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**Round Table on:**

***"Examining the interface between the objectives of  
competition policy and intellectual property"***

**Contribution**

**by**

**CADE**

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UNCTAD

*Examining the interface between the objectives of competition policy and  
intellectual property<sup>1</sup>*

**1. Introduction**

Both intellectual property (IP) rights and market competition are assured in the Brazilian constitution<sup>2</sup>. The new Brazilian competition law<sup>3</sup>, which was enacted in 2011 (and entered into force in May 2012), is clear regarding the provision that bans the abuse in the use of industrial or intellectual property rights as means to engage in anticompetitive conducts<sup>4</sup>. Blocking access to industrial or intellectual property rights is also a specific violation of the competition law<sup>5</sup>. Intellectual property law (Law n<sup>o</sup> 9.279 of May 14, 1996), on the other hand, grants privileges for the holders of intellectual property rights, such as exclusivity in the commercial use of products related to a patent for a certain period of time. At the same time, it also establishes the possibility of compulsory patent licensing when its bearers exercise their rights in an abusive way or when they use the patent for the abuse of dominant power. This same possibility is foreseen as a recommendation the

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<sup>1</sup> This written contribution was prepared by Pedro Henrique Araújo Santiago, assistant at the Merger and Antitrust Unit 5 of CADE's General Superintendence. The review was conducted by André Rothfeld Gratone and Fernando Bastos Barbosa Costa. For further contact or clarification, please contact [pedro.santiago@cade.gov.br](mailto:pedro.santiago@cade.gov.br) or [international@cade.gov.br](mailto:international@cade.gov.br).

<sup>2</sup> A 2010 version of the Brazilian Constitution is available in English at [http://en.cade.gov.br/topics/legislation/constituicao\\_ingles\\_3ed2010.pdf/@@download/file/constituicao\\_ingles\\_3ed2010.pdf](http://en.cade.gov.br/topics/legislation/constituicao_ingles_3ed2010.pdf/@@download/file/constituicao_ingles_3ed2010.pdf). Intellectual property is set out in the article 5, XXIX: "the law shall ensure the authors of industrial inventions of a temporary privilege for their use, as well as protection of industrial creations, property of trademarks, names of companies and other distinctive signs, viewing the social interest and the technological and economic development of the country". Article 170, IV, sets out "free competition" as a principle of the economic order.

<sup>3</sup> Law n<sup>o</sup> 12.529 of November 30, 2011. English version available at [http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/@@download/file/LAW%20N%C2%BA%2012529%202011%20\(English%20version%20from%2018%2005%202012\).pdf](http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/@@download/file/LAW%20N%C2%BA%2012529%202011%20(English%20version%20from%2018%2005%202012).pdf).

<sup>4</sup> Article 36, §3<sup>o</sup>, XIX: "to abusively exercise or exploit intellectual or industrial property rights, technology or trademark [shall characterize violations of the economic order]".

<sup>5</sup> Article 36, §3<sup>o</sup>, XIV: "to monopolize or prevent the exploitation of industrial or intellectual property rights or technology [shall characterize violations of the economic order]".

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Administrative Council for Economic Defense – CADE, the Brazilian antitrust authority, may provide to the national patent office (INPI) in the case of alleged anticompetitive conducts<sup>6</sup>.

The aforementioned provisions are analyzed under two perspectives of conviction of anticompetitive conducts related to intellectual property rights, namely, i) the undue exercise of IP rights, such as the use of fake patents against competitors, and ii) the abuse in the exercise of legitimate intellectual property rights. Most of the times, however, accusations of abuse perpetrated by holders of IP rights are considered a legal exercise of their granted rights. The following cases exemplify the rationale of CADE's enforcement of competition law in relation to intellectual property matters.

## **2. Relevant cases involving competition law and intellectual property rights<sup>7</sup>**

### **2.1 Prosecution Service of the state of Minas Gerais v. *Alcoa Alumínio S.A.*<sup>8</sup>**

The aluminium company *Alcoa Alumínio* was accused, among other things, of restraining competition by filing fraudulent patent requests and taking advantage of the automatic concession of intellectual property rights to instantly seek judicial injunctions against the alleged transgressors of the precarious patents. This action could be considered sham litigation, as *Alcoa* was taking advantage of a loophole in the patent office's filing proceedings with the intention of harming competitors. Furthermore, *Alcoa* notified clients and consumers suggesting that it was the owner of patents that did not belong to the company.

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<sup>6</sup> Article 38, XI, *a*: “[When so required according to the seriousness of the facts or public interest, one or more of the following penalties may be imposed: (...) recommendation to the respective public agencies so that:] a compulsory license over the intellectual property rights held by the wrongdoer be granted, when the violation is related to the use of that right”.

<sup>7</sup> All the decisions and the case filings can be accessed in CADE's website. Instructions for case search are available in English at [http://en.cade.gov.br/case\\_search](http://en.cade.gov.br/case_search).

<sup>8</sup> Preparatory investigation No. 08012.005727/2006-50.

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The proceedings at the patent office consisted of both the automatic concession of intellectual property rights and a merit analysis of the request. Among the requests that were being challenged as part of the anticompetitive conduct, six were upheld in the merit analysis and three were still being evaluated by the patent office.

Moreover, (i) four of the upheld requests had the merit analysis demanded by *Alcoa* even before the Prosecution Service of the state of Minas Gerais had received the complaint regarding the company's conduct; (ii) only 5.4% of *Alcoa's* products (all from the same relevant market) were protected by patents; and, (iii) *Alcoa's* market share was not increased by the patents' register.

The aforementioned evidence led CADE to decide for the absence of *Alcoa's* advantage in any procedural loophole and, as a consequence, for the absence of sham litigation by *Alcoa*. Furthermore, the company could not be accused of abuse in the use of its patent rights, since there was evidence regarding the company's intention of making "sleeping patents"<sup>9</sup>, *i.e.* held patents that are not commercially exploited, due to strategic reasons<sup>10</sup>.

In addition, the company's notifications to competitors and clients were not about patents that did not belong to *Alcoa*. In fact, as reported, the notifications warned consumers to certify themselves that the products they acquired from certain brands were not fake. In fact, the brands in question belonged to *Alcoa*. In this sense, no anticompetitive conduct resulted from the sent notices. The investigation was filed.

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<sup>9</sup> As a reference for this concept, CADE refers, in its decision, to R. J. Gilbert and D. Newbery's "Preemptive patenting and the persistence of monopoly" (*American Economic Review*, 72, 1982).

<sup>10</sup> Also, there would be no anticompetitive conduct if the patents *Alcoa Alumínio* held were related to the products with the biggest number of sales. Taking into account the legal procedure for the register of patents at the patent office, a larger number of sales from *Alcoa Alumínio's* products which are protected by patents would be a sign of competitive merit of the company, which would be trying to offer better goods to the market.

## 2.2 Videolar v. Philips<sup>11</sup>

Philips was the administrator, in Brazil, of the patent pool related to CD-R and DVD-R media formats. The creation of the patent pool was previous to the introduction of the new legislation on merger review in Brazil. *Videolar*, a producer of digital media discs and tapes, was accusing Philips of abuse of dominant position by eliminating non-optical media formats, such as VHS, and charging abusive prices for the license of patents needed for the production of digital media.

*Videolar* accused Philips of allowing competitors to import optical discs without the due payment of royalties and, thus, making *Videolar* totally dependent on the payment of royalties to Philips for developing its economic activity. Moreover, the market of competing magnetic media, whose only producer in Brazil was *Videolar*, was being eliminated. There was a technological superiority of optical media over magnetic media. In this sense, *Videolar* lost its position in the market due to a change in the technological sphere. The additional accusation of Philips not exercising its patent rights over unlicensed products being (illegally) imported was groundless, as the holder of the intellectual property license is the only one who can invoke its rights.

The accusation of abusive pricing was based on the fact that the prices charged by Philips in Brazil were higher than those charged in other countries and the possibility of importing CD-R and DVD-R without royalties charged by overseas companies. However, there was no evidence of the practice of abusive pricing by Philips in order to exclude competitors. Furthermore, the prices charged by Philips in other countries were not actually lower than those charged in Brazil. In fact, a special policy from Philips gave *Videolar* a discount of 25% on the royalty standard prices. In addition, the possibility of importing CD-R and DVD-R without paying royalties to Philips was illegal, and this illegality was actually one of the reasons presented by *Videolar* in its accusation of Philips' abuse of dominant position on the elimination of non-optical media formats. The absence of the exercise of IP

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<sup>11</sup> Preparatory investigation No. 08012.005181/2006-37.

rights by Philips over these illegal importations was a private matter that did not harm competition. As a result of this assessment, the investigation was filed.

### **2.3 Gradiente and CCE v. Philips<sup>12</sup>**

Philips held dominant position in the technology market for the production of DVD players. *Gradiente* and CCE accused Philips of abuse of dominant position by: (i) unduly charging royalties from clients, suppliers, distributors and resellers of DVD players; (ii) including, in the DVD-related patent pool, technologies to which it did not hold any patent or technologies not essential for DVD players' production; (iii) charging abusive prices for the licensing of its technologies; (iv) charging royalties in duplicity; (v) discriminating royalties charged from each DVD player producer. As a result, Philips could leverage its dominant position and gain market share in the downstream market of manufacturing and selling of DVD players.

The relevant market was defined as the manufacturing and selling of hardware for reading and reproducing DVDs. The market's geographical scope was defined as worldwide. In this case, CADE considered that there was no evidence that Philips' conducts could damage competition.

Clients, suppliers, distributors and resellers were not being unduly charged – in fact, they only received notifications related to the possibility of legal injunctions if they sold DVD players without the payment of royalties, what is in accordance to the Brazilian intellectual property law. Since there was no decision that prevented Philips from exercising its patent rights, there was no abuse in the conduct. Moreover, the allegation of discrimination in the charged royalties from each DVD player producer resulted from the fact that the DVD-related patents were filed only in Brazil, Argentina and Venezuela, which could generate a disadvantage in manufacturing DVD players in Brazil. This was, however, a matter of commercial defense, and not of competition regulation.

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<sup>12</sup> Preparatory investigation No. 08012.001315/2007-21.

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The importation of DVD players from countries where patents were not filed would result in the payment of royalties to Philips due to the products' sales in Brazil. Also, transportation costs could be more important than the due royalties in the case the patents were filed in other Latin American countries. In this sense, it would make no difference for an importer to buy hardware for reading and reproducing DVDs from a particular country where patents had not been filed. In addition, the holder of patent licenses has the right to decide where to protect its intellectual property, a decision which is based on the costs related to the filing of a patent in a certain jurisdiction.

As to the inclusion of patents that did not belong to Philips in the patent pool, CADE acknowledged an efficiency in the fact that a patent pool allows the negotiation of a number of licenses with only one member of the patent pool, and not necessarily with each one of the patent holders. The royalties paid for the use of the patents in the pool did not change according to the number of technologies included, in a way that there would be no difference in the charging royalties if there were patents essential for the production of DVD players. Furthermore, *Gradiente* and CCE were not able to affirm which technologies were indispensable for the production of DVD players and which ones were not. As a result, the investigation was filed.

#### **2.4 ABB / Siemens<sup>13</sup>**

ABB and Siemens intended to make a non-assertion agreement, also called “non-assertion” or “non-challenge” contract, according to which each party would stop exercising IP rights on specific electric power transmission systems. Both companies notified CADE as they were not sure whether the operation had to be submitted for approval under the new regulation on the Brazilian competition law’s definition of “associative contracts”.

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<sup>13</sup> Merger File No. 08700.011952/2015-68.

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According to that regulation<sup>14</sup>, agreements whose subject promotes a horizontal relation between the parties must be notified at the antitrust authority if the combined market share on the affected market surpasses a 20% threshold. On the other hand, if the agreement's subject promotes a vertical relation between the parties, it must be notified if one of the parties has 30% or more of one of the affected markets, and if the agreement promotes either an exclusivity relation or sharing of revenue or losses.

In the ABB/Siemens' case, CADE regarded a non-assertion agreement as a contract which made its parties vertically related. In this case, it had the same effects of a non-exclusive royalty-free cross-license agreement, under which one party (the licensee) can have access to patents of the other one (the licensor) and vice-versa. In other words, the licensee would use the licensed good (the patent) as an input for its economic activity.

As the non-assertion agreement was non-exclusive and royalty-free, although some of the parties could have 30% or more of the affected relevant market, the contract was not considered a merger that needed to be notified and reviewed at CADE.

## **2.5 Sony / Philips / Panasonic / Hitachi / Samsung / Cyberlink<sup>15</sup>**

Sony, Philips, Panasonic, Hitachi, Samsung and Cyberlink constituted a patent pool for essential patents related to the production of Blu-ray Disc products. The operation would create vertical relations between the parties, as they were players in markets directly related to the licensed technology.

CADE's analysis observed that the creation of the patent pool would be beneficial to the competitive dynamics, as transaction costs would be reduced, economies of scale would be generated, patents would be unblocked, litigation

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<sup>14</sup> CADE's Resolution nº 10 is available in Portuguese at <http://www.cade.gov.br/assuntos/normas-e-legislacao/resolucao/resolucao-10-04-de-novembro-de-2014.pdf/@download/file/Resoluçã%2010%20-%2004%20de%20novembro%20de%202014.pdf>

<sup>15</sup> Merger file No. 08012.008810/2009-23.

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costs would be avoided, Blu-ray technology would be disseminated, there was no exclusivity in the licensing agreements and research and development would be stimulated. The operation was approved without restrictions.

**2.6 Editora Nova Atenas and Ponto da Arte Editora v. Ediouro<sup>16</sup>**

The publishers *Editora Nova Atenas* and *Ponto da Arte Editora* accused *Ediouro* of sham litigation due to the creation of barriers to entry in the national market of entertainment publications, such as crosswords and similar puzzles. *Ediouro* was allegedly exercising intellectual property rights it did not hold. Many judicial procedures initiated by *Ediouro* ended up in exclusive agreements with the publishers accused of violating *Ediouro's* supposed intellectual property rights.

After analysis, CADE's General-Superintendence concluded that *Ediouro* had a dominant position of in the market. *Ediouro's* argument for the lack of barriers of entry in the market was not accepted, since sham litigation itself can be a barrier to entry and, if successful, such conduct may hinder competitors from entering the market. The General Superintendence stated that intellectual property rights over crosswords were already expired and are currently in the public domain. After evaluating if *Ediouro's* petition was carried out anticompetitively, i.e. if the legal measures taken by *Ediouro* lacked a reasonable justification, the General-Superintendence concluded that *Ediouro* incurred in anticompetitive conduct and sent the case to CADE's Tribunal.

During CADE's Tribunal analysis, *Ediouro* proposed a settlement and signed a Cease and Desist Agreement in which it agreed not to enforce its IP rights concerning a list of common 32 words and expressions in the market of entertainment publications. *Ediouro* also agreed to refrain signing any judicial or extrajudicial agreement with competitors concerning IP rights. In addition, *Ediouro* agreed to pay the amount of BRL 1,696,469.94 as part of the pecuniary contribution of the settlement proceeding. The proceeding is suspended since July

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<sup>16</sup> Administrative Proceeding No. 08012.005335/2002-67.

2016 and may be filed after the due verification of compliance to all the terms of the Cease and Desist Agreement.

**2.7 National Association of Automotive Parts Producers (ANFAPE) v. Volkswagen, Fiat and Ford<sup>17</sup>**

Volkswagen, Fiat and Ford are automakers that hold industrial design rights over certain automotive parts of vehicles. Such rights enable those companies the right to exclusively produce and sell these parts for 10 years extendable for additional three successive periods of 5 years each. According to ANFAPE, the aforementioned companies were taking legal measures against independent producers of auto-parts in order to prevent their sales of auto-parts for the automakers vehicles. ANFAPE accused the automakers of adopting the legal measures with the intention of eliminating the independent producers of the auto-parts aftermarket. According to ANFAPE, the competition law provides that the automakers' intellectual property rights should be enforceable only against rival automakers, and not against aftermarket players.

This case is still being analyzed by CADE's Tribunal and its General Superintendence has already issued an opinion towards the conviction of the automakers for the violation alleged by ANFAPE. The general auto-parts aftermarket was considered as different from the original equipment manufacturing market, and each kind of auto-part would constitute a different relevant market. The lock-in effect derived from the enforcement of intellectual property rights was deemed as anticompetitive by the General-Superintendence and unjustifiable by the intellectual property law itself. Moreover, judicial decisions related to the enforcement of the automaker's industrial design did not fully consider their effects over competition in the related markets. A final decision is yet to be issued by CADE's Tribunal.

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<sup>17</sup> Administrative Proceeding No. 08012.002673/2007-51.

### **3. Conclusion**

CADE emphasizes the complementary role between competition law and intellectual property rights. At the same time IP law creates incentives for research and development of new products and services, competition law praises differentiation and innovation as strong components of competitive action. At the end, both policies can promote dynamic efficiencies. However, conducts related to intellectual property rights may generate anticompetitive effects as well as conducts related to exercise of private property rights.

CADE generally recognizes the use of intellectual property rights as compatible with the competition law, unless there is fraud or abuse in the register procedure of those rights, if a company seeks enforcement of fake intellectual property rights with anticompetitive intentions, or if there is an abuse in the very exercise of legitimate IP rights, as it was discussed in the last cases presented in this paper. The second situation occurs when the exercise of the IP right deviates from the social-economic objective that justified its existence, in accordance with the understanding that legitimate property rights are not absolute. According to the rule of reason, the negative effects of the imposition of IP rights against other companies should not overcome the positive effects generated by the same conduct, as the dynamic efficiencies from intellectual property rights can overcome the resulting static inefficiencies.

All these considerations about anticompetitive effects derived from intellectual property rights constitute an application of the constitutional provision regarding the necessity to ensure IP rights in accordance with social interest and with the technological and economic development of the country (article 5, XXIX). CADE's power to analyze how market players make use of the IP law is in accordance with its objective of ensuring a competitive, innovative and efficient economy.