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EU General Court quashes Qualcomm antitrust fine for "exclusivity payments", and censures the EU Commission for multiple due process and substantive errors

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The General Court of the European Union delivered a blow to the European Commission in fully annulling its *Qualcomm (exclusivity payments)* decision of 2018 and a EUR 997 million fine.

Qualcomm v Commission[1] is the first annulment of an Article 102 TFEU decision adopted by Commissioner Margrethe Vestager. The judgment is notably based on the importance of due process when it comes to economic analysis, and criticizes both the Commission's procedures and its substantive assessment.

Key points of the judgment

- The General Court strongly criticized the Commission's failure to inform Qualcomm of a number of interviews it conducted with third parties. The Commission failed to maintain a proper record of these meetings, which meant that the Commission's argument against the relevance of these meetings could not be proven, and thus confirmed the violation of Qualcomm's rights of defense.
- Although the Commission was entitled to drop its charges with respect to one of the markets under investigation, without hearing Qualcomm's views on that, narrowing the coverage of the abuse affected the parameters of Qualcomm's economic analysis (relating to the AEC test), thus rendering it obsolete. Failure to give Qualcomm the opportunity to update this analysis infringed its right to be heard per *Intel*.[2]
- The General Court also set aside the Commission's analysis of anticompetitive effects. Given that Qualcomm was the sole supplier capable of satisfying Apple's technical and scheduling chipset requirements for iPhones, the Commission had not proved that Qualcomm's conduct had an effect on Apple's incentives to switch suppliers for all products. In effect, even absent the exclusivity payments, Apple would still have sourced from Qualcomm.

Background

In January 2018, the European Commission handed the world's largest supplier of baseband (LTE)

chipsets a EUR 1 billion fine.[3] The Commission found that Qualcomm abused its dominant position by paying Apple to exclusively source its iPhone and iPad chipsets from Qualcomm during 2011-2016.[4] The agreement also enabled Qualcomm to reclaim a large part of the payments if Apple were to switch supplier. The Commission found that Qualcomm's exclusivity payments denied its rivals (in particular, Intel) the chance to compete for Apple's business, which comprised a third of baseband chipset demand. It further asserted that the loss of Apple as a customer had further ripple effects on the market, due to the importance to other customers of Apple's decisions on procurement and design.

Due process violations

The General Court[5] focused on the Commission's failures:

- To inform and allow Qualcomm to comment on the meetings the Commission held with certain third parties, and
- To enable Qualcomm to adapt its economic defense to the Commission's modified scope of investigation.

Right of access to the Commission's record of meetings with third parties

Following the decision, it was revealed that the Commission had failed to inform Qualcomm of a number of meetings with third parties. For some of these, the Commission had also omitted to maintain a written record that could be disclosed to Qualcomm.

In the footsteps of the Court of Justice's judgment in *Intel*,[6] the General Court confirmed that when the Commission interviews third parties to collect information relevant to an investigation (be it in a meeting or a call[7]), it must record a meeting's content in a form of its choosing.[8] The Commission does not discharge this obligation simply by means of recording the participants and agenda items, but must at least "*provide an indication of the content*" and "*nature of information*" discussed. The General Court explained that the Commission's failure to provide Qualcomm with concrete evidence on these meetings[9] left the defendant exposed to the possibility of a third party mentioning evidence, be it inculpatory, exculpatory, or neutral,[10] that Qualcomm would not be aware of (and thus use for its defense).

The General Court accepted that the interviews at hand "*could have related*" to matters wholly pertinent to the investigation, such as the competitors' capacity to supply Apple, their willingness to challenge the agreement with Qualcomm, and the relative merits of Qualcomm's chipsets. Likewise, knowledge of these interviews "*could have proved relevant*" to Qualcomm's defense and "*could have enabled*" it to tweak its defense strategy accordingly. The General Court further rejected as "*speculation*" the Commission's argument that the information provided during these meetings was comparable to the input provided by the third parties in response to the Commission's requests for information (RFIs).[11] The General Court also rejected the Commission's argument suggesting that Qualcomm should have asked the Court to hear witnesses during the proceedings to remedy the Commission's failure to provide meeting notes.

It is interesting that the General Court takes a relatively asymmetric approach with respect to

"*speculation*" as to the content of a meeting. On the one hand, it rejected the Commission's argument that the third parties would presumably not have produced in the meetings at hand any concrete evidence on top of what they provided in their written responses to the RFIs. On the other hand, it accepted the possibility of Qualcomm fishing out from these meetings evidence potentially useful to its defense. Such an asymmetry makes sense, in our view. Had the Commission prevailed here, it would have essentially secured for itself a blank check on conducting virtually undocumented meetings. Put differently, the General Court recognized that it is not for the Commission to determine which meeting is prone to generate "*concrete evidence*" and thus merits a detailed account. This also makes sense given we are in quasi-criminal law territory, as the case law recognizes.[12] The judgment is also remarkable in that it reaches a different conclusion than in *Intel*: the Court of Justice, after having found that the Commission failed to take minutes of a meeting with an executive of Dell, considered that Intel rights of defense had not been breached. As the General Court notes in this case, the Intel case was different because the Commission had given to Intel access to an internal note about the meeting and a subsequent submission reflecting the content of the meeting.[13]

A final point to be made here relates to the exceptional number of procedural violations. Unlike in *Intel*, where the failure to keep record of a meeting concerned only one meeting, here the Commission failed to properly record seven meetings, with six different third parties, one of which was critical to the Commission's analysis and another claimed anonymity. Notes of all these meetings were sketchy at best and thus useless to Qualcomm (and the General Court). And, regardless of the absence of notes, the very existence of these meetings was concealed until after Qualcomm was fined (and for one meeting even after the rejoinder, forcing the court to adopt measures of organization and hear the parties on the newly revealed documents). There is no acknowledgment by the General Court that it was *put together*, rather than *each in isolation*, that these fallacies resulted in annulment. Would each one individually suffice to annul the entire decision? Indeed, it seems valid to interpret the judgment as flagging seven different violations of Qualcomm's defense rights, each committed every time the Commission failed to inform Qualcomm of a meeting in a timely and diligent manner.

The difference between the Statement of Objections and the contested decision

The Commission was initially investigating an abuse on two distinct relevant markets, that of LTE chipsets and that of UMTS chipsets. It alleged an abuse in both markets in its Statements of Objections. In response, Qualcomm submitted a "critical margin analysis" (CMA) a light version of the sort of as-efficient competitor (or AEC) test done in Intel, covering both of these markets. However, the Commission's ultimate decision dropped the charges on the abuse on the UMTS segment and found an abuse only on LTE chipsets. Qualcomm thus complained against the Commission's failure to inform it of the change and allow it to amend the data and the analysis used in its CMA.

The General Court found that, by submitting the critical margin analysis on LTE and UMTS chipsets, Qualcomm exercised its *Intel*[14] right to produce economic evidence that its conduct was not capable of restricting competition. The Commission actually examined this analysis, rejected it, and carried out a revised analysis in the contested decision. By then, however, the analysis had become obsolete on account of the reduced scope of the alleged abuse. The General Court thus

held that, although the Commission was perfectly entitled to reduce the scope of its investigation to the defendant's favor, without explaining this, it should have nevertheless brought that to the defendant's attention, giving it the opportunity to adapt its economic analysis.[15]

By failing to do that, the Commission had made a similar sort of error as seen in *UPS*,[16] said the General Court. Qualcomm had submitted an analysis that the Commission decided was no longer responsive, but only because of the change in scope. By making its charge-sheet a moving target, the Commission had deprived Qualcomm of its right to be heard.

Erroneous analysis of anticompetitive effects

Qualcomm claimed that the Commission had not proven that its payments to Apple were capable of having anticompetitive effects by reducing Apple's incentives to source LTE chipsets from Intel.

First, the General Court noted that the analysis of whether a conduct is capable of foreclosing as-efficient competitors must take account of "*all the relevant factual circumstances*" and "*cannot be purely hypothetical*."[17] It then found that, with respect to iPhones, which accounted for approx. 90% of Apple's LTE chipset requirements, there was no contestable demand; the Commission itself acknowledged that, between 2011 and 2015, Qualcomm was the sole supplier capable of meeting Apple's technical requirements.[18] Even so, the Commission consistently referred to Apple devices in its decision, without distinguishing between iPhones and iPads. The General Court thus found that the Commission failed to "*make a link*" between the "*undisputed fact*" of iPhone chipset demand being uncontestable and the alleged lessening of Apple's incentives to switch to Intel. More boldly, the General Court acknowledged that, in light of the absence of alternatives, Apple's decision to single source from Qualcomm "*could fall within competition on merits*" rather than an "*anticompetitive foreclosure effect*."[19] To put it differently, there was no competition in the first place that was restricted, since Apple would have sourced from Qualcomm anyway. This is effectively a counterfactual argument that was successful.

Moving on to iPad chipsets, the Commission had sought during the General Court hearing to argue that, even if the contestable demand were to be confined to them, Qualcomm had leveraged its non-contestable demand for iPhone chipsets to foreclose competitors on the contestable iPad chipset demand. The General Court said that this change in the Commission's theory of harm was not acceptable, and there was no evidence brought forward in the contested decision to support it.[20] In short the General Court says that the Commission cannot rewrite the decision at the appeal stage.

Second, Qualcomm disputed the Commission's finding that the exclusivity payments had an effect on Apple's procurement incentives and strategy with respect to iPads actually launched in 2014 and 2015. Here, the Commission admitted a "*clerical error*," revealing that its analysis on the actual effects of payments only concerned a certain type of iPad models "*to be launched*" and not "*actually launched*" in 2014 and 2015, whereas the decision referred to Apple devices, including iPhones. The General Court agreed with Qualcomm that it was not legitimate for the Commission to make a conclusion on Apple's incentives without first exploring its actual alternatives for chipsets covering the iPad models concerned, under the same technical and scheduling

requirements.[21]

Finally, the General Court reviewed whether the Commission had proved an *actual* effect on Apple's incentives to switch chipset supplier for certain iPad devices. The General Court accepted that Apple had indeed taken into account the exclusivity payments from Qualcomm, but that did not suffice. The General Court was not convinced by the internal documents presented that, absent the payments, Apple would have switched.[22] It further rejected the alternative assertion that, absent actual effects, these payments were at least *capable* of foreclosure under the circumstances. Because the Commission's theory of harm covered exclusivity payments for the iPhone and iPad chipset requirements of an entire six-year period, it was not fit for the fringe part of iPad chipset demand that the Commission was using it for.

On these multiple counts, the General Court quashed the Commission's analysis of anticompetitive effects, since the conduct's capacity to foreclose was not analyzed "*in the light of all the relevant factual circumstances*," while the alleged actual effects of such conduct were not verified based on the evidence brought forward.[23]

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[1] Case T-235/18, *Qualcomm v Commission*, ECLI:EU:T:2022:358 ("***Qualcomm v Commission***").

[2] Case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2017:632, para. 138.

[3] The Commission's formal investigation commenced in July 2015, along with a parallel investigation against Qualcomm for pricing its chipsets below-cost to foreclose rival Icera. For the latter part, the Commission adopted a separate decision in July 2019 and imposed a fine of EUR 242 million. That case is currently under appeal (Case T-671/19, *Qualcomm v Commission*).

[4] In its decision, the Commission noted that Qualcomm paid Apple a "*total of USD[2-3] billion between 2011 and 2015*."

[5] Case T-235/18, *Qualcomm v Commission*, ECLI:EU:T:2022:358 ("***Qualcomm v Commission***").

[6] Case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2017:632, para. 93.

[7] *Qualcomm v Commission*, para. 185.

[8] *Qualcomm v Commission*, para. 190.

[9] The Commission itself admitted that its failure to take notes on two of these meetings was a "*regrettable*" failure on its part (*Qualcomm v Commission*, para. 237).

[10] The General Court accepted that the Commission can withhold evidence that is irrelevant to the factual and legal basis of the investigation and its statement of objections.

[11] *Qualcomm v Commission*, para. 142.

[12] Case T-442/08, *CISAC v Commission*, ECLI:EU:T:2013:188, para. 93.

[13] *Qualcomm v Commission*, para. 259.

[14] Case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2017:632, para. 138.

[15] *Qualcomm v Commission*, para. 340.

[16] Case C-265/17 P, *Commission v United Parcel Service*, ECLI:EU:C:2019:23. In that case, the econometric analysis used by the Commission in its prohibition decision, was non-negligibly different to that used during the administrative procedure. The General Court thus found, and the Court of Justice agreed, that UPS's right to a fair hearing had been breached, due to the Commission's failure to allow it to make its views known on the edited econometric analysis ultimately used in the decision.

[17] *Qualcomm v Commission*, paras 396-397.

[18] Only in 2016, did the Commission find that approximately half of Apple's requirements were contestable (*Qualcomm v Commission*, para. 407).

[19] *Qualcomm v Commission*, para. 414.

[20] *Qualcomm v Commission*, para. 421.

[21] *Qualcomm v Commission*, para. 479.

[22] *Qualcomm v Commission*, para. 488.

[23] *Qualcomm v Commission*, para. 511.

This entry was posted on Tuesday, June 21st, 2022 at 11:00 am and is filed under Source: OECD“>Abuse of dominance, As Efficient Competitor, Economics, Effects-based, Fundamental rights, General Court of the European Union, Procedures
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