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INTELLECTUAL PROPERTY BRAZIL

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Brazilian Antitrust Authority expected to decide cases of "sham litigation" involving patents in 2015

By **Gabriel Leonardos | gabriel.leonardos@kasznarleonardos.com**
and **Rafael Salomão Safe Romano Aguillar | rafael.aguillar@kasznarleonardos.com**

It is expected that, in 2015, the administrative court of the Brazilian antitrust authority (Conselho Administrativo de Defesa Econômica – CADE) rules some important cases involving the sham litigation doctrine applied to intellectual property. It is expected that these cases will more accurately indicate what CADE understands as anticompetitive behavior and infringement of the economic system concerning the abuse of intellectual property rights.

CADE's administrative court is a federal nonjudicial instance 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. Among its institutional competences it can be mentioned the legally required prior consent to "acts of economical concentration", such as mergers and acquisitions, and the application of sanctions to infringements of the economic order.

It is always worth remembering that the current Brazilian antitrust Act, differently from its predecessor, expressly considers the possibility of undue use of intellectual property rights as a hypothesis of infringement of the economic system. The administrative court forthcoming decisions this year will help to clarify what CADE understands as an abusive use of intellectual property rights.

The American doctrine of sham litigation, which forbids the abusive use of the judicial system as a way to constrain competitors by the lawsuit itself, regardless of the merits' pertinence or chances of success, has already been applied by CADE in past decisions. The novelty this time falls within its application to intellectual property related cases.

Being this the case, CADE is about to rule complaints against patent holders who filed lawsuits to allegedly obtain an extension of their patent's term or to collect damages for patent infringement, and are accused to have, as concealed target, to drive competitors out of the market for their incapacity to bear the costs of a lawsuit or for being unwilling to face the legal uncertainty arisen out of the undefined patent's term.

It is also worth mentioning that last November the Brazilian Attorneys Institute – IAB issued a scholarly opinion through which it has condemned the practice of filing lawsuits in order to try to obtain an undue extension to the term of important medicine patents, which momentarily prevents the entry of the patents in the public domain and consequently obstructs competitors of challenging the respective consumer market. IAB has forwarded this opinion to miscellaneous public institutions, such as CADE itself and the Federal Public Prosecutors.

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Cláudio Roberto Barbosa |
Eduardo Colonna Rosman |
Elisabeth Kasznar Fekete |
Fabiano de Bem da Rocha |
Filipe Leonardos | Gabriel Leonardos |
Gustavo Barbosa | João Luis Vianna |
Liz Starling | Nancy Caigawa |
Rafael Lacaz Amaral | Ricardo Boclin |
Ronaldo Varella Gomes | Tatiana Silveira |

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The penalties in Brazil for the noncompliance with the antitrust legislation vary according to the gravity of the conduct. Among others, 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.

Pharmaceutical patents are always subject to intense debates in Brazil, one of the world's largest pharmaceutical markets and with a strong public health system, fully subsidized by the Administration. These procedures before CADE must be understood within such framework. The defense presented by the companies being accused of sham litigation is very strong and, in our opinion, the accusations are groundless. In Brazil, there is still no settled case law about most issues in patent law: in fact, we use to say that every patent case before the Courts is a leading case. In a country where patent law is still being construed by the Courts, it is farfetched to accuse anyone of filing a lawsuit “knowingly” without merits.

For further information on this matter, please feel free to contact us, by writing or calling your usual contact in our office, or Gabriel Leonardos, at Gabriel.Leonardos@kasznarleonardos.com.