo
ARP - Associação Riograndense de Propaganda
ABEP - Associação Brasileira de Empresas de Pesquisa

CENP em Revista
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BODIES AND MANAGERS

Executive Council
ABA - 4 office-bearers and 4 alternates
ABAP - 3 office-bearers and 3 alternates
ABERT - 4 office-bearers and 4 alternates, of which 2 from radio and 2 from TV
ABTA - 2 office-bearers and 2 alternates,
ANER - 2 office-bearers and 2 alternates,
ANJ - 2 office-bearers and 2 alternates,
CENTRAL OUTDOOR - 2 office-bearers and 2 alternates
FENAPRO - 3 office-bearers and 3 alternates,
ABOOH - 1 office-bearer e 1 alternate
IAB BRASIL 1 office-bearer and 1 alternate
FENAPEX - 1 office-bearer and 1 alternate

Members of Chairmen of Ethics Committee
Advertisers representatives, agencies and channels chosen by the Executive Council

Ethics Council
Ethics Chamber have a three-party composition (Agencies, Advertisers and Channels) and include representatives of the Founders and Associated Institutional

Executive Board
CEO Administrator
3 Vice-Presidents
3 Executive Officers

More information about the CENP can be obtained at www.cenp.com.br
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This series of publications is in addition to other initiatives aiming
at disseminate relevant information to Brazilian environment
of ethical and business self-regulation, existing because of the
Advertising Activity Standards.

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