EU GENERAL COURT SETS ASIDE €1 BILLION ABUSE-OF-DOMINANCE FINE ON QUALCOMM

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KEY TAKEAWAYS

- The Court holds the Commission to a high standard in respect to the rights of defense. The Court found that the Commission committed several serious procedural violations, including: (i) failure to keep and make available adequate records of a total of seven meetings with third parties; and (ii) failure to allow Qualcomm to effectively use its "as efficient competitor" analysis by unilaterally changing the scope of the infringement in the final Decision.
- This case takes the *Intel* caselaw on pricing abuses by dominant companies a step further. This could complicate the Commission's enforcement in abuse-of-dominance cases against other dominant companies.
- The Court adopts a more strict interpretation of *Intel* than the Commission. The Court rejected the Commission's mechanical application of the *Intel* criteria for the assessment of rebates, which included dominance, market coverage, duration, and conditional nature of rebates. According to the Court, the analysis of the anticompetitive effects of the rebates cannot be purely hypothetical. In that connection, the fact that LTE chipset suppliers could not meet Apple's own technical requirements for the vast majority of Apple's demand (>90%) during the relevant period meant that there could be no actual or potential anti-competitive effects.

BACKGROUND

In January 2018, the European Commission (Commission) issued a decision (Decision) imposing a €1 billion fine on Qualcomm Technologies, Inc. (Qualcomm) for abusing its dominance in Long Term Evolution (LTE) baseband chipsets. LTE baseband chipsets are key communication chips used in smartphones and tablets. The Commission's theory of harm was that Qualcomm had conditioned on exclusivity approximately €2 billion to €3 billion of incentive payments to Apple Inc. (Apple) in the 2011–2016 period. These payments—according to the Commission—reduced Apple's incentive to switch suppliers, and they had the capability to foreclose Qualcomm's competitors from the entire LTE chipset market.

On 15 June 2022, the General Court (Court) annulled the Decision based on procedural irregularities and manifest errors of assessment of the capability of Qualcomm's incentive payments to foreclose competition.[1]

Procedural Irregularities

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The Court found two sets of serious procedural irregularities: (i) failure to properly record meetings and calls with third parties; and (ii) material discrepancies between the statement of objections (Statement of Objections) and the Decision. The Court stated that these procedural irregularities were sufficiently serious to justify the annulment of the entire Decision in their own right.[2]

No Proper Record of Several Meetings and Calls With Third Parties

The Court was very critical of the Commission's failure to keep and make available to Qualcomm detailed records of meetings and calls that the Commission had held with third parties. The Court adopted a rather expansive interpretation of the record-keeping requirement set out in the *Intel* caselaw.[3]

Under *Intel*, all meetings and calls with third parties that are intended to gather information during the administrative procedure should be properly recorded and disclosed to the defendant.[4] The Court found that the Commission failed to produce proper notes for a total of seven meetings or calls with third parties during the access-to-file phase. For four of these meetings, the Commission only produced very succinct notes after the Decision was adopted, while for the other three, the Commission failed to produce any notes at all.[5] As a result, the Commission's failure to make available to Qualcomm sufficiently detailed notes of these meetings infringed Qualcomm's rights of defense.

The Court rejected as irrelevant the fact that the Commission did not use any information from these meetings in its Decision, in contrast with the *Intel* caselaw, where this was a factor to be taken into account.[6] In addition, the Court gave the benefit of the doubt to Qualcomm as to the existence of potential exculpatory information that could come out of these meetings. This goes beyond the *Intel* requirements that placed the burden of proof on the defendant instead.[7] The Court emphasized in that regard that it is not for the Commission alone to determine the evidence of use to the defendant.[8]

Material Discrepancies Between the Statement of Objections and the Final Decision

The second major procedural irregularity was that the Commission narrowed the scope of the infringement without giving Qualcomm the opportunity to adjust its economic analysis accordingly. While the Statement of Objections focused on both the LTE and Universal Mobile Telecommunications System (UMTS) baseband chipset markets, the Decision only focused on the LTE baseband chipset market. While a reduction in the scope of the abuse is in principle beneficial for the defendant, in this particular case, this reduction rendered Qualcomm's critical margin analysis irrelevant, as that analysis covered both LTE and UMTS chipsets.

The Court noted that this critical margin economic analysis—a type of “as efficient competitor” econometric analysis of Qualcomm's incentive payments—was an important part of Qualcomm's rights of defense under the *Intel* caselaw, and the Commission's change rendered this analysis irrelevant, as it affected key parameters such as the amount of incentive payments, contestable shares, and costs. The Court concluded that the Commission's failure to allow Qualcomm to adapt its econometric analysis was a violation of Qualcomm's rights of defense.[9] It is noteworthy that the Court cited by analogy to the *UPS* judgment to support its finding. In that case, the Court had annulled a Commission prohibition decision under the EU Merger Regulation, on the basis that the Commission had unilaterally changed a key econometric analysis in its final decision without allowing UPS to make its views known.[10]

Manifest Errors in the Substantive Assessment of Qualcomm's Incentive Payments

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Even though the procedural pleas were sufficient to annul the entire Decision, the Court also carried out a substantive assessment of whether Qualcomm's incentive payments had the capability to foreclose competitors. As discussed below, the Court found that the Decision fails to prove any potential or actual anticompetitive effects to the requisite legal standard, and it rejected the Commission's allegations that the Decision took into account all relevant circumstances in light of the *Intel* caselaw.[11]

Qualcomm's Incentive Payments Had No Capability to Foreclose

The Court heavily relied on the fact that there were no other LTE chipset suppliers that could meet Apple's own LTE baseband chipset requirements for iPhones during the 2011–2015 period and more than half of its requirements in 2016.[12] This was a key fact that the Commission should have taken into account, as iPhones represented more than 90% of Apple's LTE chipset requirements. The Court concluded that the Commission failed to take into account all relevant circumstances, as this technical impossibility simply meant that Qualcomm's incentive payments could not have the capability to foreclose any of Qualcomm's competitors.[13]

No Actual Foreclosure Effects for 2014 and 2015 iPads

Even though the Decision was focused on Qualcomm's abuse of dominance in the entire LTE chipset market based on the capability of Qualcomm's rebates to foreclose, the Decision also attempted to show actual anticompetitive effects for 2014 and 2015 iPads. The underlying rationale was to show the anticompetitive potential of these incentive payments. The Court rejected the Commission's assessment of actual anticompetitive effects for 2014 and 2015 iPads on several grounds: (i) the Decision was unclear on which precise iPad models were foreclosed;[14] (ii) the Decision ignored that Apple's technical and scheduling requirements were not met;[15] and (iii) the Decision relied only on Apple documents and statements by Apple employees that were contradicted by other contemporaneous evidence.[16] The Court concluded that the Commission's reasoning was vitiated by a lack of consistency in the evidence used, failure to take into account all relevant factors as required under *Intel*, and by relying on evidence that did not make it possible to support its findings.[17]

FOOTNOTES

[1] *See* Qualcomm Inc. v. European Comm'n, Case T-235/18 (*Qualcomm*).

[2] *See Qualcomm*, ¶¶ 345–46.

[3] Intel Corp. Inc. v. European Comm'n, Case C-413-14 P (*Intel*), ¶ 91.

[4] *See id.*

[5] *See Qualcomm*, ¶¶ 202–26, 252–68, 288–98.

[6] *See id*. ¶ 291; see also Intel, ¶ 95.

[7] *See Intel*, ¶¶ 98–102.

[8] *See Qualcomm*, ¶ 199.

[9] *See id*. ¶¶ 318, 326.

[10] *See id.* ¶ 338; European Comm'n v. UPS, C-265/17, ¶¶ 31, 37.

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[11] *See Qualcomm*, ¶¶ 353–55.

[12] *See id*. ¶¶ 408–10.

[13] *See id*. ¶¶ 417–28.

[14] *See id*. ¶¶ 457–58, 463.

[15] *See id*. ¶¶ 467–81.

[16] *See id*. ¶¶ 497–98.

[17] *See id*. ¶ 507.

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