

ETHICS ORIENTATION DOCUMENTS I

COMPLIANCE AND ETHICS PROPOSITIONS IN ADVERTISING SELF REGULATION



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Interactive Advertising Bureau

Compliance is the English word of Latin origin that means the act to comply in accordance to a norm, a wish, rather than *cumprimento*, its translation should be *observância*, but the English word has spread and, by virtue of such, it is used in this essay.

Letter of the President

Advertising is the means of the activity to those who advertise their products and services and to those who place advertisements. It is the core activity for advertising agencies that, within the Brazilian model – full-service, perform activities ranging from market research and creating adverts to planning and advertisement mediation. In Brazil, in all three areas, advertising engages tens of thousands of companies, from large cities to small towns, following a complex relationship of mutual trust and permanent updating.

It is admittedly an open activity of much competitiveness, enhancement of marketing techniques and much individual creativity. As an art and science, advertising has protection and is subject to laws – our Federal Constitution guarantees freedom of advertising, prohibits prior censorship and entitles the Federal Government to legislate on the activity. Common law has rules governing the making and relationship between the parties; self regulation ensures healthy and strong competitive trade relations and improves its quality.

This document is intended for those who deal with advertising and carry a single goal: warning to the need to be under **compliance** – the only way known to all of corporate existence, to act within the laws, conventions and market freedom, to respect consumers and to have commitment to sustainable development.

I recommend this reading to those who lead, who draft marketing programs, who create, who study and recommend mediums and who take advertising messages to people, in short, to all those who work with advertising.

This shall be a quick reading with appendices of laws and norms for consultation, if desired.

Special mention shall also be given to the expert opinion of professor Tercio Sampaio Ferraz Junior, who holds deep knowledge of the Brazilian market and self regulation, hereby presented as Appendix, and highlights the recognition of CENP and the Standard-Norms even by the Judiciary body while pointing out that the market is highly competitive: “There is no doubt that during its fifteen years the market incorporated the Standard-Norms for Advertising Activity recognizing CENP as the entity that oversees **compliance**. It has adopted mechanisms that avoid opportunist-oriented initiatives, offering of uneconomical proposals in order to capture new Advertisers or keep them since that may imply poor quality services and unfair competition.”

Caio Barsotti
President

TABLE OF CONTENT

1. Regulation, self regulation and compliance.....	67
2. The self regulation of advertising in Brazil.....	74
2.1. Self regulation and CENP	74
2.2. The Standard-Norms for Advertising Activity: technical and ethical orientations	77
2.2.1. Relations among agency, advertiser and medium ...	78
2.2.2. Relations between agency and advertiser	80
2.2.3. Relations between agency and medium.....	82
3. Self regulation, Ethics Committee and compliance ...	83

APPENDIX 1:

The regulation of advertising in Brazil.....	87
1. The Federal Constitution	87
2. The laws.....	93
2.1. Law nº 4.680 from June 18, 1965.....	93
2.2. Law nº 12.232 from April 29, 2010.....	96
3. The decrees.....	101
3.1. Decree nº 57.690 from February 1, 1966	101
3.2. Decree nº 4.563 from December 31, 2002.....	102

APPENDIX 2:

Expert Opinion, professor Tercio Sampaio Ferraz Junior ..	103
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1. Regulation, self regulation and compliance

The advertising activity in Brazil has a special regulatory system that governs and regulates its existence and operation. It is based on legal norms issued by the **Government – Federal Laws nºs 4680/65 and 12232/10, Federal Decrees nº 57690/66, as amended by Decree nº 4563/02. Advertising is included in the chapter on Social Communication of the Federal Constitution (Art. 220) which guarantees freedom of speech and prohibits prior censorship establishing, as well, that the Federal Government, alone, may legislate on commercial advertising (Art. 22, XXIX).**

In the field of trade relations, it is based on recognized and freely established norms by agents of the advertising market, through representative organizations and national associations¹ of advertising agencies, advertisers and media. That is: (i) The Code of Ethics of Advertising Professional legally enforced in 1965 (Art. 17 of Law nº 4680/65) and (ii) Standard-Norms for Advertising Activity, instruments to encourage good practice and ethical respect since 2002 incorporated into Federal decree nº 57690/66.

1. ABA – Associação Brasileira de Anunciantes; ABAP – Associação Brasileira de Agências de Publicidade; FENAPRO – Federação Nacional das Agências de Propaganda; 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 do Outdoor; ABDOH – Associação Brasileira de Mídia Digital Out of Home; e IAB Brasil – Interactive Advertising Bureau.

The norms contained in the **federal law** apply to each and every situation, for all market players, and are independent of the wish to abide; self-regulatory norms apply to those who wish to reap its benefits and are subject to the ongoing commitment of market players reaffirmed through the relation and role of CENP – Conselho Executivo das Normas-Padrão (Executive Council of Standard-Norms).

Advertising agencies are hired by advertising companies for the provision of advertising services defined by law (full service), ranging from studies and conception to mediating advertisements. They are compensated by advertisers in terms of what they create, conceive and produce, directly or indirectly. For the mediation of advertising, the compensation – paid via contracting party – is the result of the discount set by mediums in their price lists over the actual amount for advertisement placement. The minimum value of such discount, referred to as standard-discount, recommended by the Standard-Norms is 20% for agencies that hold the Certificate of Technical Qualification.

The federal law established the **discount which is part of the compensation of advertising agencies whose value is set by mediums** (Art. 11 of Law nº 4680/65 and Art. 19 of Law nº 12232/10) forbidding it to be **granted to those who are not agency** (sole paragraph of Art. 11 of Law nº 4680/65). The same article established the commission exclusively intended to advertising agents, who act as broker, and bear no responsibility of market research or advertisement creation.

Federal legislation yielded legal force to the Code of Eth-

ics of Advertising Professional (art. 17 of Law nº 4680/65) and included into the list of legal prohibition, the transfer of standard-discount to the advertiser (item I, 8, of the Code of Ethics cited).

The agency, despite other contractual obligations, undertakes, due to the standard-discount, the role to maintain ongoing study of the media market and to provide to the medium an effective **del credere** charging on their behalf, the accounts relating to the placement of advertising and transferring values to the medium without use of them within the prescribed period.

The existence of the standard-discount is conditional to the payment by the advertiser of the advertisement placement. Prior to that, it is solely an entry, as a reference, of its value, on the accounting and tax book issued by the communication medium. **Only when the medium is paid that the agency shall be entitled to its compensation, becoming, de facto and de jure, to be a creditor to that value.** The standard-discount is the exclusive property of agency, a fact made clear, interpretively, by federal law (Art. 19, Law nº 12232/10).

It is the duty of the agency to negotiate in each media commissioning, the best prices and terms of trade in favor of their clients-advertisers. Every and each trade discount will be reversed in favor of the advertiser. Otherwise, the agency will be breaching legal and conventional norms of advertising.

The existence of the standard-discount is conditional to the payment by the advertiser of the advertisement placement

Contract negotiation between agency and advertiser is free. The relationship should, however, in order to ensure contractual balance, avoid uneconomical and anti-competitive practices and, in the case of the standard-discount, respect legal provisions and seal its transfer to third parties, despite its importance in the relationship which gave rise to that compensation.

In order to negotiate medium on behalf of an advertiser, the agency must be accredited by it along with the communication medium ensuring the right to act on behalf of the advertiser including hiring advert placement.

The advertising self regulation is a voluntary commitment undertaken by advertising agencies, media and advertisers who adhere to its norms. The self-regulatory system facilitates daily relationship of thousands of agents in operations that require speed and solid mutual trust.

Companies and individuals are not obliged to adhere to the self-regulatory system, since, according to the Federal Constitution, no person shall be compelled to do or refrain from doing something except by virtue of law. The self regulation environment provided by the norms which formed CENP establishes parameters, references, indications, recommendations with fast track mechanism seeking to facilitate transactions among players, making them more timely and predictable.

In short:

The mediums when endorsing the Standard-Norms ensure to meet their legal obligations to (i) maintain single

public price list to be offered for negotiation, to all in the market, without restriction of any kind, (ii) to establish to all certified Advertising Agencies and to all advertising forwarded from every and each advertiser the standard-discount of at least 20%, (iii) – to make the discount percentage granted public according to its criteria for **non compliance** relations and other assumptions that are not recommended by the Standard- Norms and (iv) to comply with the requirement of advert placement pursuant to which was authorized by the agency.

The Advertising Agencies that endorse the Standard-Norms attest (i) to maintain permanent physical and qualified personnel structure (ii) to acquire and use media research in accordance with the market it operates in (iii) to ensure to the medium which are accredited the actual **del credere** (iv) to respect legal and established norms of the advertising market;

Advertisers, adhering to the Standard-Norms, enjoy an organized free market that is organically focused on the effectiveness of advertising communication, which promotes, ethically, the access of producers and service providers to Brazil's consumers.

CENP acts on behalf of its Founders and based on principles through its Ethics Committee, always in search of agreement in face of conflict between the parties involved, considering the Standard-Norms, holding clear role of conciliation and mediation. When no consensual solution is reached, the Chambers of Arbitration of the Ethics Committee utter decision which holds no punitive burden to the

The declaratory decision of non compliance is intended to warn that certain relationships may affect freedom, equality, competitiveness and transparency present in the advertising market

party who is **non compliance**, consisting of merely declaratory warning communicated privately to representatives of the advertiser and the agency, as well as to the mediums and medium associations accredited to CENP.

The declaratory decision of **non compliance** is intended to warn that certain relationships may affect freedom, equality, competitiveness and transparency present in the advertising market, since it may involve violating norms voluntarily established.

One shall also note that, as there is ample state-oriented legal and regulatory regimen especially with regards to advertising activities and also the general standard framework applicable to such activities (such as tax and fiscal issues, for instance), as well as those of international scope for multinational companies such as the Sarbanes-Oxley Act – SOX, the Foreign Corrupt Practices Act (FCPA) and UK Bribery Act, there is no avoidance of illicit or illegal practices committed by different parties in the advertising market to be identified and eventually punished by the competent authorities, which go completely beyond CENP’s realm of action despite the recognition obtained in legal regulation of its role as certifier and supervisor of technical conditions of the advertising agencies (art. 4th, Law n° 12232/10).

It is recommended to read the following documents indicating the process and the basis of the advertising self regulation practices, the Standard-Norms, the basis of relationship between the parties and **compliance** system adopted, and summary of legislation and regulations.

Being in **compliance** is the best way to ensure the rights and duties of the parties operating in the Brazilian advertising market.

This document, formed to assist the understanding of the **compliance** of norms for the advertising trade relations, has merely interpretative role and does not introduce any innovation, carrying solely the role of clarifying, not replacing, in case of any doubt or question of greater complexity, the review of the legislation itself and norms of self regulation in its entirety, as well as of experts, lawyers and in-house and hired consultants on all legal and conventional aspects which may apply to the activities. It does indicate, with regard to Standard-Norms for Advertising Activity, which are overseen by CENP, what may mean being in **compliance** with.

Whether or not in compliance with shall not be confused with ability or not to operate in the market since such freedom is constitutionally guaranteed, it is not – and could not be – taken away by self regulation or by any private entity overseer of norms of self regulation freely adopted.

2. The self regulation of advertising in Brazil

In Brazil, as seen, there are not only regulations issued by the Government who regulates the work of advertising agencies, advertisers and mediums. Alongside the federal legislation (federal laws and decree), there is a set of agreed norms and freely adopted by the parties of the advertising market in order to govern commercial ethics and relationships among them. Among these norms, we must highlight the Standard-Norms for Advertising Activity (1998), which embodies the protection of interests of all parties economically involved in the negotiations in the advertising market, that is, agencies, advertisers and mediums or even consumers.

2.1. SELF REGULATION AND CENP

Self regulation is the regulation of markets, businesses and professions by the economic operators and parties themselves and not by the Government. Being conducted by regulated entities, it differs itself from hetero-regulation, which is conducted by the Government. It is a form of collective and non individual regulation, where its legitimacy, reached due to the particular acquired consensus with the

objective of meeting collective interests and not individual ones. In addition, self regulation assumes the existence of a collective organization that establishes and enforces a set of rules to its members, which are voluntarily accepted by them as they take part in self regulation.

The role of self regulation is, by regulation, to internalize behavior patterns or practices as well as accepted and previously used habits by the market and the community, monitoring its members to create a positive reputation for the group. Self regulation is responsible not only for creating an additional set of norms, but also acts to strengthen the norms determined by the community, Government and market. It is a system of spontaneous private ordering which is based on reciprocity: individuals recognize the benefits they shall reap by adhering to agreed and established norms. From an economic standpoint, parties resort to self regulation, because it can act as an important mechanism for correction of market failures, generating greater efficiency.

In 1998, CENP – the Executive Council of the Standard-Norms was formed through a free contract among entities representing the main parties in the advertising market, **advertisers** (Brazilian Advertisers Association – ABA), **advertising agencies** (Brazilian Association of Advertising Agencies – ABAP and National Federation of Advertising Agencies – Fenapro) and the **media** (National Newspaper Association – ANJ, National Association of Magazine Publishers – ANER, Brazilian Association of Radio and Television -ABERT, Brazilian Association of TV Subscription –

ABTA and Central de Outdoor), which later also joining: the Interactive Advertising Bureau – IAB Brazil (representing mediums and agencies that operate in the internet environment) and the Brazilian Association of Out of Home Digital Media – ABDOH.

CENP is a nonprofit civic association responsible for leading the self regulation of relations between parties economically involved in the advertising market and the fostering of best business practices that encourage competition for best efficiency and quality and must ensure compliance to the Standard-Norms for Advertising Activity. It is composed of the following bodies: a) General Meeting: the governing body of the entity and holds the role to deliberate consisting of founding and institutional members which are up-to-date with their social duties b) Executive Council: the legislative and governing body of CENP, consisting of members appointed by the founders and institutional members; c) Executive Board: administrative body, in which the three segments of the advertising market are represented consisting of seven members (president, three vice-presidents and three members), d) Ethics Committee: the competent body for conciliation and mediation as well as arbitration of disputes between parties and market interests in relation to the Standard-Norms for Advertising Activity, comprising of advisors representing advertisers, advertising agencies and media designated by each e) Audit Committee: the supervisory body of CENP, consisting of three members elected by the General Meeting, which is responsible to oversee the actions of the

members elected by the Executive Council as well as provide feedback on the report and accounts of the Executive Board, f) Advisory Council: acts as advisory body of the Executive Board holding role to allow for discussions of matters of advertising interest as well as ethical and free competition issues, without therefore holding administrative role.

CENP also has two other bodies: 1) CTM – Comitê Técnico de Mídia (Technical Media Committee) composed of qualified professionals working in agencies, media and advertisers responsible for analyzing and recommending accreditation of Media Information Media studies and 2) BUP- Banco Único de Listas de Preços (Single Database of Price Lists), deposit system through which accredited mediums have the opportunity to meet the requirement establish in the Regulatory Decree, Law nº 4680/65, with lists of public prices.

CENP is responsible for leading the self regulation of relations between parties economically involved in the advertising market and the fostering of best business practices

2.2. THE STANDARD NORMS FOR ADVERTISING ACTIVITY: TECHNICAL AND ETHICAL ORIENTATIONS

This chapter aims to present, briefly, the recommendations on how to be in **compliance** with the norms derived from the self regulation of advertising activity overseen by CENP, evidently seeking to be guided by and complement government norms (both federal laws as well as decrees

listed above). Within such context, the provisions brought by the Standard-Norms for Advertising Activity play a central role, which can be divided, for the purposes of this document, into three sections according to the relation which the norms are falling into: relations among agency, advertiser and medium; relations between agency and advertiser; relations between agency and medium.

2.2.1. RELATIONS AMONG AGENCY, ADVERTISER AND MEDIUM

After discussing the basic concepts of the advertising market, the first section of the Standard-Norms for Advertising Activity is concerned with relations among agency, advertiser and medium with regard to the practices of both professional and commercial nature. Within the commercial environment, central issues are dealt with in regards to compensation to advertising agencies among which stands out the agency's standard-discount recommending to certified agencies with compliance with self-regulatory norms shall be guaranteed by the medium compensation not less than the minimum of 20% of paid medium by the advertiser. Within the professional context, norms deploy quality targets for agencies which must have professional and technical structure and minimum set of media information and data. Appendix A classifies² agencies into seven groups according to the annual revenue of the agencies.

² This classification seeks only to indicate the minimum level of commitment in terms of agency's structure/technical tools, including the use of media research studies technically accredited by CENP, which holds a Technical Committee of Media with permanent role, formed by professionals from agencies, mediums and advertisers, and who have outstanding knowledge in this field.

In short:

- The price lists of which mediums sell their space, their time and their services MUST be public and must indiscriminately hold true for businesses that are referred to them by the advertisers directly, or through agencies;
- The medium CANNOT offer directly to the advertiser a different price or advantage than that offered through the agency;
- The agency CANNOT fail to provide the client with a proposal addressed to it by the medium;
- The agency MUST demand payment of invoices from clients of corresponding space / time they have acquired per their own order and account, taking on responsibility of its billing on behalf of the medium to which they MUST transfer the values thus received;
- CENP MUST suspend the Certificate of Technical Qualification of agencies which have provably and improperly retained values;
- Medium and advertisers MAY swap space, time or free advertising service, directly or through the advertising agency in charge of the advertising account, according to the Regulatory Communication issued by CENP;
- The mediums MUST set the standard-discount to be given to those agencies certified by CENP, due to the work of conception, execution and distribution of advertisement developed by them, recommending the Standard-Norms for Advertising Activity a minimum value of 20% for compliance agencies;
- Agencies MUST, however, reach quality goals established by the Standard-Norms for Advertising Activity and qualify to receive the Certificate of Technical Qualification, assume obligations of technical quality (acquisition of re-

The medium cannot offer directly to the advertiser a different price or advantage than that offered through the agency

search to pertaining activity to be developed in favor of their clients), as well as ethical and loyalty obligations in their business relationships (limits to transfer to advertisers without breaching the loyalty to the mediums)

- Agencies **MUST** perform their work, especially media plans that will be presented to their clients in a technical manner, based on statistical market data, guiding its recommendations by good technique practices.
- The agency **MAY** negotiate a portion of its standard-discount with the advertiser guided by the parameters established in the Standard-Norms for Advertising Activity, according to volume of advertising investments;
- It is **ILLEGAL** to hire uneconomical advertising in anti-competitive conditions or while generating unfair competition.

2.2.2. RELATIONS BETWEEN AGENCY AND ADVERTISER

The second section of the Standard-Norms for Advertising Activity highlights the relationships between the agencies and advertisers, explaining the capabilities of which shall be provided by agencies certified by CENP and the way it shall preferentially be hired. Appendix B sets forth the parameters of which part of the standard-discount can be negotiated to be rolled back to the advertiser in **compliance** status.

In short:

- Agencies certified by CENP MUST be qualified to perform full service to advertisers, below are the services: a) study of the concept, idea, brand, product or service to disseminate; b) identification and analysis of the target and the market where the idea, brand, product or service find best chance of acceptance; c) identification and analysis of ideas, brands, products and competing services; d) examining the distribution and trade system; e) drafting and executing advertising plan; f) purchasing of space / time / service with mediums on behalf of and of responsibility of the advertiser, and due to such activities, to undertake the collection of these invoices and payment thereof to the respective medium;
- The agency MUST work closely with the advertiser so the advertising plan achieves the intended objectives and the advertiser yields return of its investment in advertising;
- The hiring of the agency by the advertiser MUST be preferably by written document, which MUST contain the terms of service and adjustments that the parties perform;
- Ideas, adverts, plans and advertising campaigns developed by the agency MUST belong, from the point of view of copyright, to the agency;
- The certified agency MAY choose not to be paid through the standard-discount of at least 20%. In such situation, the compensation paid by the advertiser MAY be carried out through fees or set fees. The fee MAY be cumulative or alternative to compensation through the standard-discount, but should be related to this proportional equivalence, being ILLEGAL to hire advertising under uneconomical, anti-competitive or unfair conditions.
- In contract with the public sector, advertisers of each fed-

eral body and administrative context **MUST** be considered as a single advertiser for the purposes of Appendix B predictions, norm which provides to such advertisers more favorable conditions.

2.2.3. RELATIONS BETWEEN AGENCY AND MEDIUM

The third section of the Standard-Norms for the Advertising Activity addresses the relations between agency and medium.

In short:

- Incentive plans to the agencies, which are maintained by mediums **MAY NOT** include advertisers, nor overlap, from the agencies reach, to technical criteria in the drafting and execution of media planning;
- The agency **MUST** purchase space or time specifically for its client. The medium **CANNOT**, therefore, sell space or time without making it very clear the name / product of the advertiser.
- The agency **MUST** charge within the appropriate period the amount on the invoices issued by the medium to advertisers transferring these values to the medium. Constitutes misappropriation subject to legal penalties failure to perform such transfer.

3. Self regulation, Ethics Committee and compliance

In the context of advertising self regulation, the Ethics Committee of CENP is the body that carries out important roles to reconcile, mediate and arbitrate disputes relating to Standard-Norms for Advertising Activity. To this end, the Council is empowered to raise, educate and judge procedures, analyzing whether the behavior of different parties from the advertising market is or not in **compliance** with the Standard-Norms. It is, therefore, a body whose role is of great relevance since it provides to the different parties in dispute or situations in **non compliance** condition the possibility, by means of conciliation, returning to the status of **compliance**. In such context, it is important to highlight that the Ethics Committee shall only analyze the status of **compliance** of different parties based on the Standard-Norms, and does not analyze controversies concerning advertising activity related to state-oriented norms since such role is taken by the judiciary body and is beyond CENP's competence.

It is worth mentioning that the Ethics Committee, within the logic of self regulation where voluntary commitments on behalf of goods and values considered important by a whole community that regulates itself are assumed, was

conceived as a mechanism for resolving disputes that must always seek conciliation. So much so, that the first stage of the proceeding before the Ethics Committee is brought about a Board of Conciliation and Arbitration, which is given to the parties the opportunity to resolve disputes or existing ethical conflicts between them through dialogue, in a process that the CENP's Ethics Committee, through such forum, acts as a mediator and conciliator. It does not, hence, bear the status of superior hierarchically body with power to punish the parties of the advertising market, but a system designed by the parties of the advertising market, so that they, in common agreement, reach a decision. There is no fine, for instance, to be applied to those parties who are on **non compliance** with Standard-Norms or any other penalty.

It is only after failure of attempts to reach settlement through conciliation or mediation that the Board of Arbitration and Ethical Conflicts is called. The Ethics Committee while arbitrating disputes, always aims at the preservation of best business and ethical practices, ensuring, in this context, the quality, legality and ethical business relations, among advertisers, advertising agencies and media in accordance with the rules laid down by them and embodied in the Standard-Norms. At the end of such whole procedure, if after all attempts at conciliation, the Ethics Committee finds that the agency is in **non compliance**, it may adopt a purely declaratory warning which shall be communicated to the agency's officer and advertiser involved in

the dispute and notice is given to mediums and medium associations accredited to CENP.

In short:

- CENP's Ethics Committee **MUST** always seek conciliatory solutions and act as an instrument of harmony between the parties in dispute and **CANNOT**, before such process, issue any pronouncement on the situation of **non compliance**;
- Before stating the situation of non **compliance**, taking proper statutory provisions, the Ethics Committee **MUST** establish procedures in two levels, the Board of Conciliation and Mediation and the Chamber of Arbitration and Ethical Conflicts in which **MUST** always be given the opportunity to the parties of having full defense and the possibility of reconciliation;
- If at first, it is made clear that there is no ethical problem, the President of CENP **CAN** recommend the dismissal of the case.
- Through its Board of Conciliation and Mediation, the Ethics Committee **MUST** try to facilitate an agreement between the parties so that they may return voluntarily to the situation of **compliance**;
- If attempts according to the Board of Conciliation and Mediation prove fruitless and the ethical conflict persists, the procedure should be referred to the Board of Arbitration and Ethical Conflicts in which members will vote, af-

The Ethics Committee must try to facilitate an agreement between the parties so that they may return voluntarily to the situation of compliance

- ter always ensuring complete freedom of defense and of exposure of reasoning from both parties to, then, decide whether the parties are in a situation of **non compliance**;
- The Ethics Committee CANNOT establish fines to parties in a situation of **non compliance**, nor decide on any distinct matter of interpretation of the Standard-Norms for Advertising Activity for lack of jurisdiction;
 - The activities of the Ethics Committee are confidential and only those who analyze on behalf of CENP the established facts, those who process it and the involved parties have knowledge of such. The decision of **non compliance** is merely declaratory and communicated to representatives of the parties involved in the dispute and notice is given to mediums and medium associations accredited to CENP.

APPENDIX 1

The regulation for advertising in Brazil

The purpose of this Appendix is to present an overview of the legal norms applicable to advertising. This overview has no intention to be comprehensive, therefore, it starts by analyzing the constitutional provisions relating to freedom of speech and expression of thought and the chapter on social communication. Furthermore, provisions of Federal Law nºs 4680/65 and 12232/10, which consist respectively in the regulatory milestone of the advertising activity and the major legislation concerning the bidding and contracting by the public administration in the advertising field will be analyzed, as well as presenting the provisions of Federal Decree nºs 57690/66 and 4563/02, which regulates Law nº 4.680/65.

1. THE FEDERAL CONSTITUTION

The Federal Constitution has a number of provisions that are relevant to the practice of the advertising activity, among which can be highlighted freedom of communication, expression of thought, expression and information, as well as consumer rights and the chapter on social communication.

The Federal Constitution has provisions that are relevant to the practice of the advertising activity as freedom of speech and of communication

With regards to freedom of communication, the Federal Constitution establishes a number of rights (Art. 5, IV, V, IX, XII, XIV as accompanied by arts. 220 to 224) that enable coordination among creation, expression and dissemination of ideas and creation. Included in this set, the freedom of expression of thought (Art. 5º, IV), freedom of speech (Art. 5º, IX) and freedom of information. Censorship prohibition stems from such provisions. On the other hand, one cannot forget that freedom of commercial expression can also be understood as a logical corollary of free enterprise and free competition (Arts. 1º and 170, top and IV of the Constitution), since advertising is nonetheless an economic dimension of the activities of firms in the market.

The rights of consumers was included by the Constitution in the list of fundamental rights, through Art. 5, XXXII. In addition, Art. 170, V, increases consumer protection to the condition of principle of economic order. Therefore, in face of such, there is room for the infraconstitutional legislation to ensure consumer protection. This role is mainly played by the Consumer Protection Code. In the context of advertising, including in the level which goes beyond the jurisdiction of CENP, it should be remembered, there are even prediction that advertising should follow certain guidelines, forbidding misleading and unfair advertising, that the Consumer Protection Code characterizes as infringing practices, that is, liable to penalty.

Moreover, when dealing with the constitutional aspect of culture, the Federal Constitution brings relevant provisions for the advertising activity, in the chapter “The social communication” (arts. 220-224). With regards to advertising, there is particular relevance to Art. 220, § 4th, which establishes that commercial advertising of tobacco, alcoholic beverages, pesticides, medicines and therapies is subject to legal restrictions and there should be warning about the harm resulting from its use.

In other words, the Federal Constitution guarantees protection to advertising communication treating it as part of the social communication, including banning advanced censorship, and also establishes in its article 22, item XIX, that the Federal Government is the only to bear the role of legislating on commercial advertising.

LEGISLATION MENTIONED IN THIS TOPIC:

Art. 1st – The Federative Republic of Brazil, formed by the indissoluble union of states and municipalities and the Federal District constitutes a democratic rule of law and is founded on: (...) IV – the social values of labor and free enterprise;

Art. 5th – All are equal before the law, without distinction whatsoever, guaranteeing Brazilians and foreigners residing in the country the inviolable right to life, liberty, equality, security and property, as follows:

(...)

IV – it is the free to bear expression of thought, and anonymity is forbidden;

V – the right of reply, proportional to the offense is ensured, as well as compensation for property , moral or image damage;

(...)

IX – it is free to expose expression of intellectual, artistic, scientific and communication activity, despite censorship or license;

(...)

or criminal procedural;

(...)

XIV – it is ensured to all access to information and protection of source confidentiality where necessary to perform the work;

(...)

XXXII – The State shall promote, within the law, consumer protection;

Art. 22 – The federal Government is the sole agent to legislate on: XXIX – commercial advertising.

Art. 170 – The economic level, founded on the appreciation of human labor and free enterprise, is to ensure dignified existence to all, according to the dictates of social justice, on the following bases (...) IV – free competition; V – consumer protection;

Art. 220 – The manifestation of thought, creation, expression and information, in whatever form, process or vehicle is not subject to any restriction, once the subject to the provisions of this Constitution is considered.

§ 1st – No law shall contain any provision that may constitute a hindrance to full freedom of press in any medium, subject to the provisions of Art. 5º, IV, V, X, XIII and XIV.

§ 2nd – It is forbidden any form of censorship of political, ideological and artistic nature.

§ 3rd – the federal law is responsible for:

I – regulating public entertainment and performances, where the Government holds the role to inform about their nature, not recommended age groups, locations and time that the presentation should prove inadequate;

II – establishing legal means to ensure that any individual and family have the opportunity to defend themselves from programs and program schedules on the radio and television contrary to the provisions of Art. 221, as well as advertising of products, practices and services that may be harmful to their health and the environment.

§ 4th – The commercial advertising of tobacco, alcoholic beverages, pesticides, medicines and therapies is subject to legal restrictions, pursuant to section II of the preceding paragraph, and there should be warning about the harm resulting from its use.

§ 5th – The media may not, directly or indirectly, act on monopoly or oligopoly basis.

§ 6th – The publication of print media is independent from authority license.

Art. 221 – The production and programming of radio and television stations shall comply with the following principles

(...)

V – respect to ethical and social values of an individual and family.

Art. 222 – Newspaper and radio broadcasting companies as well as sound and pictures companies shall be exclusively owned by native Brazilians or those naturalized for more than ten years, or corporations organized under Brazilian laws having their registered office in Brazil.

§ 1st – In any case, at least seventy percent of the total share and voting capital of the newspaper and radio broadcasting companies as well as sound and image companies must belong directly or indirectly to native Brazilians or those naturalized for more than ten years who shall mandatorily hold the role of management activities and provide program content

§ 2nd – The editorial responsibility, selection of activities and programming direction are to be held solely by native Brazilians or those naturalized for more than ten years, in any medium of social communication.

§ 3rd – The means of electronic social communication, regardless of the technology used to deliver the service must conform to the principles of Art. 221, in the form of the law, which will also ensure the priority of Brazilian professionals in producing national productions.

§ 4th – The Law shall regulate the participation of foreign capital in companies mentioned on § 1st.

§ 5th – The alterations of shareholder's control of the above mentioned companies in § 1st shall be communicated to the National Congress.

Art. 224 – For the purposes of this chapter, the National Congress shall establish, as its auxiliary body, the Social Communication Council, as provided by law.

2. THE LAWS

2.1. LAW Nº 4680 FROM JUNE 18, 1965

Law nº 4680/65 is the regulatory framework of the Brazilian advertising market and provides for the profession of advertising professional and advertising agent, clearly defining the parties, the advertising professional, the advertising agent, advertising agency and medium. Moreover, this law establishes rules relating to commissions and discounts payable to the advertising agents and advertising agencies, to the labor contract of the advertising agents as well as the supervision and the imposition of penalties in case of breach of its legal provisions.

According to Law nº 4680/65, advertising professionals are those who, in regular and permanent basis, take on the role of technical expert in the advertising agencies, in mediums, or any company in which it produces advertising. The concept of advertising agents, in turn, encompasses professionals, connected to mediums (contact agent,

in the jargon of the market) forwarding advertisements to them on behalf of third parties. Advertising agencies, according to the same law, consist of specialized businesses in the art and technique of advertising which, through experts, study, conceive, execute and distribute advertisement for dissemination, per own order and account of the client, in order to promote the sale of products or services, spread ideas, or inform the general public. While the medium to the legislator are any visual or audio communication media capable of transmitting advertising to the public, provided that recognized by professional bodies or entities.

With regard to commissions, Law n° 4680/65 establishes that they are due to the advertising agent in the form of compensation, which implies the need for a return for rendered service. In the case of agencies, the law stipulates that the commission shall be a discount, which is mandatory and must be set by the medium. There is also mention of the Code of Ethics of Advertising Professionals, 1957, which is endowed with legal character and defines the ethical principles that should guide advertising, among which established that the commission and / or discount of the agency and advertising agent cannot be transferred to advertisers. The same Code of Ethics provides that mediums should have their individual price lists in public and equal one for all buyers.

Furthermore, Law n° 4680/65 establishes norms dealing with supervision regarding **compliance** of its provisions, as well as the penalties to be awarded in such

cases. The Ministry of Labor and its regional offices, trade unions and associations of professional classes should carry out the supervision: **The legal penalties are provided through a fine of one tenth to ten times the legal minimum wage, or 10-50% of the advertising business amount, if offense occurred on article 11 (discounts or commissions).**

LEGISLATION MENTIONED IN THIS TOPIC:

LAW N° 4680/65

Art. 11 – The committee, which represents compensation of advertising agents and the discount due to advertising agencies will be set by media over the prices established in the given table.

Single paragraph – No commission or discount shall be given on the advertisement forwarded directly to medium by any natural person or legal entity that does not meet the classification of advertising agents or advertising agencies, as defined in this law.

Art. 17 – The national advertising activity will be governed by the principles and norms of the Code of Ethics of Advertising Professional established by the First Brazilian Advertising Congress held in October 1957 in the city of Rio de Janeiro.

CODE OF ETHICS OF ADVERTISING PROFESSIONALS

I. 8 – Commission is retribution, by mediums, related to professional work due exclusively to agencies and advertising agents. The commission is aimed at compensation to agencies and advertising agents and may not be transferred to advertisers.

II. 18 – Advertising professional must know the laws concerning their field of activity, and, as such, is responsible for the violations, negligence or willful default leading their client to violation, in the execution of the suggested and recommended advertising plan.

2.2. LAW N° 12.232 FROM APRIL 29, 2010

Law n° 12.232/2010 basically establishes general norms for bidding and contracting by government of advertising services provided by agencies, but also other measures. Such norms apply to bids and contracts with the Federal Government, states and municipalities, as well as the Executive, Legislative and Judicial bodies. This law recognizes the validity and current enforcement of Law n° 4680/65 and establishes that, in a complementary way, just as the Law n° 8666/93, it is also applied to the bidding procedures and contracts resulting from them.

Worth noting the provisions by Art. 4, § 1st, which provides that the certificate of technical qualification issued by

CENP or other entity also legally recognized as inspection and certification of advertising agencies is requisite for an advertising agency to participate in the bidding or contracting with the public administration. But it is also provided on the same article, in addition to the certificate, that only advertising agencies whose activities are governed precisely by Law n° 4680/65 may be contracted.

There are also other important predictions in this law. Particularly arts. 18 and 19 which clearly fall within the regulatory system governing advertising in the country as a whole, considering explicitly the rules of self regulation as components of this system, even with regard to its application to bids and contracts with the public administration.

That is the case because Art. 18 refers to the incentive plans of mediums in relation to the agencies regulating the matter following the same terms as CENP had done, affirming it relates to discretionary and free theme for each medium and shall not affect the economic-financial equation defined in the bidding and contract. On the other hand, it is expected that agencies should always conduct, when guiding the choice of mediums in a media plan, by research and proven technical data and not the existence of incentive plans. Failure to comply with this prediction constitutes a serious violation of contractual duties by the agency and it shall submit the latter to administrative proceeding in which, once proven unwarranted behavior, involves the application of penalties under the *caput* Art. 87 from Law n° 8666 from June 21, 1993.

In turn, Art. 19 provides that, for purposes of interpretation of the current law, the values of the agency's standard-discount (terminology from Standard-Norms for Advertising Activity adopted by the legislature) that are owed for conceiving, executing and distributing advertising constitute revenues for the advertising agency and should on no account be billed and recognized as revenue by the medium including if the transfer of standard-discount is carried out through the medium, completing the sealing of Law n° 4680/65 in terms of transferring the set compensation to the advertiser by the medium.

Finally, this law deserves full diligence provided for the referred bidding procedures, which must necessarily be "best technique" or "technique and price" and cannot be "lowest price" type, and the call for bidding should predict price proposal "issues of representative forms of compensation in the current advertising market" (Art. 6th, V). The law describes the provision of services to be rendered by the advertising agency, controls and legitimate form of subcontracting.

LEGISLATION MENTIONED IN THIS TOPIC:

LAW N° 12232/10

Art. 1st – This law basically establishes general norms for bidding and contracting by government of advertising services provided by agencies, within the federal Government, states, Federal District and municipalities.

§ 1st – The Executive, Legislative and Judicial bodies, people of indirect administration and all entities controlled directly or indirectly by the entities referred to in this article are subordinate to the provisions of this law.

§ 2nd – Laws in 4680 from June 18, 1965, and 8666 of June 21, 1993 will apply to the bidding procedures and contracts governed by this Law, in a complementary way.

Art. 4th – Advertising services provided for herein will be hired in advertising agencies whose activities are regulated by Law n^o 4680 from June 18, 1965, and have obtained the certificate of technical qualification for operating.

§ 1st – The certificate of technical qualification for operating envisaged in this Article may be obtained before the CENP Conselho Executivo das Normas-Padrão – Executive Council of the Standard-Norms), a nonprofit entity, integrated and managed by national bodies representing mediums, advertisers and agencies, or equivalent organization, legally recognized as supervisor and certifier of technical conditions for advertising agencies.

§ 2nd – The contracted agency under this Law may only reserve and buy advertising spot or time from mediums per own order and account of their client, if previously identified and expressly authorized by them.

Art. 5th – Bids under this Law shall be processed by the agencies and entities in charge for hiring, subject to the conditions set out in Art. 22 of Law n^o 8666 from June 21, 1993, adopting as mandatory the ‘best technique’ or ‘technique and price’ types.

Art. 6th – The preparation of the bid announcement under this law shall comply with the requirements of Art. 40 of Law n° 8666 from June 21, 1993, except for those provided for in sections I and II of § 2nd, as the following:

(...)

V – The price proposal shall contain representative points of the prevailing forms of compensation in the advertising market;

Art. 18 – It is optional for the granting of incentive plans per medium and its acceptance by the advertising agency, and the gain resulting there from shall be, for all legal purposes, the revenue of the agency and are not included in the obligation set forth in the sole paragraph of Art. 15 of this law.

§ 1st – The economic-financial equation defined in the bid and the contract does not alter due to the presence or absence of incentive plans referred to in this article, the gains of which are expressly excluded from it.

§ 2nd – The advertising agencies shall not, in any case, override incentive plans to the interests of contracting parties, not selecting mediums that do not grant them or prioritizing those that provide them, and must always conduct client to guide the choice of these mediums according to research and proven technical data.

§ 3rd – Failure to comply with no the provision of § 2nd of this article constitutes a serious violation of contractual duties by the agency and it shall submit the latter to administrative proceeding in which, once proven unwarranted behavior, involves the application of penalties under the *caput* Art. 87 of Law nº 8666 from June 21, 1993.

Art. 19 – For purposes of interpretation of the current law, values corresponding to the agency’s standard-discount for conceiving, executing and distributing advertisement, per advertiser’s order and account, constitute revenue for the advertising agency and as a result, the medium may not, for any purpose, bill and account such values as own company revenues, even when the standard-discount is forwarded to the advertising agency through medium.

Decree nº 57.690/66 addresses the issue of professional ethics, noting that agencies, medium, and advertising professional are subject to the Code of Ethics of Advertising Professionals

3. THE DECREES

3.1. DECREE Nº 57690 FROM FEBRUARY 1, 1966

Decree nº 57690 regulates Law nº 4680/65 and provides for rules relating to commissions payable to the advertising agents and discounts payable to advertising agencies.

This decree also addresses the issue of professional ethics, noting that agencies, medium, and advertising professionals are subject to the Code of Ethics of Advertising Professionals. In this context, it brings lists of behaviors that are not allowed and duties which constitute the principles underlined by Article 17 of Law n° 4680/65. Among the not allowed behaviors, we highlight the publication of texts against public order and morale, the disclosure of confidential information concerning the business of advertisers, defamation of competitors, or the attribution of fault to their products. Among the duties, the following are provided for: to disseminate truthful events, deny commissions to persons related to the client and show proof of expenses.

3.2. DECREE 4563 FROM DECEMBER 31, 2002

Decree n° 4563/02 brought changes to the wording of article 7 of Decree n° 57690/66. It recognizes the benefits brought by private self regulation, expressly mentioning several provisions of the Standard-Norms for Advertising Activity as applicable to relations with advertising agencies in the advertising market, including item 3.5 which refers to Appendix “B” of those norms of self regulation.

APPENDIX 2

Expert Opinion, prof. Tercio Sampaio Ferraz Junior

SELF REGULATION OF THE ADVERTISING MARKET: CENP

SELF REGULATION FROM A COMPETITIVE STANDPOINT

Self regulation is seen, from a competitive standpoint, as a form of private governance of the agents of certain sectors to formalize the control, establishment and enforcement of voluntarily accepted and liable to self-coordinating rules.

The role of self regulation is, by regulation, to internalize behavior patterns accepted by the market and the community, monitoring its members to create a positive reputation for the group. In other words, agents' reputation is in play and will be determined according to the efficient application of self regulation. Thus, self-regulation does not only provide for an additional set of norms but also acts to strengthen the norms determined by the community, Government and market.

The Brazilian experience with self regulation taken to the antitrust authority is relatively small, which is why a reference to the literature and practices of other countries is needed.

The possibility of establishing agreements, horizontal and vertical ones, between economic agents, is recognized in literature and international jurisprudence

From an **economic standpoint**, the efficient provision of public or collective goods affects the private competitiveness of each company constituting what Piore & Sabel³ call the extrafirm infrastructure and that make up sectoral institutions according to Best⁴.

“A sector may include a variety of inter-firm practices and extrafirm agencies, such as trade associations, apprenticeship programs, joint marketing arrangements, regulatory commissions, norm and standard entity. Sectoral institutions may influence the organization of individual firms and their strategies, as well as the collective competitiveness of the sector relative to other sectors located in other regions. From such point of view, firms not only compete, but they can cooperate to provide common services, to establish the rules of the market and investment strategies “(underlined)

There is actually a constant tension between competition and cooperation.

³ Piore, Michael; Sabel, Charles F. *The Second Industrial Divide*. New York: Basic Books, 1983.

⁴ Best, Michael. *The New Competition: Institutions of Industrial Restructuring*. Cambridge: Harvard University Press, 1990. 296 p.

Best therefore proposed two conditions so that balance between competition and cooperation is established. First, there must be a clear purpose for cooperation, which means developing and implementing a sectoral strategy that is built from individual firms' strategies and, at the same time, they influence the firms. Second, there must be a means to monitor and oblige individual actions to counterbalance the tendency to free rider behavior.

One of the important elements to analyze the effect of self regulation is associated with its nature. Private ordering systems may spontaneously generate efficient outcomes. Spontaneous orderings are based on reciprocity: individuals recognize the benefits they shall reap by adhering to the rules of the group. That is exactly the case of self regulation of the advertising market: a spontaneous private ordering that to be sustainable must generate benefits for its participants. Quality standards can reduce search costs for clients regarding the non apparent quality characteristics⁵.

From a **legal standpoint**, however, the possibility of establishing agreements, horizontal and vertical ones, between economic agents, is recognized in literature and international jurisprudence.

For instance, in Germany, it is recognized by law (GWB, § 28th), the possibility of creating **Wirtschafts-und Berufsvereinigungen** (economic and professional associations). The content of the common rules established by such as-

⁵ Ogus. Rethinking self-regulation, *Oxford Journal of Legal Studies*, v. 15.

sociations usually follows ethical norms, particularly as fair dealing in competitive terms, also accepting rules on pricing⁶. The prediction of a process of recognition of these rules by the competitive authority (*Kartellamt*), however, as long as they are in **compliance** with the law, meant that this recognition was not necessary for them to produce binding effects between the signatories.

The United States courts, as regards to the publication of common standards and issuance of judgments on their violation, recognize that in principle, all requirements associated with the definition of the members have some sort of rules or restrictive criteria and may restrict, at least indirectly, the market competition.

Nevertheless, the assessment of the legality of such rules is based on the economic legitimacy of the purpose pursued by this association through self regulation, as well as the reasonableness and objectivity of the standard rules adopted in relation to the purposes given. If the standards are not objective and purposes not reasonable, the rules will be considered illegal, as it would act as a barrier to market entry, i.e., a sort of boycott by persuading purchasers to not hire with companies that do not meet the standard. In face of such elements, it is noticed that the horizontally / vertically conduct corrected in the form of self regulation agreements should always be analyzed based on the rule of reason⁷.

⁶ Cf. Rainer Bechtold, *GWB – Kartellgesetz – Gesetz gegen Wettbewerbsbeschränkungen*, Munich, 1993, p. 375 ss.

⁷ Cf. *Antitrust Law Developments – ABA*, 4th ed., 1997, v. 1, p. 110-115.

Among the parameters of American jurisprudence, considered relevant in determining reasonableness and, therefore, recognize the legality of self regulation agreement, the following can be pointed out:

(a) for an analysis from a competitive point of view, the agreement must have some purpose or commercial impact, as to be legally assessed; in the Brazilian case⁸, even though the emphasis comes on the ethical dimension (as CONAR, for example), it is important to have repercussions in the commercial behavior of underwriters (again, CONAR itself);

(b) the standards set should be objective, that is, its rules must be impersonal⁹; in the case in question, the allocation rules meets the requirement of impartiality, designed for all participants in the advertising market, without exclusions that may be qualified as barriers to competition and entry into competition;

(c) the standards adopted should be accessible also to non-members of the agreement¹⁰, i.e., the agreement should be known to all market;

(d) there shall be, in addition to suppliers of products or services, the participation of buyers in the definition of standards of conduct and judgment taken from the set standards¹¹, i.e., the agreement also has relational impact and thus should be analyzed;

⁸ Cf. *St. Bernard Gen. Hosp. v Hospital Serv. Association*, 712 F.2d 978,988 (5th Cir. 1983).

⁹ Cf. *Radiant Burners v Coke Co.*, 364 U.S. 656, 658 (1961).

¹⁰ Cf. *Bogus v American Speech & Hearing Association*, 582 F.2d. 277 (3d Circuit 1978).

¹¹ Cf. *Consolidated Metal Products v American Petroleum Inst.* 846 F.2d 284, 295 (5th Cir.1988).

(e) there is no antitrust violation where self regulation implements federal safety standards, i.e., it meets the relevant legislation¹² to the case, the agreement receives principles of law relating to advertising;

(f) the agreement must provide procedural safeguards against decision which deny approval¹³.

Interesting to note that the Federal Trade Commission (“FTC”) has explained on several occasions, a favorable opinion towards self regulation, and the Court understood as a practice that helps the entity to control competition.

In a speech during a symposium at the American Bar Association¹⁴, its president at the time asserts that the Court recognizes, for over a generation, self-regulation as an important complement to their efforts in consumer protection. Moreover, the existence of state regulation on certain topic does not prevent private agents from organizing themselves to set further rules on the subject.

More recently, the discourse of Court representative Pamela Jones Harbour summarizes the position of the FTC as favorable to always encourage self regulation when it is beneficial to consumers, and recognize that some markets are regulated more effectively by their private agents than the Government itself. In that speech, the representative

¹² Cf. *Moore v Boating Ind. Associations*, 819 F.2d 693, 695 (7th Circuit 1987).

¹³ Cf. *Pretz v Holstein Friesian Ass’n*, 698 F.Supp. 1531, 1540 (D.Kan. 1988) e. *Weight Rite Golf Corp v United States Golf Ass’n*, 766 F.Supp 1104, 1111 (MD. Fla.1991).

¹⁴ “*Self Regulation and Antitrust*”. Prepared Remarks of Robert Pitofsky – Chairman, Federal Trade Commission. D. C. Bar Association Symposium, February 18, 1998, Washington, D.C. Disponível em: <<http://www.ftc.gov/speeches/pitofsky/self4.shtml>>. Data de acesso:3 fev. 2014.

lists in some markets where such characteristic is clear – especially those involving technological development.

In Brazil, one of the few experiences of self regulation taken to the authority, its purposes was to avoid ethical and unfair commercial conduct which is the case of CENP (an entity that brings advertising agencies, media and advertisers together) that, submitted to CADE, for fifteen years, has been performing noteworthy work.

CENP

CENP was founded in 1998 and today is comprised of the following associations:

- ABA – Associação Brasileira de Anunciantes (Brazilian Association of Advertisers)
- ABAP – Associação Brasileira de Agências de Publicidade (Brazilian Association of Advertising Agencies)
- ABERT – Associação Brasileira de Emissoras de Rádio e Televisão (Brazilian Association of Radio and Television Broadcasters)
- ABTA – Associação Brasileira de Televisão por Assinatura (Brazilian Association of Pay TV)
- ANER – Associação Nacional de Editores de Revista (Brazilian Association of Magazine Publishers)

The Federal Trade Commission (“FTC”) has explained a favorable opinion towards self regulation, and the Court understood as a practice that helps the entity to control competition

- ANJ – Associação Nacional de Jornais (National Association of Newspapers)
- Central de Outdoor
- Fenapro – Federação Nacional das Agências de Propaganda (National Federation of Advertising Agencies)

And has as institutional members:

- IAB Brasil- Interactive Advertising Bureau
- ABDOH – Associação Brasileira de Mídia Out of Home (Brazilian Association of Out of Home Media)

CENP holds the Standard-Norms for Advertising Activity as its main working tool laying the foundation of technical training of an Agency and ethical relationship to the sector, based on their best practices and legislation that governs the activity.

CENP awards the Certificate of Technical Qualification to Agencies by checking its structure, technical staff, the availability and systematic use of media research and the fulfillment of the commitments laid out in the Standard-Norms. Such certification ensures that the agency's "standard-discount" is not less than 20%.

Furthermore, CENP also makes the deposit of Individual and Autonomous Pricing Lists of Mediums, giving transparency to the offer, committing to the provisions in the legislation and also conducts the accreditation of studies and research of media agencies, ensuring reputable surveys.

To achieve its objectives, the following was established:

1) The mediums sell their spots, their time and their services based on prices of valid public knowledge for all business with the advertisers. It is, due to the nature of businesses, assumed that mediums offer conditions or advantages according to their convenience in individual negotiations they undertake;

2) Agencies are hired by advertisers who choose them for their qualities and virtues. Always acting per order and account of who hires, basing itself, hence, in the excellence of their study, creation and it is distributed to the media.

3) To exercise their functions with fullness, agencies need the recognition by the media, for whom, indirectly because of the activities they work on behalf of their clients, they also provide relevant service while charging for the price of placing the advert, with discretion and accuracy, paying the due amount, within the maturity date to the medium;

4) Also in relation to mediums, also indirectly, agencies provide essential technical service to the market and democracy by ensuring plurality of media and freedom of expression; through research and behavioral studies, scientifically, they know the market, its means and mediums, indicating the forms of communication of advertising messages;

5) According to the Standard-Norms, mediums, while recognizing the paramount importance of agencies, choose to work through them in relation to advertisers, respecting them and never refusing to serve them directly as they wish;

Mediums consider that the standard-discount is recognition for the effective del credere Agencies hold by being clearly responsible for the low default rates of clients

6) Advertisers, after all, are the holders of credit granted by the medium against whom they issue invoices for advert placement, forwarding them, when there is a relationship, through the agency, who holds the duty of **del credere**, i.e., the obligation to collect from advertisers and settle the amounts received from invoices to the medium;

7) The agency is basically paid by the two services it provides: (a) when the agency creates the advertisement and the campaign for the intellectual and material work exercised and for the management and production that is always performed by specialized companies, such as phonogram producers, for instance, and (b) when placing the advertisements of its client-advertiser with the standard-discount for fulfilling commitments to make available / use and investments in research studies performed in the media field, and mediums also consider, by means of norms, that the standard-discount is a recognition for the effective del credere agencies hold by being clearly responsible for the low default rates of client-advertiser;

8) The level of agency's compensation is carried out through in-house services – creation and production man-

agement – through studies of actual costs incurred by the unions of agencies in each state, which respects the diversity of the country and ensures greater reality in the indications of reference price;

9) In common set agreement among organizations representing agencies, mediums & advertisers, the Standard-Norms for Advertising Activity foresees standard-discount of at least 20% to agencies certified by CENP and who are in **compliance** with the granted standards of self regulation in line with Law nº 12232/10, as follows:

a) The “Negotiated Amount” paid by the client, the agency retains 20% from the standard- discount and forwards the remaining 80% to the medium;

b) When payment is made directly by the client-advertiser, the medium will receive its 80% and the agency, in the same way, receives directly from the advertiser the amount corresponding 20% for the standard-discount.

10) The Norms lay down the principle of advertiser value that stands out in its market, allowing, according to the level of investment in advertising, that up to 5% of the standard-discount to be reversed by the agency to the advertiser by returning to the latter the possibility of optimizing its communication budget;

11) The Norms value free market, knowing that it begins when competition among agencies is respected, among mediums valued and among advertisers adopted as a form of respect for the client. Nothing is static for the Standard-Norms for Advertising Activity, but everything must remain in the narrow field of ethics.

There is no doubt that during its fifteen years the market incorporated the Standard-Norms for Advertising Activity recognizing CENP as the entity that oversees **compliance**. It has adopted mechanisms that avoid opportunist-oriented initiatives, offering of uneconomical proposals in order to capture new advertisers or keep them since that may imply poor quality services and unfair competition.

Hence, The Judiciary also deserves mention that once faced with discussion involving adjustments in the Standard-Norms recognized the important role played by CENP and its functions:

“O Conselho Executivo de Normas-Padrão – CENP, de-fendant herein, was formed on December 16, 1998, by the advertising market to ensure observance of the stan-dard norms for advertising activity, basic document with recommendations and ethical principles that seek to en-sure best business practices in the relationship maintained among the main agents of Brazilian advertising. it holds as its principal body an Executive Council with twenty-three (23) representatives of Advertising Agencies, Advertisers, Mediums and the Federal Government.

In addition, it is established that the norms of advertis-ing activity edited by CENP are recognized by law, as seen through Article 7 of Decree nº 4563/200, clearly making reference to provisions set in the form of “items” by CENP as sustained by the defendant in defense (see fl. 118).

Also included among the activities of CENP as self regu-latory entity of the sector, the protection of the standard

norms of advertising activity, the issue of regulatory or technical communications to the advertising market, in addition to certification of Advertising Agencies, to raise or maintain the quality of advertising produced in the country. Therefore, the modifications of the standard norms of advertising activity as object of inquiry is within the jurisdiction of 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, which establishes general norms for bidding and contracting by government of advertising services provided by agencies, but also other measures”(Sentence, Case nº 0208709-51.2011.8.26.0100, 15th Central Civil Court, Sao Paulo).

It is worth noting that the Brazilian market is admittedly competitive. In recent decision (2013), CADE, while examining significant transaction presented as act of concentration (transaction between Publicis and Omnicom, administrative procedure n. 08700.008058/2013-49), concluded that the Brazilian advertising market is highly spread with “competition among agencies of different sizes, because even agencies considered medium or small can get large ‘accounts’ (clients who place high investment in advertising).” Furthermore, the investigation conducted by the General Superintendence of CADE in this case concluded that the responses of competitors’ jobs and jurisprudence support the “existence of low barriers to entry and high market rivalry”.

For bidding process and hiring of advertising services in the official branches of the executive, legislative and

judiciary, the three levels of government – Federal, state and municipal Law nº 12.232, of April 29, 2010, an initiative of the National Congress, legitimized CENP to the role of certifier and supervisor of technical training of advertising agencies, a condition required as a prerequisite to participate in the bidding process and execution of advertising contracts in the public sector.

As a successful process of self-regulation, one can therefore say that CENP demonstrated, in its fifteen-year history, to be able to certify agencies and require from them the provision of technical structures and of personnel to ensure to advertisers good advertising work and to the Mediums the certainty that the scheduled advertisements are based on informed technical criteria made by advertisers and agencies. Hence, as above described, it does take on relevant role in the Brazilian market.

Tercio Sampaio Ferraz Junior

Este livro foi editado na fonte Castle.

Papel Polen 90g/m².

Guardas - Papel Color Plus Marfim 180g/m²

