Towards a Balanced SEP Enforcement: Key Insights from CADE's Study

11.08.2025 3 min read

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CADE's Department of Economic Studies (DEE) has released a comprehensive study on standard-essential patents (SEPs), marking a significant step in Brazil's institutional engagement with the competitive dynamics of intellectual property licensing and enforcement[1]. The report adopts a technically grounded and balanced approach but unveils that certain SEP-related practices in Brazil merit close attention as they may raise competition concerns.

The Report's Analytical Approach

The study presents comparative analysis of SEP licensing frameworks, guidelines, court decisions, and enforcement practices across multiple jurisdictions, including the European Union, United States, Japan, South Korea, and Brazil. It does not propose regulatory reform but compiles examples of practices and patterns that may distort competition, particularly where licensing asymmetries and strategic litigation tactics are observed. CADE underscores the need for transparency, procedural safeguards, and economically informed analysis enforcement that consider effects on competition and consumer welfare.

Key Antitrust Concerns Identified

While reaffirming the importance of safeguarding incentives to innovation and fair remuneration for SEP holders, the study highlights several practices that may raise competition concerns:

- **Refusals to license SEPs and coercive demands for global licenses:** the report identifies scenarios where SEP holders condition access to markets on the acceptance of global licensing packages. This practice may restrict competition by forcing implementers to accept terms that potentially inflating royalty burdens and limiting market entry.
- **Tying and bundling of non-essential patents:** implementers are sometimes required to license patents that are not essential to the standard, a practice that may distort negotiations and increase costs.
- **Lack of transparency in licensing negotiations:** confidentiality and asymmetry of information in SEP negotiations may prevent implementers from assessing whether the proposed terms are fair, reasonable, and non-discriminatory. This opacity can hinder proper negotiations and facilitate strategic behavior.
- **Excessive royalty rates and pressure through injunctions:** certain cases may involve the use court-ordered injunctions to compel

implementers to accept excessive royalty rates. This tactic may distort the bargaining process and result in supra-FRAND outcomes.

- **Use of injunctions as leverage**: the report identifies a pattern in Brazilian courts where injunctions are granted before determining whether the SEP owners comply with the FRAND terms. Premature injunctive relief may incentivize strategic litigation and disrupt licensing dynamics.
- **Patent ambush and undue declarations of essentiality:** the study warns about practices where patent holders fail to disclose relevant patents during the standard-setting process or declare patents as essential without proper justification.
- **Patent pools with exclusionary effects:** While patent pools can streamline licensing, the report cautions that they may also reinforce market power and raise barriers to entry when structured in ways that exclude certain implementers or impose discriminatory terms.

Spotlight on Injunctions in Brazil

One of the most sensitive issues addressed is the judicial treatment of injunctions. The report identifies a pattern in which injunctions may be granted before courts assess whether SEP holders have complied with their FRAND commitments or whether implementers are acting in good faith.

This practice may distort licensing negotiations and enable strategic behavior that raises competition concerns. The absence of specific guidance or legal standards in Brazil means that courts often apply general patent law, which may not fully capture the complexities of SEP enforcement.

The study references recent developments, such as in the *DivX v. Gorenje* case[2], where the court emphasized the need of plaintiffs demonstrating compliance with the FRAND commitment, especially the "non-discrimination" requirement. The study highlights that maintaining such approach would align Brazil with the standard applied in other jurisdictions.

"In this context, the DivX v. Gorenje case stands out, in which a court conditioned the granting of injunctions on evidence that SEP holders had previously offered a license on FRAND terms. [...] the judge emphasized that the 'non-discrimination' aspect is the most important criterion for assessing compliance with FRAND terms. To date, this is the first decision by a Brazilian court highlighting that patent holders must fulfill their FRAND obligations, a position that, if maintained in the future, would align Brazil with the approach adopted in other jurisdictions".

Final Remarks

Although the report does not advocate for regulatory reform, CADE's study lays an important analytical foundation for future enforcement, judicial consideration, and policymaking. As SEP-related disputes in Brazil continue to grow in number and complexity, the report signals that Brazil could benefit from a more structured and economically informed approach to prevent anticompetitive behavior and safeguard consumer welfare.

NOTES

1 Contribuições do CADE: Patentes Essenciais. 6 August 2025. Available here.

2 Divx, LLC. vs. Gorenje and others. Case no. 0834763-49.2024.8.19.0001, in Rio de Janeiro State Court.

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