ONLINE ADVERTISING AND REGULATORY PERSPECTIVES FOR 2018

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2017 was important for online advertising in Brazil. Even through the economic crisis, the sector had a strong growth as it was the target of critical regulatory discussions, which will probably continue throughout 2018.

In such regard, we have selected some regulatory topics that should be critical to the Internet, technology and advertising markets this year:

/ THE GENERAL DATA PROTECTION REGULATION OF THE EUROPEAN UNION

The General Data Protection Regulation – "GDPR", Regulation (EU) 2016/67, was drafted by the European Union in order to replace Directive 95/46/EC, known as the European Personal Data Protection Directive. GDPR was implemented in April 2016 but due to a 24-month *vacatio legis,* it shall be effective on May 25, 2018. The Regulation will have global consequences, as it applies to entities that process personal data, even when outside the geographic boundaries of the European Union, if assets or services are provided to data owners located in any country of the European block or upon monitoring the behavior of data owners located in the European Union.

Based on the foregoing, any Brazilian company may be subject to the jurisdiction prescribed by GDPR if it offers its services and products directly to the market of European Union members and/or if it handles data of European citizens.

Furthermore, Brazil is not considered by the European Commission as a country with an appropriate level of data protection. Thus, transfer of personal data pertaining to owners located in the European Union by Brazilian companies, either directly or indirectly, may only occur based on one of the authorized circumstances. For operation and bureaucratic purposes, Brazilian companies may be required to adopt contractual clauses, in which the owner located in one of the member-States expressly authorizes according to the informative rules described in GDPR that his/her personal data be transferred to Brazil or a country where the company may process such data.

Our firm prepared a specific study on the matter which can be accessed here.

/ GENERAL PERSONAL DATA PROTECTION BILLS

The current regulatory scenario for personal data protection in Brazil is complex as there are at present over 40 norms in force. Some more flexible, some stricter, directly or indirectly dealing with personal data protection. This scenario is challenging to companies and users since most part of such norms, despite being sectorial, cannot be treated separately. In such regard, a General Personal Data Protection Regulation – currently under discussion – may define a more fluid and harmonious scenario in compliance with economic, technologic and innovation development purposes while assuring individual rights.

From 2012 to 2016, many bills (PL) for personal data protection were determined in Brazil, such as PLs 4060/2012, 5276/16 and 6291/2016, jointly analyzed with the House of Representatives and PLs 330/2013, 131/2014 and 181/2014, of the Federal

Senate. However, 2017 ended and no PL concerning personal data protection was enacted.

Among all PLs, 5276/16 must be emphasized. Since 2010 it has been widely discussed by the civil society and it brings a more complete approach on the matter when compared to the remaining bills. In addition to that, PL 330/16 has gained importance in the political debate and it may present progress in 2018 in the discussions of the Federal Senate.

We noticed that both PL 330/13 of the Senate, and PL 5276/16 of the House (as submitted to public inquiry) have come with a more extensive protective list to data owning individuals while providing further clarity on the liabilities assigned to those responsible for data handling.

In the early 2018, the conclusion of what the Brazilian political scenario will bring to the future personal data act is still uncertain. Over the last years, we have constantly noticed that the "data protection" matter has been addressed by the legislative and executive branches. PL 330/13, for instance, was filed in 2015. In its turn, PL 5.276/2016 was approved by the executive branch in a rush during the last days of president Dilma Rousseff's office. Apart from the uncertainties, something is assured by both the current and future law: companies operating in the interactive media sector shall go through a period of adaptation and challenges to maintain their activities under the legal exercise.

To learn more on the topic, visit Privacy Hub, our data protection website.

/ IN 134/2017 BY ANCINE

In May 2017, the National Agency of Cinema – "Ancine" published Normative Instruction no. 134 which, among other amendments, included the "Internet audiovisual advertising" market segment into the definition of "Other Markets", outlined in the Provisional Remedy 2.228-1/01. Upon such amendment,

advertising audiovisual works, although solely developed for the Internet, would have to pay Condecine as well as their registration before Ancine.

This new norm would be effective as of July 18, 2017, but in view of issues with the online advertising market regarding the lack of rationality of this norm in relation to the market concerned, Ancine suspended its effectiveness postponing it to October 18, 2017, which was once again put off to July 18, 2018.

Although IN 134 was issued after a public inquiry, market contributions were not complied with. Thus, the norm caused several adverse reactions from the sector, especially on the collection of such contribution.

Lack of regulatory impact studies, the insistence in ignoring suggestions by several industry associations, plus the generic and inappropriate text of IN 134 and Internet specificities brought many uncertainties to the market. In a study published by IAB Brazil, IN 134 and the Condecine collection as presented by Ancine would result in legal insecurity and discouragement to investment in audiovisual contents, i.e. in completely the opposite direction to the regulatory reasoning underlying the Condecine creation (which is focused on encouraging production of audiovisual contents).

We estimate that, in the first half of 2018, Ancine will provide its regulatory impact analysis for a new Normative Instruction to be submitted to public inquiry in the online advertising sector.

/ LEVY OF ICMS ON ONLINE ADVERTISING

In 2017 the Tax Court (TIT) of the State of São Paulo removed the levy of Taxation on Goods and Services (ICMS) on digital advertising in 3 different decisions.

The matter was initiated in 2003 with Supplementary Act (LC) No. 116 when the inclusion of Internet advertising was barred

from the list of services subject to Tax on Services of Any Nature (ISS) (tax that can only be collected by municipalities). Upon such prohibition many States began to interpret that this activity should be construed as a communication service, then subject to ICMS.

ICMS-Communication, as outlined in the Federal Constitution, has, as a triggering fact, the "provision of communication services, which is construed as the transmission and receipt through any processes of written, verbal or visual messages, unless the broadcasting and receipt points are in the territory of the same Municipality and their message cannot be captured out of such territory". The State tax authorities attempted to create a forced interpretation of the article, since ICMS-Communication is taxing the provisions of communication services, not the provisions of any services by communication companies.

This scenario was covered in new developments in the late 2016. As it shall be explained in the following item, Supplementary Act 157/2016 included the Internet advertising activity into the list of services subject to ISS. Thus, the municipalities were authorized to collect ISS over such activity. However, this regulatory change did not relieve the possibility that the states remain pleading collection of ICMS over online advertising on the period prior to the effectiveness of LC 157/2016. In our opinion, the inclusion of this activity into the list of ISS services represented a favorable argument for taxpayers to relieve ICMS levy, especially in relation to the recent decisions by TIT.

In 2018, new decisions shall be seen in the Tax Courts of different States, possibly with a uniform interpretation of the matter.

/ ISS COLLECTION FOR ADVERTISING

As mentioned above in response to LC 157/2016 municipal acts considering online advertising as a taxable service were drafted and became effective. In the city of São Paulo, the Act published

in November 2017 shall be effective as of 02/14/2018, with its rate set at 2.9%. Porto Alegre, Florianópolis, Curitiba, Vitória and Salvador are some of the other municipalities to apply related acts where the rate may range from 2% to 5%.

The advertising activity through the Internet was never in the List of Services of LC 116/2003. Thus, municipalities could never require ISS over the revenues obtained by online communication outlets (such as: content portals, research websites, social networks, blogs, etc.) upon third-party advertising.

With LC 116/2003 such scenario changed and municipalities were then expressly authorized to collect ISS over "inclusion of texts, graphics and other publicity and advertising materials, into any media (except in books, newspapers, journals, and the sound radio transmission and free receipt sound and image services)".

The change is going to impact the market. As a rule, prior to the amendment promoted by LC 157/2016, companies which conducted advertising through Internet websites provided their customers with a pay receipt to document the operation and did not levy ISS since this activity was not included into the List of Services of LC 116/2003. After adding the Internet advertising services into the List of Services of ISS, companies shall issue a Service Invoice levying ISS as of the date the law becomes effective in the municipalities where established.

Thus, taxation of online advertising will probably render the service more burdensome. On the other hand, ISS levy should bring greater legal security to the sector, especially to large online publishers, just because they relieve the collection of ICMS (as explained above), whose applicable rates are significantly higher (25% to 30%) as compared to the ISS rates (from 2% to 5%).

/ DOUBLED TAXATION OF ISS TO ADVERTISING AGENCIES IN SÃO PAULO

The City of São Paulo (PMSP) on December 22, 2017 published Decree No. 58.045/2017, amending Decree No. 53.151, dated May 17, 2012, regulating the Tax on Services of Any Nature - ISS.

Among the points modified by the Decree one dating 2017 with revocation of article 47 dealing with the ISS calculation basis for advertising agencies. Article 47 stipulates:

> Art. 47. Gross earnings of advertising agencies:
>
> I – amount of fees, including bonuses on any account, earned from advertising;
> II – amount of fees, creation, text and advertising;
> III – price of general production.

Sole paragraph. When the service referred to in item III hereof is carried out by third-parties issuing invoices or receipts to the agency on behalf of the customer, the service price of the agency shall be the difference between the amount of its invoice to the client and the amount in the document of the executor to the agency.

The major consequence of such change is the lack of an objective parameter which may be construed as the gross earnings (or price of services provided) of the advertising companies. It will directly impact the PMSP's understanding on the ISS calculation basis of the advertising agencies.

The key point of the Decree is the "on-lending" matter of the advertising agencies regarding costs with media, production and other third-party services contracted by the agency to the benefit of its advertising clients. Upon revocation of such article there is a potential risk of "doubled taxation", i.e. ISS accruing over the amount corresponding to the third-party service both in the advertising company and in the third-party itself.

Let us exemplify with the following scenario: an agency sends to client an invoice related to communications in the amount of

BRL 100.00 plus 20% for agency fee. By the rules of the Decree dated 2012, the agency could issue an Invoice in the amount of BRL 120, but the ISS calculation basis would be only BRL 20. With the admission of a 5% rate, we would have a payable tax in the amount of BRL 1.00.

After such norm was revoked, these operation dynamics are still undefined. In the same example as above in the event of double taxation the agency would keep on issuing an invoice for BRL 120.00, but it should consider the calculation basis of BRL 120, i.e. the tax would be BRL 6.00.

As seen, consequences of this normative change are quite adverse to advertising agencies, because in addition to bringing legal insecurity regarding the calculation basis to be used in the ISS collection, it could force them to make significant operating changes to their invoicing for compliance with their fiscal obligations.
In the early 2018, associations such as ABAP and FENAPRO registered pleadings so that PMSP would reconsider this decree; other entities are also going in such direction.

/ 2018 ELECTIONS AND NEW STANDARDS FOR ONLINE ADVERTISING

In October 2017 an amendment to Act no. 9.504/1997 (the "Election Act") was approved, changing the Internet election marketing standards, creating mechanisms for content removal, prohibiting nicknames and creating new guidelines on paid posts.

The updating election standards enables the electoral fund to require suspension through websites of content that the candidates consider "hate speech, false information or offense", not requiring judicial determination, which has been criticized by many analysts who found it contrary to the determinations of the Marco Civil of Internet.

The proposal approved also prohibited the use of false identities in social networks to disclose electoral content. In practice, using alias and nicknames in electoral matters shall be punished as a crime.

Finally, the amendment prohibits paid political advertising in radio or television except the Internet. Although the payment of ads in blogs is prevented, candidates and their representatives, parties and coalitions will be entitled to "leverage" contents (provided that unequivocally identified), opening a new frontier for online campaigns in election periods.

/ 2018 WORLD CUP AND AMBUSH MARKETING

The World Cup year brings issues related to using the symbols associated with the event for advertising purposes. Thus, there is a lot of debating on what is known as ambush marketing, which has been defined as the parasitic and opportunistic use of advertising in events, concerts, promotional campaigns and others, using athletes, brands, team insignia and other reference without the authorization of the owners of image and trademark.

The mere context created in an ad could characterize as ambush marketing as long as there is a notion of using some type of "ride" for such advertising.

In 2018, a critical challenge is imposed: Act no. 12.663/2012, known as the General World Cup Act, came up with a legal definition of ambush marketing, but the item with such definition had been revoked on December 31, 2014. However, similar concepts may be found in the CONAR Code of Ethics, as well as in the Consumer Defense Code (deceptive advertising), the Civil Code (unjustified enrichment) and the Industrial Property Act (unfair competition).

Furthermore, another challenge in 2018 is the advertising conducted by the soccer players themselves through their social networks. FIFA has regulated such issues by means of specific

documents binding upon all members of the delegations, preventing the participants from posting stories or interviews of other delegation members or delegations. In such regard, FIFA disclosed the *Media and Marketing Regulations* for the event, a key document to understand the rules to which players are subject regarding advertising during the World Cup period.

/ CENP, PROGRAMMATIC ADVERTISING AND ANNEX D

Finally, reference should be made to the initiative promoted by the Executive Council of Standard Norms (CENP), private legal entity for self-regulation of its associates in the advertising sector, which created in 2017 a Technical Digital Committee to discuss implementation of Annex D. It was a document equally proposed in 2017 which aimed at self-regulating advertising on the Internet, especially in relation to the programmatic advertising market.

We should point out that the Committee was set up to analyze and systematize contributions made by the market to enhance Annex D. The final text should be presented in early 2018 which may have a significant impact on the online advertising industry.