

# BRAZILIAN ANTITRUST AUTHORITY'S DECISION ON SEP LICENSING PRACTICES

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## *Introduction*

In April 2025, Brazil's antitrust authority (the *Conselho Administrativo de Defesa Econômica* (CADE)) addressed an administrative appeal filed by Motorola Mobility Comércio de Produtos Eletrônicos Ltda. (Motorola Mobility) and Lenovo Tecnologia Brasil Ltda. (Lenovo). The appeal challenged a decision by CADE's General Superintendence (GS) that had denied their request for an Interim Measure against Telefonaktiebolaget L.M. Ericsson (Ericsson) concerning alleged abuse of dominance in the licensing of 5G standard-essential patents (SEPs).<sup>1</sup>

Lenovo and Motorola alleged that Ericsson, holding a dominant position with its extensive portfolio of 5G SEPs, abused this position by *refusing* to license these patents on a standalone, Brazil-only basis. Instead, Ericsson allegedly conditioned access to its SEPs on the acceptance of a global cross-license agreement, even when Lenovo and Motorola expressed willingness to pay a provisional rate for Brazil and had legitimate reasons, such as ongoing litigation in other jurisdictions, to prefer a local license.<sup>2</sup> The complainants characterized this as an unlawful tying arrangement and a discriminatory practice that imposed potentially abusive clauses, undermining Ericsson's commitment to license SEPs on Fair, Reasonable, and Non-Discriminatory (FRAND) terms and potentially contravening obligations under the TRIPS Agreement.<sup>3</sup>

The case reached CADE in late April 2025. During the plenary session, the parties reported that they had executed a global licensing agreement and jointly asked to withdraw the appeal.<sup>4</sup>

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<sup>1</sup> Para 10 of the Vote.

<sup>2</sup> Para 13 of the Vote.

<sup>3</sup> Para 10, 13 of the Voluntary Appeal Vote GAB 03 (Apr. 29, 2025), [https://sei.cade.gov.br/sei/modulos/pesquisa/md\\_pesq\\_documento\\_consulta\\_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lskjh7ohC8yMfhLoDBLddZ7BJaSj-iR1wMZDgIQel66QrOJDLJDJGYRy-WsBSAfbjklLga9Ngwl0hnt79IxSPWw7M1P4PO-XIeQ-ORAZyGVg](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?HJ7F4wnIPj2Y8B7Bj80h1lskjh7ohC8yMfhLoDBLddZ7BJaSj-iR1wMZDgIQel66QrOJDLJDJGYRy-WsBSAfbjklLga9Ngwl0hnt79IxSPWw7M1P4PO-XIeQ-ORAZyGVg) (Voluntary Appeal Vote). Para 145-146

<sup>4</sup> Paras 48-51.

While CADE granted the withdrawal,<sup>5</sup> it took a notable step of ordering the GS to initiate an *ex officio* administrative inquiry into Ericsson's conduct, despite the private settlement.<sup>6</sup> Commissioner Augusto's opinion, adopted unanimously by CADE, highlighted that the public and collective nature of competition interests, as the "*collectivity is the holder of the legal interests protected by [Brazilian Competition Law],*"<sup>7</sup> and the *prima facie* evidence of potential antitrust violations justified a deeper investigation into Ericsson's SEP licensing practices.<sup>8</sup> This decision confirms CADE's willingness to apply competition law to SEP licensing in Brazil, drawing upon both domestic antitrust norms and international agreements like TRIPS Agreement.

### ***Background: The Global Dispute***

The CADE decision did not occur in a vacuum but was a key front in a sprawling global dispute between Ericsson and Lenovo over the licensing of Ericsson's portfolio of 2G, 3G, 4G, and 5G SEPs. After negotiations broke down, Ericsson launched a multi-jurisdictional litigation campaign in late 2023, seeking sales injunctions against Lenovo's products in several key markets, including the US, Brazil, and Colombia. In response, Lenovo filed its own suit in the UK, asking the court to determine the terms of a global FRAND licence and undertaking to be bound by that determination. The conflict in Brazil was particularly sharp, with Ericsson obtaining a preliminary injunction to halt the sale of Lenovo's 5G devices. Lenovo claimed to have offered to pay the full royalty rate demanded by Ericsson for its Brazilian sales in exchange for a stay of the injunction, an offer Ericsson allegedly refused.

The global dispute reached a turning point in February 2025. The UK Court of Appeal, in a decisive judgment in favour of Lenovo, granted a declaration for an interim licence. Arnold LJ, delivering the judgment, sharply criticised Ericsson's strategy of pursuing injunctions in other countries while a FRAND determination was underway in the UK. He concluded that Ericsson's preference was not for any particular court to determine the FRAND rate, but "*for the exclusionary power of a national injunction [...] over FRAND determination by any court.*"

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<sup>5</sup> Para 7 of the Vote.

<sup>6</sup> 'CADE abre inquérito para apurar conduta anticoncorrencial da Ericsson em licenciamento de patentes 5G' (Cátedras, 24 April 2025) <https://www.catedras.com.br/2025/04/24/cade-abre-inquerito-para-apurar-conduta-anticoncorrencial-da-ericsson-em-licenciamento-de-patentes-5g/#:~:text=A%20controv%C3%A9rsia%20teve%20in%C3%ADcio%20com,seu%20potencial%20impacto%20no%20mercado> accessed 29 May 2025. Paras 7, 51, 163.

<sup>7</sup> Paras 52, 157.

<sup>8</sup> Paras 6, 51-57, 155, 160-162.

In a stark assessment of Ericsson's tactics, he stated simply: "*This is hold up.*"<sup>9</sup> This ruling proved to be a critical catalyst. Within weeks, the parties announced a global settlement, terminating all ongoing litigation. This context, particularly the high-profile judicial critique of Ericsson's conduct as patent hold-up, provides a crucial backdrop to understanding why CADE, just two months later, chose to pursue its own public interest investigation despite the private settlement.

### ***Relevance of TRIPS to SEP Licensing and Competition Enforcement***

The licensing of SEPs sits at the intersection of IPR and competition policy, an interplay acknowledged by TRIPS Agreement. TRIPS Article 8.1 affirms that WTO Members can, when "*formulating or amending their laws, adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development,*" as long as these measures are consistent with TRIPS. Furthermore, TRIPS Article 8.2 explicitly allows WTO Members to take appropriate, TRIPS-consistent measures to prevent the abuse of IP rights by their holders or to counter practices that "*unreasonably restrain trade or adversely affect the international transfer of technology.*" In essence, Article 8 provides a foundational justification for competition authorities like CADE to intervene when SEP licensing practices are perceived as abusive, ensuring IP rights serve broader public and developmental interests. CADE's investigation into Ericsson's conduct can be seen as an application of these principles.

TRIPS Article 28 grants patent owners exclusive rights. However, these rights are territorially limited. CADE emphasized this, stating, "*A patent is a territorial asset, which only exists within a national territory. There are no worldwide patents.*"<sup>10</sup> CADE elaborated that "*a patent exists only within a jurisdiction, which is the country in which it was filed. The patent, in each of these jurisdictions, is a distinct asset, and may have different validity periods, procedures, ownership, and rules, depending on each national law.*"<sup>11</sup> This principle of territoriality, inherent in Article 28, means that national laws, including competition rules, can mediate conflicts between patent rights and market access.<sup>12</sup> CADE's scrutiny of Ericsson's insistence on a global license, potentially overriding legitimate national interests, is grounded in this understanding. While, CADE explicitly viewed Ericsson's behaviour through competition law

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<sup>9</sup> *Lenovo Group Ltd & Ors v Telefonaktiebolaget LM Ericsson (PUBL) & Anor* [2025] EWCA Civ 182, [153].

<sup>10</sup> Para 3.

<sup>11</sup> Para 111.

<sup>12</sup> TRIPS, art 8.

criteria rather than framing it as a TRIPS violation, its reasoning aligns with the flexibilities TRIPS affords.

Crucially, TRIPS provides flexibilities for addressing anti-competitive practices. TRIPS Article 40.1 acknowledges that “*some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.*” TRIPS Article 40.2 affirms Members’ right to specify and adopt measures against such anti-competitive licensing practices. CADE directly referenced these provisions noting that “*restrictions arising from patent registration may generate harm to competition and anticompetitive conduct.*”<sup>13</sup>

Furthermore, TRIPS Article 31 authorizes compulsory licences of patents under specific conditions. While Article 31(b) generally requires prior efforts to obtain authorization from the right holder on reasonable commercial terms and conditions, and that “*such efforts have not been successful within a reasonable period of time,*” Article 31(k) provides an important exception relevant to competition law. It permits the waiver of the requirement for such prior negotiation “*where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive.*” This explicitly recognizes that governments may intervene when patent rights are abused contrary to competition law. CADE’s focus on Ericsson’s alleged refusal to license locally on FRAND terms aligns with these TRIPS flexibilities.

### ***Brazilian Competition Law and SEP Obligations***

Under Brazilian law, antitrust liability is assessed on conduct based on its potential or actual effects on competition, irrespective of intent. Article 36<sup>14</sup> of the Competition Act lists unlawful, *inter alia*, acts that have as their object or may produce effects of limiting, distorting or in any way harming free competition. Specifically, refusal to sell goods or provide services,<sup>15</sup> imposing abusive or unjustified conditions,<sup>16</sup> and abusive exercise of intellectual property rights<sup>17</sup> are proscribed. In the Ericsson case, CADE identified *prima facie* indications that Ericsson’s exclusive global licensing requirement and refusal to grant standalone Brazilian licenses could constitute such prohibited acts. In the decision summary, CADE noted that a

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<sup>13</sup> Para 60.

<sup>14</sup> Lei nº 12.529, de 30 de novembro de 2011 (Brazilian Competition Law) art 36(3)(xi).

<sup>15</sup> Ibid art 36(3)(xi).

<sup>16</sup> Ibid (art. 36(3)(xviii)).

<sup>17</sup> Ibid art. 36(3)(xix).

refusal to license SEPs in Brazil could be seen as a refusal to sell goods or provide services, which the law treats as an anti-competitive practice.<sup>18</sup> The refusal to license SEPs for the Brazilian territory alone, particularly when the implementer demonstrated a legitimate interest in such a license and a willingness to pay a FRAND rate for Brazil, was viewed as potentially unlawful tying and an abuse of Ericsson's patent rights.<sup>19</sup>

While Brazilian law does not have a specific statute codifying FRAND principles, such obligations arise out of standard setting organizations (SSOs) IPR Policy trying to ensure that licensing practices do not violate competition law.<sup>20</sup> Historically, FRAND commitments arose as a proactive measure by SSOs to prevent patent holders from abusing the standardization process to harm competition, a risk that competition authorities had identified early on.<sup>21</sup> As such, these commitments are not merely private contractual terms but a direct response to competition concerns, designed to ensure that access to standardized technology remains open and competitive. CADE's analysis, therefore, correctly views that Ericsson's alleged deviation from its FRAND commitment as a competition law issue. CADE underscored that an SEP holder must license to interested parties on non-discriminatory terms, and Ericsson's refusal to offer national licenses, despite an apparent agreement on price for the Brazilian territory, seemed to contravene this principle.<sup>22</sup> Thus, by treating the FRAND commitment as a benchmark for assessing conduct, CADE can use its general competition rules against refusal to deal, discrimination, and abusive practices to scrutinize licensing behaviour that undermines competition.

### ***CADE's Public Interest Mandate to Enforce SEP Abuse***

A key theme in CADE's reasoning was that there is an independent competition law obligation for Ericsson to license its SEPs on FRAND terms arising out of its voluntary contributions to 5G and associated contractual commitments. It is important however to frame this decision as representing CADE's early thoughts in a complex and evolving area. The decision itself notes that CADE's Department of Economic Studies is currently conducting a formal study on the

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<sup>18</sup> Beatriz Olivon, 'Antitrust watchdog to keep 5G patent probe despite private agreement' (*Valor International*, 24 April 2025) <https://valorinternational.globo.com/business/news/2025/04/24/antitrust-watchdog-to-keep-5g-patent-probe-despite-private-agreement.ghtml> accessed 29 May 2025.

<sup>19</sup> Paras 120, 145.

<sup>20</sup> See the webpage at <https://lesi.org/article-of-the-month/overview-of-seps-frand-licensing-and-patent-pools/#:~:text=If%20the%20SEP%20holder%20is%20a%20member%20of%20a%20standard,takes%20effect%20as%20a%20contract>.

<sup>21</sup> Robert Pocknell & David Djavaherian, 'The History of the ETSI IPR Policy: Using the Historical Record to Inform Application of the ETSI FRAND Obligation' (2023) 75 Rutgers University Law Review 977.

<sup>22</sup> Paras 76, 90, 106-107, 129-132.

competitive impacts of SEP licensing, signalling that the authority’s framework is still under development.<sup>23</sup> The positions articulated here, while significant, may therefore be refined over time.

Commissioner Augusto stated that “*patents considered essential for compliance with a given interoperability standard, such as 5G SEPs, warrant the intervention of this Competition Authority . . .*”<sup>24</sup> CADE highlighted that “*when a company provides its technology to set the standard for a technological system, it must assume an obligation to allow other companies to use that technology in order to compete in new markets and launch innovative products. To admit otherwise is to allow technological standards to be set in order to close markets, prevent innovation and establish monopolies . . .*”<sup>25</sup> By this token, abusive conduct regarding those patents may configure an infringement of the economic order.<sup>26</sup>

This marks the first occasion on which CADE has opened an abuse-of-dominance investigation into a SEP dispute.<sup>27</sup> This approach resonates with frameworks in other key jurisdictions, such as that established by the Court of Justice of the European Union (CJEU) in its *Huawei v. ZTE* judgment.<sup>28</sup> While CADE’s decision does not replicate the exact procedural dance as *Huawei*, its focus on Ericsson’s alleged refusal to negotiate a Brazilian license on FRAND terms, its insistence on a global deal, and potential price discrimination reflects a similar underlying principle: a dominant SEP holder’s enforcement rights are conditioned by its FRAND commitments and its duty not to engage in exclusionary or exploitative abuses.

CADE’s opinion extensively discussed the principle of patent territoriality. It noted that “*when a global license is required what is being offered is not a single patent with global scope, as such a legal entity does not exist in international law. What is being done is, quite simply, conditioning the licensing of a Brazilian patent to the licensing of a bundle of patents filed in other jurisdictions.*”<sup>29</sup> He found it improper “*to condition the licensing of a good or service existing solely in national territory upon the forced acquisition of goods or services that exist*

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<sup>23</sup> Para 87.

<sup>24</sup> Para 88.

<sup>25</sup> Para 128.

<sup>26</sup> Voluntary Appeal Vote (n 1) para 160.

<sup>27</sup> Janith Aranze, ‘CADE adjusts SEP enforcement approach with Ericsson probe’ (*Global Competition Review*, 24 April 2025) <https://globalcompetitionreview.com/article/cade-adjusts-sep-enforcement-approach-ericsson-probe> accessed 29 May 2025.

<sup>28</sup> Nicholas Banasevic and Zuzanna Bobowiec, ‘SEP-Based Injunctions: How Much Has the Huawei v ZTE Judgment Achieved in Practice?’ (2023) 14(2) *Journal of European Competition Law & Practice* 121 <https://doi.org/10.1093/jeclap/lpad012> accessed 29 May 2025.

<sup>29</sup> Para 144.

*only in other jurisdictions,”* especially when the licensee has legitimate reasons to exclude certain territories.<sup>30</sup> CADE even noted the UK Court of Appeal finding that Ericsson’s pursuit of injunctions in foreign courts, despite Lenovo’s willingness to take a license on FRAND terms determined by the UK court, was a breach of good faith.<sup>31</sup>

CADE also highlighted the public nature of its investigation, emphasizing that competition law protects collective interests, society, the market, and consumer welfare, not just the private interests of the complainants.<sup>32</sup> This mandate justifies CADE’s continued investigation despite the settlement, ensuring that potential broader market harm from such alleged practices is addressed.<sup>33</sup>

### ***Pricing Concerns and Discrimination***

Another focus within CADE’s decision was pricing discrimination in Ericsson’s licensing practices. CADE reported signs of price discrimination in Ericsson’s licensing and detailed findings from a market test which suggested that Ericsson’s stated global offer of US\$5.00 per device was “*fictitious*” and “*not applied in practice by any of the cell phone manufacturers operating in the Brazilian market.*”<sup>34</sup> CADE noted that licenses were granted on a case-by-case basis through complex, confidential bilateral negotiations.<sup>35</sup> In particular, CADE was concerned about first-degree price discrimination, charging each customer the maximum they are willing to pay under different licensing models.<sup>36</sup> Moreover, capturing the entire consumer surplus in this manner can harm social welfare when the patented technology is indispensable for market participation.<sup>37</sup> CADE pointed that such individualized, opaque pricing is incompatible with the obligation to license SEPs on non-discriminatory FRAND terms and could distort competition by imposing disparate costs on similarly situated rivals.<sup>38</sup>

The Commissioner also referenced the Brazilian Superior Court of Justice ruling in *Ericsson v. Apple*, which limited Ericsson’s royalties for its 5G patent package to US\$3.00 per device, 40% lower than Ericsson’s initial global offer, suggesting a pattern of initially inflated

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<sup>30</sup> Para 119.

<sup>31</sup> Paras 151-152.

<sup>32</sup> Paras 52-56

<sup>33</sup> Paras 51, 56

<sup>34</sup> Paras 42-43, 46, 139

<sup>35</sup> Voluntary Appeal Vote (n 1) para 142, 43

<sup>36</sup> Voluntary Appeal Vote (n 1) para 99 - 101

<sup>37</sup> Lars A Stole, ‘Price Discrimination and Competition’ in Mark Armstrong and Robert H Porter (eds), *Handbook of Industrial Organization*, vol 3 (North-Holland 2007) 2221–2299.

<sup>38</sup> Paras 91, 96-98, 100-102, 141-142

demands.<sup>39</sup> The Tribunal found these indications of discriminatory and opaque pricing, coupled with the refusal of territorial licenses, sufficiently concerning to warrant further investigation.<sup>40</sup>

### ***Conclusion***

CADE's decision in the Ericsson case signals a more assertive stance in applying Brazilian competition law to SEP licensing practices. By ordering a formal inquiry despite a private settlement, the Tribunal affirmed that such SEP disputes have public interest implications warranting antitrust oversight. The decision establishes that a dominant SEP holder's licensing strategies, particularly concerning essential technologies like 5G, are subject to scrutiny under broad competition principles, including obligations to offer reasonable and non-discriminatory terms and to avoid unjustified tying or exclusionary practices based on the territorial nature of patents.

This outcome is likely to have a broad impact. First, it reinforces that implementers in Brazil may have a legitimate basis to seek territorial SEP licenses rather than being compelled to accept global packages, especially when such imposition is used to leverage disputes in other jurisdictions or when the global package includes patents not relevant or valid in all territories.<sup>41</sup> Second, it suggests that FRAND commitments, while originating from SSO policies, can be indirectly enforced through Brazilian antitrust rules against abusive and discriminatory conduct. Third, the pronounced focus on pricing transparency and non-discrimination indicates that CADE may increasingly scrutinize the terms of global SEP licensing deals for their local competitive effects, including the justification for price variations among licensees.

Ultimately, CADE's action aligns Brazil more closely with global trends in SEP regulation and FRAND enforcement. Its invocation of competition related TRIPS provisions suggests a framework where SEPs are treated as critical inputs for market participation. While this initial framework will likely be refined by its ongoing economic study to ensure it properly distinguishes between voluntarily committed SEPs and other proprietary technologies, the investigation into Ericsson underscores the principle that FRAND encumbered patent rights are not absolute and must be exercised in a manner consistent with competition law. As CADE articulated, the objective is to ensure that vital technologies are available on fair terms,

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<sup>39</sup> Paras 83-84, 140

<sup>40</sup> Para 155

<sup>41</sup> Paras 105-107, 119-120, 130-132, 153

preventing unilateral licensing strategies from stifling competition and innovation.<sup>42</sup> The ensuing administrative inquiry by the GS will be pivotal in shaping the contours of SEP licensing and enforcement in Brazil.

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<sup>42</sup> Paras 128, 134-135