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# Qualcomm wins appeal to General Court over exclusivity payments

The European General Court (GC) has annulled the European Commission's decision to fine Qualcomm €997.4 million for abuse of dominance under Article 102 TFEU. The GC held that the Commission had breached Qualcomm's rights of defence through manifest procedural errors, and had not applied the correct legal standard when seeking to demonstrate the anti-competitive effects of Qualcomm's exclusivity payments.

## BACKGROUND

On 24 January 2018 the European Commission imposed a fine of €997.4 million on Qualcomm for abuse of dominance under Article 102 TFEU (as reported in a previous edition of this newsletter). According to the Commission, Qualcomm was dominant on the global market for Long Term Evolution (LTE) baseband chipsets between 2011 and 2016, and had abused its dominance by making payments to Apple on the condition that Apple obtained LTE chipsets for its iPad and iPhone models exclusively from Qualcomm. The Commission considered that the effect of these payments was to exclude Qualcomm's rivals from competing for a share of Apple's entire demand for LTE chipsets.

Qualcomm appealed the decision to the GC on 6 April 2018.

## GC JUDGMENT

On 15 June 2022 the GC annulled the Commission's decision in its entirety.

### *MANIFEST PROCEDURAL ERRORS*

Qualcomm argued that the Commission had breached its rights of defence by committing manifest procedural errors during the administrative procedure that led to the adoption of the Commission's decision. The GC agreed.

First, the GC found that the Commission had failed to fulfil its obligation to record properly the content of all interviews conducted for the purposes of collecting information relating to the subject matter of an investigation. In particular the GC found that the Commission had failed to fulfil this obligation in respect of meetings and conference calls it held with third parties. The GC considered that the information obtained by the Commission in those interviews might have been relevant for Qualcomm's defence.

Second, by adopting a decision which had a narrower focus (concerning the market for LTE chipsets) than the statement of objections (which concerned the markets for both LTE and Universal Mobile Telecommunications Service chipsets), the Commission had affected the relevance of the data necessary for Qualcomm to complete its own 'effects' analysis.

These errors, whether taken individually or jointly, undermined Qualcomm's rights of defence and vitiated the Commission's decision.

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## *ANTI-COMPETITIVE EFFECTS - iPHONES*

Qualcomm also contested the Commission's assessment of the potential anti-competitive effects of its exclusivity payments. It first argued that the Commission had failed to take account of "*all relevant circumstances*", namely that there was no 'contestable' portion of Apple's demand for LTE chips for iPhones.

The GC acknowledged that when the Commission seeks to establish that conduct is capable of being anti-competitive, it must consider "*all relevant circumstances*" and ensure the potential anti-competitive effect of the alleged conduct is not "*purely hypothetical*". It then concluded that there was no contestable demand for most iPhone models sold between 2011 and 2016, since only Qualcomm's LTE chipsets were capable of meeting Apple's technical and scheduling requirements.

The Commission had failed to make the link between this lack of technical alternatives to Qualcomm's LTE chipset for most iPhone models – which comprised c. 90 per cent of Apple's LTE chipset requirements – and the alleged lessening of Apple's incentives to switch to Qualcomm's competitors. On the contrary, the Commission decision had consistently referred to the anti-competitive effects of Qualcomm's exclusivity payments on Apple's demand for LTE chipsets for all its devices, without distinguishing between the demand for iPhones and iPads. It had, therefore, failed to take account of "*all relevant circumstances*".

## *ANTI-COMPETITIVE EFFECTS - iPADS*

During the hearing, the Commission had attempted to modify its analysis to argue that, even if the only contestable portion of Apple's demand was for LTE chipsets for iPads, Qualcomm had leveraged the non-contestable share of Apple's demand for LTE chipsets for iPhones to foreclose competitors on the contestable share of demand relating to iPads. The GC accepted Qualcomm's argument that the Commission could not recast its theory of harm after adopting its decision.

Qualcomm also argued that the Commission had failed to demonstrate that the exclusivity payments had actually influenced Apple's sourcing decisions in relation to iPad models launched in 2014 and 2015. The GC once again agreed. In particular it agreed with Qualcomm's submission that there was no contestable demand for those iPad models - as with iPhones, competitors' (in particular Intel's) LTE chipsets did not meet Apple's technical and scheduling requirements.

In any event, the GC held that, even if the Commission had established anti-competitive effects in respect of iPads, this would not have countered its failure to take account of the lack of contestable demand for Apple's LTE chipset requirements for iPhones when alleging anti-competitive effects in respect of all Apple devices.

## OUTLOOK

The GC's judgment clarifies the procedures by which the Commission must reach its decision, and reaffirms the high threshold the Commission must meet when establishing the anti-competitive effects of exclusivity payments under Article 102 TFEU, following the Court of Justice's (CJ) decision in *Intel* (as reported in a previous briefing).

In this regard, it is another example of the GC finding the Commission's effects analysis wanting, following its remittal decision in *Intel* earlier this year (as reported in a previous briefing). The Commission has appealed the GC's finding in *Intel* to the CJ. It remains to be seen whether it will do the same in respect of this latest judgment from the GC.

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# OTHER DEVELOPMENTS

## MERGER CONTROL

### THYSSENKRUPP LOSES APPEAL AGAINST THE EUROPEAN COMMISSION'S VETO OF JOINT VENTURE WITH TATA

On 22 June 2022 the GC issued a judgment upholding the Commission's decision to prohibit a proposed joint venture between thyssenkrupp and Tata Steel. The GC rejected all the arguments raised by thyssenkrupp.

On 25 September 2018 thyssenkrupp and Tata notified the Commission of their plans to acquire joint control of a newly established joint venture that would bring together the flat carbon steel business of Tata and thyssenkrupp in the EEA. The Commission opened an in-depth investigation into the proposed transaction as it had serious competition concerns in relation to its compatibility with the internal market, particularly regarding metallic coated and laminated steel products for packaging, and hot-dip galvanised steel products used in the automotive industry. On 11 June 2019 the Commission prohibited the proposed transaction (as reported in a previous edition of the newsletter). On 22 August 2019 thyssenkrupp appealed to the GC for the annulment of the Commission's decision.

In its judgment, the GC upheld the Commission's decision, holding that the Commission made no procedural errors, errors of law or manifest errors of assessment. Thyssenkrupp had, *inter alia,* argued that the Commission had wrongly defined the relevant product markets by not including electrogalvanised steel in its market definition, thereby failing to account for the interchangeability of galvanised industrial and automotive products. The GC rejected this argument and ruled that the Commission's finding of a separate market for automotive hot-dip galvanised steel was based on an overall assessment of a large number of factors and was "*supported by an extensive body of evidence*". In response to the appellant's argument that the Commission had failed to carry out an econometric test such as the SSNIP test to assess supply-side substitutability, the GC clarified that the "*Commission is not bound by any test when determining whether the products concerned may be substitutable*". The Commission therefore has the right to choose from the evidence before it whatever it considers the most appropriate in each individual case.

The GC also held that the Commission was right to reject the remedies offered by the two companies. Thyssenkrupp pleaded that the Commission had unduly dismissed the remedies offered and that the Commission had failed to perform a proper market test of the remedies. The GC disagreed and concluded that "*the Commission thoroughly examined all the elements of the commitments to establish whether they were comprehensive and effective from all points of view*".

### CAT ISSUES JUDGMENT ON META APPEAL AGAINST FACEBOOK / GIPHY MERGER

On 14 June 2022 the UK Competition Appeal Tribunal (CAT) issued a judgment on Meta Platform's appeal against the UK Competition and Markets Authority's (CMA) prohibition of Meta's completed acquisition of Giphy.

On 30 November 2021 the CMA issued its final report concluding that Meta's ownership of Giphy had resulted or may be expected to result in a substantial lessening of competition in (i) the supply of display advertising in the UK, and (ii) the supply of social media services worldwide (including in the UK). The CMA further ordered Meta to divest Giphy following its acquisition of the online search engine in May 2020. On 23 December 2021 Meta filed an application with the CAT appealing the CMA's decision, based on six grounds of appeal (as reported in a previous edition of our newsletter).

In its judgment, the CAT dismissed all of the substantive grounds of appeal brought by Meta. The CAT noted that the substantive grounds of appeal all related to the CMA finding that the transaction would result in a horizontal substantial lessening of competition. In particular, Meta's substantive grounds of appeal focused on the CMA's interpretation of the market and its assessment of dynamic competition in the market. The CAT found that the

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CMA had applied the correct test. The CAT also ruled that the CMA acted rationally in order to put itself in a position to properly apply the substantial lessening of competition test in a case of dynamic competition.

The CAT also considered that the CMA should take into account the drawbacks of intervention and potential chilling effect on innovation. It emphasised that in future cases of dynamic competition, the CMA should take into account the impact of its intervention if its assessment of dynamic competition is wrong.

However, the CAT upheld Meta's procedural ground of appeal relating to the redaction of necessary information from the CMA's provisional findings and final report. The CAT held that the redactions applied by the CMA were "*difficult to defend*". Indeed, the CAT noted the CMA had failed to balance the protection of confidential information with the necessity of disclosure and had, instead, focused on protecting third party material. In particular, the CMA did not disclose that Snap (Meta's competitor) had acquired Gfycat (a close competitor of Giphy). The CAT considered that the CMA, by not disclosing knowledge of this deal, had withheld information that may have helped Meta's case. The CAT held that the CMA had failed to properly consult and had wrongly excised portions from the provisional findings and the final report, ruling that the excisions were "*unlawful and cannot be justified by reference to the regime in the Enterprise Act 2002*".

## ANTITRUST

### HONG KONG ANTITRUST REGULATOR TAKES AIR-CONDITIONING WORKS CARTEL CASE TO THE COMPETITION TRIBUNAL

The Hong Kong Competition Commission (HKCC) commenced proceedings before the Competition Tribunal (Tribunal) against two air-conditioning works providers and their parent companies for allegedly fixing prices, sharing markets, and/or rigging bids in contravention of the First Conduct Rule of the Competition Ordinance.

According to the HKCC's press release, senior representatives of the two competitors engaged in frequent communications (e.g. emails, WhatsApp messages) with each other in relation to customers' requests for tender or quotations. In those communications, they agreed to provide cover bids, shared information about their intentions to bid, and/or disclosed commercially sensitive information on their intended bidding price or other parameters of the bid (e.g. required number of days to complete the works).

The HKCC's case alleges that the suspected cartel reduced customer choice and increased the cost of air-conditioning works for the Hong Kong public and private sectors. The potential impact on the sales of the two providers is estimated to be around HK$2 billion (c. £2 million).

The HKCC is seeking remedies before the Tribunal, including pecuniary penalties, prohibition orders and orders requiring the respondents to implement compliance programs. Following the recent Hong Kong Court of Appeal ruling that contractors may be fully liable for fines for anti-competitive conduct carried out by subcontractors (as reported in a previous edition of our newsletter), the HKCC indicated in its press release that it will seek to assert that the parent companies of the works providers should be liable for the full, unmitigated penalty, to "*highlight the need for parent companies to ensure all members of their group abide by the Competition Ordinance*".

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