

## THE 2018 *QUALCOMM* DECISION AND THE EU REGULATION OF DOMINANT FIRM BEHAVIOUR

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### I. *Problematic Trends*

In January 2018, the European Commission fined Qualcomm (the largest manufacturer of LTE baseband chipsets in the world) €997.439 million (approximately US\$1.23 billion) for abusing its dominant position in the market of Long-Term Evolution (LTE) baseband chipsets (hereinafter the “Decision”).<sup>1</sup> LTE baseband chipsets are often referred to as “modem chips” or “4G chipsets” in the information and communication technology sector. Such baseband chipsets are referred to as “LTE chipsets” in the Decision.

This Article has five main parts. Following this introductory section, the second section briefly analyses EU competition rules on the abuse of a dominant market position. The third section of this Article examines the Decision. This section concerns certain controversial agreements between Qualcomm and Apple Inc., which were in effect from 2011 through 2016. Qualcomm stated that the agreements are not in breach of EU competition rules.<sup>2</sup> This San Diego-based manufacturer of baseband chipsets initiated court proceedings against the Commission on 6 April 2018.<sup>3</sup> Qualcomm noted, *inter alia*, that the Decision committed “manifest errors of assessment regarding the definition of the relevant product market and the finding of dominance”. Also, Qualcomm denied that relevant agreements between Qualcomm and Apple “were capable of producing *potential anticompetitive effects*” (emphasis added), alleging that the Decision committed manifest errors of law and of relevant assessment.<sup>4</sup> Qualcomm has asked the General Court to annul the Decision and annul, or alternatively, reduce the fine substantially.

Section 4 of this Article examines the pleas and major arguments articulated by Qualcomm

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<sup>1</sup> The Commission has not yet published a “public version” of the Decision containing no business secrets or other confidential information. On July 31, 2018, the Commission made public a summary of the Decision (hereinafter as the “Summary Decision”). Nonetheless, this Summary Decision does not provide full details of the Qualcomm case. European Commission, Summary of Commission Decision of 24 January 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.40220 – Qualcomm (Exclusivity Payments)) (notified under document C(2018) 240), OJ C 269, 31.7.2018, p.25.

<sup>2</sup> Qualcomm stated that it strongly disagrees with the Decision, adding that the Decision does not relate to Qualcomm’s licensing business and has no impact on ongoing operations. Qualcomm, *Qualcomm to Appeal European Commission Decision Regarding Modem Chip Agreement*, <https://www.qualcomm.com/news/releases/2018/01/24/qualcomm-appeal-european-commission-decision-regarding-modem-chip-agreement>

<sup>3</sup> Case T-235/18, *Qualcomm v. Commission*.

<sup>4</sup> n.3 above.

before the General Court. This section focuses on whether the agreement between Qualcomm and Apple produced “potential anticompetitive effects” on the one hand, and on the other, whether the practices of Qualcomm can be justified by efficiency. The answers to these questions could be used to determine whether the practices of Qualcomm could be regarded as abusive conduct.

The fifth and final section draws upon the conclusions reached in the previous sections and makes a number of suggestions for dominant firms operating in the European information and communication technology sector. These high-tech firms should make significant efforts to avoid engaging in practices aimed at excluding competitors from markets.

## II. *EU Regulation of the Abuse of a Dominant Position: An Overview*

Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the European Economic Area Agreement prohibit undertakings from abusing a dominant position in the market. Article 102 TFEU provides that:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

First of all, with a view to investigating the possible dominant position of an undertaking in a given product market, the possibilities of competition must be judged in the context of the market comprising the totality of the products or services which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products or services.<sup>5</sup> The definition of the relevant market is crucial in the assessment of whether the undertaking concerned is able to prevent effective competition from being maintained and to behave to an appreciable extent independently of both its competitors and customers.<sup>6</sup> The Commission noted that “relevant product market comprises all those products and/or services which are regarded as *interchangeable* or *substitutable* by the *consumer*, by reason of the products’ *characteristics*, their *prices* and their

<sup>5</sup> Case T-229/94, *Deutsche Bahn v. Commission*, EU:T:1997:155, para. 54; Case T-219/99, *British Airways v. Commission*, EU:T:2003:343, para. 91; Case T-321/05, *AstraZeneca v. Commission*, EU:T:2010:266, para. 31.

<sup>6</sup> Case 322/81, *NV Nederlandsche Banden Industrie Michelin v. Commission*, EU:C:1983:313, para. 37; Case T-556/08, *Slovenská pošta v. Commission*, EU:T:2015:189, para. 112. See also Commission Notice on the definition of relevant market for the purposes of Community competition law (hereinafter as “Commission notice on market definition”), OJ C 372, 9.12.1997, p.5.

intended use”.<sup>7</sup> (emphasis added) Also, the Commission stated that:

Undertakings are subject to three main sources of competitive constraints: *demand substitutability*, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, *demand substitution* constitutes the *most immediate and effective* disciplinary force on the suppliers of a given product.<sup>8</sup> (emphasis added)

Secondly, the term “dominant position” in Article 102 TFEU concerns a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition being mainlined in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately its consumers.<sup>9</sup> An important factor for determining whether there is a dominant position is the existence of a very large market share. In most circumstances, a very large market share is evidence of a dominant position, such as the case where a company has a market share of 50 percent or above.<sup>10</sup> A share of between 70 percent and 80 percent is, in itself, a clear indication of the existence of a dominant position in a relevant market.<sup>11</sup> The ratio between the market share held by the dominant undertaking and that of its nearest rivals is also a highly significant indicator.<sup>12</sup> Another crucial factor is the existence of barriers to entry or expansion, preventing either potential competitors from having access to the market or actual ones from expanding their activities in the market.<sup>13</sup> Other considerations include the overall size and strength of the undertaking, its financial and technical resources, its vertical integration, and its ownership of intellectual property rights, all of which may constitute barriers to market entry.<sup>14</sup>

Thirdly, as far as the abuse of a dominant position is concerned, the Court of Justice of the European Union (hereinafter as the “CJEU”) holds that a dominant undertaking has a special responsibility not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the internal market.<sup>15</sup> The scope of the special responsibility of the dominant undertaking must be considered in light of the specific circumstances of the case.<sup>16</sup> Nonetheless, the nature of such responsibility remains unclear. The Commission and

<sup>7</sup> Commission Notice on market definition, para. 7.

<sup>8</sup> Commission Notice on market definition, para. 13.

<sup>9</sup> Case C-27/76, *United Brands and United Brands Continental v. Commission*, EU:C:1978:22, para. 65; Case 85/76, *Hoffmann-La Roche v. Commission*, EU:C:1979:36, para. 38; Case T-201/04, *Microsoft v. Commission*, EU:T:2007:289, para. 229.

<sup>10</sup> Case C-62/86, *Akzo v. Commission*, EU:C:1991:286, para. 60; Case T-340/03, *France Télécom SA v. Commission*, EU:T:2007:22, para. 100; Case T-336/07, *Telefónica SA v. Commission*, EU:T:2012:172, para. 150.

<sup>11</sup> Case T-30/89, *Hilti v. Commission*, EU:T:1991:70, para. 92; Joined Cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line and Others v. Commission*, EU:T:2003:245, para. 907; Case T-66/01, *Imperial Chemical Industries v. Commission*, EU:T:2010:255, para. 257; Case T-336/07, *Telefónica SA v. Commission*, EU:T:2012:172, para. 150.

<sup>12</sup> Case T-219/99, *British Airways v. Commission*, EU:T:2003:343, para. 210.

<sup>13</sup> Case 27/76, *United Brands and United Brands Continental v. Commission*, EU:C:1978:22, para. 122; Case 85/76, *Hoffmann-La Roche v. Commission*, EU:C:1979:36, para. 48.

<sup>14</sup> David Edward and Robert Lane, *Edward and Lane on European Union Law* (Cheltenham, Edward Elgar, 2013), 765.

<sup>15</sup> Case 322/81, *NV Nederlandsche Banden Industrie Michelin v. Commission*, EU:C:1983:313, para. 57; Case C-209/10, *Post Danmark*, EU:C:2012:172, para. 23; Case C-457/10 P, *AstraZeneca v. Commission*, EU:C:2012:770, para. 134; Case T-286/09, *Intel v. Commission*, EU:T:2014:547, para. 205.

academic writers rarely mentioned the special responsibility prior to 2015. Such responsibility deserves more attention as the Court of Justice and the General Court have taken it into consideration in three judgments in recent years.<sup>17</sup> Article 102 TFEU and Article 54 of the EEA Agreement prohibit practices by an undertaking in a dominant position that tend to strengthen that position.<sup>18</sup> Also, these provisions prohibit the conduct of a dominant undertaking in a given market that tends to extend that position to a neighbouring but separate market by distorting competition.<sup>19</sup> As a result, the fact that the abusive conduct of a dominant firm has adverse effects on a market distinct from the dominated one does not preclude the application of Article 102 TFEU or Article 54 of the EEA Agreement.<sup>20</sup> As a result, it is not necessary that the dominance, the abuse, and the effects of the abuse are all in the same market. These two articles list examples of abusive practices but do not provide an exhaustive enumeration of practices that may constitute an abuse of a dominant position prohibited by the TFEU or the EEA Agreement.<sup>21</sup> For example, the two articles generally prohibit any abusive practice capable of limiting markets.<sup>22</sup>

### III. *How Does The Qualcomm Decision Affect The Global Baseband Chipset Sector?*

#### 1. Facts

The Decision was addressed to Qualcomm. The Commission opened its investigation on 16 July 2015. On 8 December 2015, the Commission sent to Qualcomm a Statement of Objections setting out its preliminary concerns, followed by a letter sent in February 2017 setting out additional factual elements relevant to the final decision. According to the Commission, the rights of defence for Qualcomm have been fully respected in this case.<sup>23</sup> In light of the evidence in the Commission's case file pointing to the harm to competition caused by Qualcomm's conduct, the Commission concluded that this case satisfied the criteria for being

<sup>16</sup> Joined Cases C-395/96 P and C-396/96 P, *Compagnie Maritime Belge Transports and Others v. Commission*, EU: C:2000:132, para. 114; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, EU:C:2011:83, para. 84.

<sup>17</sup> Case C-209/10, *Post Danmark*, EU:C:2012:172, para. 23; Case C-457/10 P, *AstraZeneca v. Commission*, EU:C:2012:770, para. 134; Case T-286/09, *Intel v. Commission*, EU:T:2014:547, para. 205.

<sup>18</sup> Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, EU:C:1973:22, para. 26; Case 85/76, *Hoffmann-La Roche & Co. AG v. Commission*, EU: C: 1979: 36, para. 91; Case 322/81, *NV Nederlandsche Banden Industrie Michelin v. Commission*, EU:C:1983:313, para. 57.

<sup>19</sup> Case 311/84, *Centre belge d'études de marché - Télémarketing (CBEM) v. SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)*, EU:C:1985:394, para. 27; Case C-333/94 P, *Tetra Pak v. Commission*, EU:C:1996:436, para. 25; Case T- 228/97, *Irish Sugar plc v. Commission*, EU:T:1999:246, para. 166; Case T-201/04, *Microsoft v. Commission*, EU:T:2007:289, para. 1344.

<sup>20</sup> Case C-333/94 P, *Tetra Pak v. Commission*, EU: C: 1996: 436, para. 25; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, EU:C:2011:83, para. 85.

<sup>21</sup> Case 6/72, *Europemballage and Continental Can v. Commission*, EU:C:1973:22, para. 26; Case C- 280/08 P, *Deutsche Telekom v. Commission*, EU:C:2010:603, para. 173; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, EU:C:2011:83, para. 26.

<sup>22</sup> Case T-286/09, *Intel v. Commission*, EU:T:2014:547, para. 216.

<sup>23</sup> European Commission, *Antitrust: Commission Fines Qualcomm €997 million for Abuse of Dominant Position*, [http://europa.eu/rapid/press-release\\_IP-18-421\\_en.htm](http://europa.eu/rapid/press-release_IP-18-421_en.htm)

dealt with as a priority in line with the Commission Communication on Guidance on Enforcement Priorities to focus on those cases that are most harmful to consumers. On 8 December 2015, the Commission also sent Qualcomm a Statement of Objections concerning potential predatory pricing. According to the Commission, “[t]his investigation is ongoing, and its outcome cannot be prejudged at this stage”.<sup>24</sup>

The Commission noted in the Summary Decision that the relevant product is the merchant market of LTE chipsets.<sup>25</sup> LTE chipsets enable smartphones and tablets to connect to cellular networks. These chipsets are mainly used both for voice and data transmission. Such chipsets comply with the 4G LTE standard. There are, however, other chipset suppliers on the market of LTE chipsets. In particular, Intel, the largest manufacturer of chipsets used in computers, has made efforts to challenge and compete with Qualcomm for customers.<sup>26</sup> Qualcomm held a dominant position in the worldwide market for LTE chipsets between 1 January 2011 and 31 December 2016.<sup>27</sup> The Commission stated that:

First of all, Qualcomm has enjoyed large shares in the worldwide market for LTE chipsets since 2010. Second, the worldwide market for LTE chipsets is characterized by the existence of a number of barriers to entry and expansion. Third, the commercial strength of Qualcomm’s baseband chipset customers is incapable of affecting Qualcomm’s dominant position.<sup>28</sup>

The Commission noted in a press release that the conclusion regarding the dominant position of Qualcomm in the global market for LTE chipsets over the period between at least 2011 and 2016 is based in particular on its very high market share, amounting to more than 90 percent for the majority of the period. The Commission stressed that “[t]he market is also characterised by *high barriers to entry*. These include the research and development expenditure required before a supplier can launch an LTE chipset and *various barriers* related to Qualcomm’s *intellectual property rights*”.<sup>29</sup> (emphasis added) These intellectual property rights are obviously the patents and confidential information regarding the leading technology owned by Qualcomm in the baseband chipset sector.

Apple, a major manufacturer of smartphones and tablets with a premium brand image in the world, has been a major customer for LTE baseband chipsets. According to the Commission, Qualcomm in 2011 “signed an agreement with Apple, committing to make *significant payments* to Apple on condition that the company would *exclusively* use Qualcomm chipsets in its ‘iPhone’ and ‘iPad’ devices. In 2013, the term of the agreement was extended to the end of 2016”.<sup>30</sup> (emphasis added) Under this agreement, Qualcomm would cease the payments if Apple commercially launched a device with a chipset supplied by a rival of Qualcomm. In addition, “for most of the time the agreement was in place, Apple would have had to return to Qualcomm a large part of the payments it had received in the past, if it decided to switch suppliers”.<sup>31</sup> The agreement, scheduled to expire on 31 December 2016, terminated on

<sup>24</sup> European Commission, n.23 above.

<sup>25</sup> European Commission, n.1 above.

<sup>26</sup> European Commission, n.23 above.

<sup>27</sup> European Commission, n.1 above.

<sup>28</sup> European Commission, n.1 above.

<sup>29</sup> European Commission, n.23 above.

<sup>30</sup> European Commission, n.23 above.

16 September 2016 as Apple launched its iPhone 7 devices incorporating Intel LTE chipsets.<sup>32</sup>

## 2. The Decision

As the Commission notes, “[m]arket dominance is, as such, not illegal under EU antitrust rules. However, dominant companies have a *special responsibility* not to abuse their powerful market position by restricting competition, either in the market where they are dominant or in separate markets”.<sup>33</sup> (emphasis added) According to the Decision, “Qualcomm abused its dominant position in the worldwide market for LTE chipsets by granting payments to Apple on condition that Apple obtain from Qualcomm all of Apple’s requirements of LTE chipsets”.<sup>34</sup> The infringement of Qualcomm took place between 25 February 2011 and 16 September 2016.<sup>35</sup>

The Commission articulated four reasons in support of this conclusion. First, “the payments granted by Qualcomm to Apple on condition that Apple obtain from Qualcomm all of Apple’s requirements of LTE chipsets were exclusivity payments”.<sup>36</sup> Second, “notwithstanding Qualcomm’s arguments to the contrary, its exclusivity payments had potential anti-competitive effects”.<sup>37</sup> Elaborating on this point, the Commission stated that:

In the first place, Qualcomm’s payments reduced Apple’s *incentives to switch* to competing LTE chipset suppliers as confirmed by Apple’s internal documents and explanations. In the second place, Qualcomm’s exclusivity payments covered a *significant share* of the worldwide LTE chipset market. In the third place, Apple is an *attractive customer* for LTE chipset suppliers because of its importance for entry or expansion in the worldwide LTE chipset market. (emphasis added)<sup>38</sup>

Third, “the critical margin analysis submitted by Qualcomm does not support its claim that its exclusivity payments were incapable of having anti-competitive effects. And fourth:

Qualcomm has not demonstrated that its exclusivity payments were counterbalanced or outweighed by advantages in terms of efficiency that also benefit the consumer. This is because Qualcomm has not demonstrated that the exclusivity payments were necessary for the achievement of any gains in efficiency.<sup>39</sup>

The Commission added that the infringement of Qualcomm has an appreciable effect on trade

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<sup>31</sup> European Commission, n.23 above. In the Summary Decision, the Commission elaborated on the exclusivity agreements. In February 2011, Qualcomm entered into an agreement with Apple concerning the delivery of baseband chipsets. This agreement was amended in February 2013 by means of a subsequent agreement. This amended agreement took effect retroactively as of 1 January 2013. Both the 2011 agreement and the amended agreement provided for payments being granted by Qualcomm to Apple on condition that Apple obtain from Qualcomm all of Apple’s requirements of LTE chipsets. European Commission, n.1 above.

<sup>32</sup> European Commission, n.1 above.

<sup>33</sup> European Commission, n.23 above.

<sup>34</sup> European Commission, n.1 above.

<sup>35</sup> European Commission, n.1 above.

<sup>36</sup> European Commission, n.1 above.

<sup>37</sup> European Commission, n.1 above.

<sup>38</sup> European Commission, n.1 above.

<sup>39</sup> European Commission, n.1 above.



between Member States in the EU within the meaning of Article 102 TFEU.<sup>40</sup>

In addition to the four reasons mentioned above, the Commission issued a press release analysing the possible impact of Qualcomm-Apple agreements on the competitors of Qualcomm in the relevant market.<sup>41</sup> This analysis also supports the conclusion that Qualcomm abused its dominant position in the global market for LTE chipsets between 2011 and 2016. The Commission stated that under the agreement, “Qualcomm’s rivals were denied the possibility to *compete effectively* for Apple’s *significant business*, no matter how good their products were. They were also *denied* business opportunities with other customers that could have followed from securing Apple as a customer”.<sup>42</sup> (emphasis added) The Commission is of the opinion that the practices of Qualcomm “amount to an abuse of Qualcomm’s dominant position in LTE baseband chipsets by preventing competition on the merits”.<sup>43</sup> The Commission stated that “Qualcomm has abused this market dominance by preventing rivals from competing in the market”. It added that “[i]t did so by making significant payments to a key customer on condition that it would exclusively use Qualcomm chipsets. The issue with such an arrangement is not that the customer receives a short-term price reduction, but that the exclusivity condition *denies rivals the possibility to compete*”.<sup>44</sup> (emphasis added)

Elaborating on the rationale behind the Decision, the Commission stated that its decision was based on a variety of qualitative and quantitative evidence, the assessment of which indicated that both consumers and competition have suffered as a result of the conduct of Qualcomm. According to the Commission, this assessment took into account, *inter alia*:

- the extent of Qualcomm’s dominant position;
- the significant amounts paid by Qualcomm in exchange for exclusivity;
- a broad range of contemporaneous evidence (including Apple’s internal documents) that Qualcomm’s payments reduced Apple’s incentives to switch to rivals;
- the importance of Apple as a customer in the market for LTE baseband chipset suppliers: Apple accounts for a significant share of LTE chipset demand (on average one third). Apple is also a leading smartphone and tablet manufacturer, which can influence other customers’ and manufacturers’ procurement and design choices. By making sure that rivals had no chance to compete for any of Apple’s important business, Qualcomm’s conduct had an effect on the LTE baseband chipset market as a whole; and
- that Qualcomm did not demonstrate that the exclusivity condition created any efficiencies, which could have justified Qualcomm’s practices.<sup>45</sup>

Having taken into consideration the duration and gravity of the practices of Qualcomm, the Commission concluded that Qualcomm abused its dominant position in the market for LTE baseband chipsets by preventing competition. The fine of more than €997 million, which was aimed at deterring market players from engaging in such anti-competitive practices in the

<sup>40</sup> European Commission, n.1 above.

<sup>41</sup> European Commission, n.23 above.

<sup>42</sup> European Commission, n.23 above.

<sup>43</sup> European Commission, n.23 above.

<sup>44</sup> European Commission, n.23 above.

<sup>45</sup> European Commission, n.23 above.

future, represented 4.9 percent of the turnover of Qualcomm in 2017.<sup>46</sup>

The Decision requires Qualcomm to “refrain from repeating the conduct described in the Decision and from any act or conduct that would have the same or an equivalent object or effect as the conduct described in the Decision”.<sup>47</sup> As regards such practices or practices with an equivalent object or effect, the Commission noted that the practices include “payments, rebates or any type of consideration, conditional on Apple obtaining from Qualcomm all or most of its requirements of LTE chipsets”.<sup>48</sup>

#### IV. *Qualcomm’s Antitrust Battle*

The Commission has a policy of zero tolerance for abuse of a dominant market position in the information and communication technology sector. The Decision is apparently consistent with such a policy. As Commissioner Margrethe Vestager, in charge of competition policy in the EU, noted in a press release:

Qualcomm illegally shut out rivals from the market for LTE baseband chipsets for over five years, thereby *cementing its market dominance*. Qualcomm paid *billions of US Dollars* to a key customer, Apple, so that it would not buy from rivals. These payments were not just reductions in price – they were made on the condition that Apple would *exclusively* use Qualcomm’s baseband chipsets in all its iPhones and iPads.<sup>49</sup> (emphasis added)

Vestager added that:

This meant that no rival could *effectively challenge* Qualcomm in this market, *no matter how good their products were*. Qualcomm’s behaviour denied consumers and other companies *more choice and innovation* – and this in a sector with a huge demand and potential for innovative technologies. This is illegal under EU antitrust rules and why we have taken today’s decision.<sup>50</sup> (emphasis added)

In response to the Decision, Don Rosenberg, executive vice president and general counsel of Qualcomm, stated that “[w]e are confident this agreement did not violate EU competition rules or adversely affect market competition or European consumers”, adding that “[w]e have a strong case for judicial review and we will immediately commence that process”.<sup>51</sup> Qualcomm initiated court proceedings against the Commission, asking the General Court to annul the Decision and annul, or in the alternative, reduce substantially the amount of the fine of more than €997 million. In support of its action, Qualcomm articulated seven pleas in law as well as its main arguments:

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<sup>46</sup> European Commission, n.23 above. Under the “2006 Guidelines on fines” of the Commission, the fine has been calculated on the basis of the value of Qualcomm’s direct and indirect sales of LTE baseband chipset in the European Economic Area. The duration of the infringement established in the decision is five years, six months and 23 days.

<sup>47</sup> European Commission, n.1 above.

<sup>48</sup> European Commission, n.1 above.

<sup>49</sup> European Commission, n.23 above.

<sup>50</sup> European Commission, n.23 above.

<sup>51</sup> Qualcomm, n.2 above.



First plea in law, alleging that the contested decision is vitiated by manifest procedural errors;

Second plea in law, alleging that the contested decision commits manifest errors of assessment, fails to state reasons and distorts evidence in dismissing Qualcomm's efficiency defence;

Third plea in law, alleging that the contested decision commits manifest errors of law and of assessment in finding that the impugned agreements were capable of producing potential anticompetitive effects;

Fourth plea in law, alleging that the contested decision commits manifest errors of assessment regarding the definition of the relevant product market and the finding of dominance;

Fifth plea in law, alleging that the contested decision commits manifest errors of law and of assessment and fails to state reasons with regard to the duration of the alleged infringement;

Sixth plea in law, alleging that the contested decision commits manifest errors of assessment in applying the fining guidelines and infringes the principle of proportionality; and

Seventh plea in law, alleging that the contested decision commits manifest errors of assessment in establishing the Commission's jurisdiction and effect on trade between Member States.

The details of these main arguments are not immediately apparent, but attention should be focused on the second, third, and fourth pleas.

## 1. Definition of Relevant Market

It is necessary to analyse the fourth plea first, which concerns two imperative issues, i.e. the definition of relevant product markets and the evaluation of the economic strength of Qualcomm in the relevant market. Qualcomm stated that the Decision had committed "manifest errors of assessment regarding the definition of the relevant product market and the finding of dominance". Qualcomm might argue before the General Court that the scope of relevant market has been wrongly drawn by the Commission. Qualcomm would presumably claim that the definition of relevant market in the Decision does not comprise all the products regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use. Another possible claim could be that some other chipsets and Qualcomm 4G baseband chipsets share similar characteristics, and these chipsets could be regarded as substitutable products by Apple and other consumers.

None of these possible claims are convincing. LTE baseband chipsets have been used for years to enable smartphones and tablets to connect to cellular networks. Their main functions include voice and data transmission. The other products in the ICT technology sector do not perform these functions. For instance, the chipsets used in desktop and laptop computers, or the chipsets that comply with the 3G standard,<sup>52</sup> have never been regarded as interchangeable

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<sup>52</sup> 3G standard is also referred to as the "Universal Mobile Telecommunications System" standard, or the "UMTS" standard.

products by manufacturers of smartphones and tablets.

## 2. Evaluation of Market Power

Qualcomm might argue before the General Court that it did not hold a dominant position in the global market for LTE baseband chipsets between 2011 and 2016. This claim could be rejected by the Court as well, should Qualcomm fail to demonstrate in advance that the relevant market was wrongly defined by the Commission. The main reason is that Qualcomm had a very high market share during the period in the relevant market defined by the Commission. The market share amounted to more than 90 percent for the majority of the period. In addition, the Commission noted that the relevant market has also been characterised by high barriers to entry, adding that “[t]hese include the research and development expenditure required before a supplier can launch an LTE chipset and *various barriers* related to Qualcomm’s *intellectual property rights*”.<sup>53</sup> (emphasis added)

Neither the claim that Qualcomm did not have a high market share nor the claim that a high entry barrier did not exist is persuasive. In short, the dominance of Qualcomm in the relevant market has been characterised by a high market share and a high entry barrier, i.e. the intellectual property rights owned by Qualcomm. It is widely believed that Qualcomm secured the market power to behave independently of Apple and other customers. Although Qualcomm could still attempt to prove before the General Court that it did not have the economic strength to behave independently of Intel and other competitors in the relevant market, there is a relatively slight chance of persuading the Court that Qualcomm did not have a dominant position in the market.

## 3. Assessment of Abusive Conduct

There is a close relationship between the second and third pleas articulated by Qualcomm before the General Court. These two pleas concern whether the agreement between Qualcomm and Apple produced “potential anticompetitive effects” on the one hand, and on the other, whether the practices of Qualcomm could be justified by efficiency. The answers to these questions would determine whether the practices of Qualcomm would be regarded as abusive conduct.

As regards the question of whether the Qualcomm-Apple agreement produced “potential anticompetitive effects”, the Commission gave a positive answer in the Decision. Taking into account the significant payments by Qualcomm in exchange for exclusivity, the Commission held the opinion that the exclusivity payments reduced the incentives of Apple to switch to the competitors of Qualcomm. As the rivals did not have much chance to compete for the significant business of Apple, the Commission concluded that the practices of Qualcomm resulted in a potential anticompetitive effect on the LTE baseband chipset market as a whole.

Having performed a “price-cost” test, Qualcomm submitted the results to the Commission before the Decision was made. This test provided that the pricing practices of Qualcomm did not violate Article 102 TFEU if the prices of Qualcomm covered their costs.<sup>54</sup> Nonetheless, the

<sup>53</sup> European Commission, n.23 above.

<sup>54</sup> Governance and Compliance, *EU Qualcomm Fine Bolsters Credibility on IT Competition*, <https://www.icsa.org.uk/>

Commission assessed and rejected the submission by Qualcomm, having reached the conclusion that “the results of this test failed to support Qualcomm’s claim that its exclusivity payments were not capable of having anti-competitive effects”.<sup>55</sup>

The significant payments by Qualcomm in exchange for exclusivity obviously reduced the incentives of Apple to switch to the rivals of Qualcomm. It was then extremely difficult, if not impossible, for these competitors to compete for the significant business of Apple. There is, however, a slight chance of convincing the General Court that this is not so. The key issues relating to this case concern the impact of significant payments made by Qualcomm for exclusivity. The Court could rule in favour of Qualcomm if Qualcomm successfully demonstrated that Apple still had a wide range of autonomy when Apple considered switching to the rivals of Qualcomm under the exclusivity agreement, or Qualcomm convinced the Court that the other manufacturers of LTE baseband chipsets could compete fairly with Qualcomm for Apple’s business.

As to whether the practices of Qualcomm can be justified by efficiency, the Commission stated that “Qualcomm has not demonstrated that its exclusivity payments were counterbalanced or outweighed by advantages in terms of efficiency that also benefit the consumer”.<sup>56</sup> The Commission added that “[t]his is because Qualcomm has not demonstrated that the exclusivity payments were necessary for the achievement of any gains in efficiency”.<sup>57</sup> In other words, the Commission is of the opinion that Qualcomm did not demonstrate that the exclusivity condition created any efficiencies, which could have justified the practices in question. Nevertheless, Qualcomm has in its second plea accused the Commission of “distort [ing] evidence in dismissing Qualcomm’s efficiency defence”. The full details of the efficiency defence are not immediately apparent, but Qualcomm would presumably argue that its practices could be justified by efficiency.<sup>58</sup> One possible ground might be that under the five year agreement, continuous efforts were made to produce LTE baseband chipsets suitable for Apple smartphones and tablets. This means that at least some of the LTE chipsets could be custom-made with a view to improving the functions of Apple products. As a result, such long-term efforts could enhance the efficiency of producing both the Qualcomm chipsets as well as the Apple products. Whether the General Court would accept these grounds depends on whether Qualcomm could demonstrate that the exclusivity payments had indeed enhanced the efficiency of producing both its baseband chipsets and the Apple smartphones and tablets.

#### 4. Does the CJEU’s *Intel* Judgment Give Cause for Hope?

The Commission bears the burden of proving that the agreement between Qualcomm and Apple produced “potential anticompetitive effects”, and that the practices of Qualcomm cannot be justified by efficiency. Qualcomm would presumably cast doubt on the ability of the Commission to establish both the anticompetitive effects and the ineffectiveness of efficiency defence made by Qualcomm. It should also be noted that the judgment of *Intel Corp. v.*

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<sup>55</sup> European Commission, n.23 above.

<sup>56</sup> European Commission, n.1 above.

<sup>57</sup> European Commission, n.1 above.

<sup>58</sup> Bloomberg, *Qualcomm Asks EU Court to Overturn \$1.2 Billion Antitrust Fine*, <https://www.bloomberg.com/news/articles/2018-06-04/qualcomm-asks-eu-court-to-overturn-1-2-billion-antitrust-fine>

*European Commission* adopted by the Court of Justice on 6 September 2017 might give Qualcomm cause for hope.<sup>59</sup>

The Commission in 2009 applied the “as efficient competitor” test (hereinafter as the “AEC test”) in the *Intel* decision to establish that the Intel rebates scheme was “capable of restricting competition and, accordingly, constitutes an abuse of a dominant position within the meaning of Article 102 TFEU”.<sup>60</sup> As to this rebates scheme, the Commission stated that the level of the rebates granted by Intel to Dell, HP, and NEC between 2002 and 2005 was *de facto* conditional on the customers sourcing their x86 Central Processing Units exclusively (Dell) or, within defined segments, almost exclusively (HP and NEC) from Intel.<sup>61</sup> The Commission noted that “the as efficient competitor analysis as applied in this case examines what price an as efficient competitor would have to offer an Intel trading partner in order to compensate it for the loss of any Intel rebate”.<sup>62</sup>

In the judgment of *Intel Corp. v. European Commission* adopted by the General Court on 12 June 2014, the Court did not regard the analysis carried out by the Commission in the *Intel* decision as relevant.<sup>63</sup> Intel later challenged before the Court of Justice the General Court opinion regarding the relevance of the AEC test performed by the Commission.<sup>64</sup> The Court of Justice stated that “the AEC test played an important role in the Commission’s assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors”,<sup>65</sup> and “the General Court was required to examine all of Intel’s arguments concerning that test”.<sup>66</sup> As a result, the Court of Justice set aside the judgment of the General Court, “since, in its analysis of whether the rebates at issue were capable of restricting competition, the General Court wrongly failed to take into consideration Intel’s line of argument seeking to expose alleged errors committed by the Commission in the AEC test”.<sup>67</sup>

The *Intel* judgment by the Court of Justice indicated that the General Court must examine all the errors that might have been committed by the Commission in its economic analysis of a case relating to the abuse of a dominant market position. This conclusion might indirectly encourage a dominant firm accused of abusing its market power to cast doubt on how the

<sup>59</sup> Case C-413/14 P, *Intel Corp. v. European Commission*, EU:C:2017:632.

<sup>60</sup> Case C-413/14 P, *Intel Corp. v. European Commission*, EU:C:2017:632, para. 111. The Commission stated in the *Intel* Decision that Intel Corporation committed an infringement of Article 102 TFEU. The Commission on 21 September 2009 published the provisional non-confidential version of its 13 May 2009 Decision. Commission Decision of relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3/37.990 - Intel).

<sup>61</sup> With regard to Dell, the level of the rebates was conditional upon purchasing all of the x86 CPUs required from Intel. With regard to HP and NEC, the level of the rebates was conditional upon sourcing most of their requirements for corporate desktop PCs and client PCs respectively from Intel. See *id.* para. 1001.

<sup>62</sup> The Commission added that:

If Intel’s rebate scheme means that in order to compensate an Intel trading partner for the loss of the Intel rebate, an as efficient competitor has to offer its products below a viable measure of Intel’s cost, then it means that the rebate was capable of reducing access to Intel trading partners which could offer products from the as efficient competitor, or in other words capable of foreclosing a hypothetical as efficient competitor.

See *id.* para. 1154.

<sup>63</sup> Case T-286/09, *Intel v. Commission*, EU:T:2014:547, para. 216.

<sup>64</sup> Case C-413/14 P, *Intel Corp. v. European Commission*, EU:C:2017:632, para. 131.

<sup>65</sup> Case C-413/14 P, *Intel Corp. v. European Commission*, EU:C:2017:632, para. 143.

<sup>66</sup> Case C-413/14 P, *Intel Corp. v. European Commission*, EU:C:2017:632, para. 144.

<sup>67</sup> Case C-413/14 P, *Intel Corp. v. European Commission*, EU:C:2017:632, para. 147.

Commission assesses economic evidence in a case relating to the abuse of a dominant market position. In other words, casting serious doubts on how the Commission applies concepts and principles of economics could be regarded as an effective way to annul a Commission decision.

Nonetheless, a dominant firm might be overly optimistic in holding such a view. The nature of rebates in the *Intel* case and that of payments in the *Qualcomm* case are to some extent identical, as both were employed to secure loyalty from customers. However, the facts of these two disputes are far from similar. In the *Intel* case, the Commission held the opinion that the Intel rebates scheme constituted an abuse of a dominant position under Article 102 TFEU, but the distinction between pro-competitive discounting and the exclusionary rebates system was vague. Generally, conditional rebates are offered to increase sales. By doing so, an undertaking may stimulate demand and benefit consumers. However, in circumstances where such rebates are granted by a firm holding a dominant position, the rebates may lead to exclusion.<sup>68</sup> This means that the Intel rebates scheme does not necessarily fall within the scope of Article 102 TFEU because of the indistinct dividing line between this scheme and pro-competitive discounting. Nonetheless, in the *Qualcomm* case, the significant payments by Qualcomm in exchange for exclusivity fall easily within the scope of Article 102 TFEU. The payments rendered it difficult for Apple to switch to other manufacturers of LTE baseband chipsets. As a result, these exclusivity payments denied the competitors of Qualcomm the possibility of competing effectively for the significant business of Apple. There is, however, a slight chance of convincing the General Court that the payments were beneficial to customers rather than anti-competitive. Qualcomm could attempt to prove that the significant payments made during the five years finally resulted in a reduction in the prices of Apple smartphones and tablets.

## V. Conclusion

At least one of the following attempts must be successful before the General Court could rule in favour of Qualcomm: First of all, Qualcomm would have to successfully prove before the Court that it did not have the economic strength between 2011 and 2016 to behave independently of Intel and other competitors in the relevant market. This would give Qualcomm a slight chance of persuading the Court that it did not secure market dominance. Secondly, Qualcomm would have to demonstrate that Apple still had a wide range of independence when Apple considered switching to the competitors of Qualcomm during the five years. Thirdly, Qualcomm would have to persuade the Court to accept that the other manufacturers of chipsets could still then compete in a fair manner with Qualcomm for Apple's business. For instance, Qualcomm might argue that fierce competition remained, as its competitors could attempt to enter into an exclusivity agreement similar to the Qualcomm-Apple agreement. Fourthly, Qualcomm would have to successfully demonstrate that a continuous effort had been made under the five year agreement to produce LTE baseband chipsets suitable for Apple smartphones and tablets. This suggests that some of the LTE chipsets could be custom-made to improve the functions of Apple products.

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<sup>68</sup> Kuo-lien Hsieh, *Law and Information Technology: Theories and Practices concerning Recent Developments* (Taipei, Sharing, 2014), 61-62.

The *Intel* judgment delivered by the Court of Justice might give Qualcomm cause for hope, but a dominant firm might be overly optimistic in holding such a view. The facts of the *Intel* case are not at all similar to those of the *Qualcomm* case. The Intel rebates scheme does not necessarily fall within the scope of Article 102 TFEU, because of the vague distinction between this scheme and pro-competitive discounting. As a matter of fact, Intel offered discounts to its customers in a highly competitive market. Nevertheless, agreements and business practices such as those in the *Qualcomm* decision may easily fall within the scope of Article 102(2)(b) TFEU. This provision provides that an abuse of a dominant position may consist in “limiting production, markets, or technical development to the prejudice of consumers”. There is, however, a slight chance of convincing the General Court that the payments were beneficiary to customers rather than anti-competitive. Qualcomm must demonstrate that it made the significant payments during the five years, which directly or indirectly, helped Apple reduce the prices of smartphones and tablets.

Dominant firms should not underestimate the significant antitrust risks posted by their practices that prevent competition. High-tech firms operating in Europe should not take any risks when drafting contracts relating to the sale of goods. Dominant firms must avoid being too aggressive, particularly where their practices could exclude competitors from a market. The Court of Justice holds that dominant undertakings have a special responsibility not to impair genuine undistorted competition in the internal market. The terms of “limiting production”, and “limiting markets”, “limiting technical development” in Article 102 TFEU have been broadly defined during the last 15 years by the Commission in its decisions regarding ICT sector. The General Court and Court of Justice upheld most of these decisions.

A key issue in the Decision concerns whether the agreement between Qualcomm and Apple has produced “potential anticompetitive effects”. Even if this agreement has produced such effects, it is uncertain whether such an agreement has limited “production, markets, or technical development to the prejudice of consumers”. It remains unclear whether potential anticompetitive effects would result in negative impacts on consumers. The opinions of the General Court on this issue would presumably determine the outcome of the *Qualcomm* case.