

## FRAND: Brazilian Antitrust Authority Dismissed a Case of Patent Misuse Involving Essential Patents Of Cell Phone Technology International Standard

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**T**he Superintendency of the Brazilian antitrust authority (Conselho Administrativo de Defesa Econômica – CADE) has dismissed a case brought against the holder of essential patents related to an international standard in cell phone technology. According to the bureau, there was no infringement of the economic order concerning the abuse of intellectual property rights.

CADE's Superintendency is the first federal instance to analyze acts of economic concentration, such as mergers and acquisitions, and the occurrence of infringements of the constitutional economic order. CADE, the national antitrust watchdog, is encharged with enforcing the constitutional economic principles, such as free enterprise, freedom of competition, social role of property, consumer protection and the restraining of abusive behavior.

In the present case, the patentee of the international standard cell phone technology was accused of sham litigation and patent misuse, since it had sued the denouncing company, which tried to obtain the due licenses, for patent infringement.

CADE's Superintendency dismissed the case because it was demonstrated that there was no abusive charges, beyond FRAND terms, and also that the patentee managed to successfully demonstrate that it had not refused to license the essential patents. In fact, an agreement was not reached simply because the denouncing company did not accept the proposed royalty fees. Although the patentee was not charging abusive or excessively high royalty fees, the negotiation was undergoing for a very long time, during which the inventions were being used without a corresponding license and royalty payment, which motivated the lawsuits.

In view of the above, CADE understood that the case was a mere private dispute between the parties, with no harmful effects to the market whatsoever, since the patentee has not refused to license the patents. Moreover, it was demonstrated that the patentee no longer has businesses within the market of the patented inventions, meaning that there was no competition between the parties. Consequently, the patentee had no benefit nor reason to wish that the whistleblower company were driven out of the market.

It is always worth remembering that the current Brazilian Antitrust Act, differently to its predecessor, expressly considers the possibility of abusive misuse of intellectual property rights as a hypothesis of infringement of the economic order. Case law on this matter is still being built by CADE and the courts.

The penalties in Brazil for the noncompliance with the antitrust legislation vary according to the gravity of the conduct. Among other, the law sets forth the following sanctions: prohibition to contract with the Public Administration for at least five years and penalties of 0.1% to 20% of the annual gross revenue of the infringer.

Since the case was dismissed by CADE's Superintendency, it can still be brought under the scrutiny of CADE's administrative court for review if so desires one of the court's justices.

**Kasznar Leonardos** follows up this important issue and is fully available to provide you further information. Please feel free to contact us, whether in written or by phone, directly to your usual contact within our office or to [Gabriel.Leonardos@kasznarleonardos.com](mailto:Gabriel.Leonardos@kasznarleonardos.com)