

## EU Competition Law

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### EU Commission Fines Qualcomm EUR 997 Million

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#### SUMMARY

On January 24, 2018, the European Commission (“Commission”) fined Qualcomm EUR 997 million (approximately USD 1.2 billion) for abusing its dominant position under Article 102 TFEU in the market for LTE (4G) broadband chipsets.<sup>1</sup> Closing a three-year investigation, the Commission found that Qualcomm had made significant payments to secure exclusivity from a key customer, Apple.

This is the first time that the Commission has imposed a fine on Qualcomm, almost a decade after closing a four-year investigation into Qualcomm’s 3G licensing practices.<sup>2</sup> The fine, which amounts to 4.9% of Qualcomm’s 2017 worldwide turnover, ranks among the highest imposed by the Commission to date under Article 102 TFEU. It comes close to the EUR 1.06 billion fine imposed in 2009 on Intel for issuing rebates and payments designed to secure customer exclusivity.<sup>3</sup>

The decision was issued only six days after the Commission cleared Qualcomm’s USD 47 billion acquisition of NXP Semiconductors subject to various licensing, interoperability, and standard-essential patent transfer commitments in the near-field communication sector.<sup>4</sup> Qualcomm is still subject to a seemingly more complex abuse-of-dominance investigation by the Commission involving predatory pricing practices in the market for UMTS (3G) baseband chipsets.<sup>5</sup>

Qualcomm announced its intention to appeal the Commission’s decision before the EU Courts.<sup>6</sup>

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#### DECISION

Based on the limited public information currently available, it is understood that Qualcomm prevented alternative suppliers (including at least Intel) from competing on the merits in the market for LTE baseband chipsets between 2011 and 2016. According to the Commission, Qualcomm accounted for more than 90% of the worldwide LTE baseband chipset market during most of the relevant period. Qualcomm’s dominance was further enhanced by high entry barriers resulting from Qualcomm’s intellectual property rights as well as the R&D expenditure necessary to develop competing LTE baseband chipsets.

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Qualcomm abused its dominance by paying billions of US dollars to Apple on the condition that Apple would not source LTE baseband chipsets from competing suppliers for use in its iPhones and iPads. The agreement made clear that Qualcomm would terminate the payments if Apple launched a device incorporating a competitor's chipset. Apple would also have to return a portion of cashed-in payments if it decided to switch suppliers. Consequently, competing suppliers such as Intel were denied access to Apple's demand, which represented approximately one third of the market. This also entailed a loss of resulting business opportunities with customers and manufacturers that follow Apple's procurement and design choices.

The Commission justified the level of the EUR 997 million fine by the strength of Qualcomm's dominant position, the significance of the payments Qualcomm had made to Apple, the payments' effectiveness in preventing Apple from switching suppliers, and the importance of Apple as a customer in the market for LTE baseband chipsets.

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### COMMENT

This is the Commission's first abuse-of-dominance decision since the landmark judgment of the EU Court of Justice ("ECJ") in *Intel*.<sup>7</sup> In that judgment, the ECJ restricted the presumption of illegality of exclusivity rebates in cases where the dominant company submits evidence that its conduct was not capable of restricting competition in the market. According to the Court, the Commission cannot rely on an automatic finding of illegality and refuse to run an economic assessment of the conduct's ability to foreclose as-efficient competitors. It must assess the defendant's arguments and confirm anticompetitive effects.

While the Commission apparently assessed and rejected the economic evidence submitted by Qualcomm, it is not clear what degree of economic analysis features in the Commission's decision. Based on available public sources, it seems that the Commission's case rests to a significant extent on Apple's internal documents revealing that Qualcomm's payments played a material role in Apple's decision not to switch to Intel. According to Margarethe Vestager, the Commissioner for competition, "Apple was seriously thinking about switching from Qualcomm to Intel for some of its supplies of baseband chipsets [...] at various moments between 2011 and 2016".<sup>8</sup>

In September 2016, as Apple's agreement with Qualcomm approached the end of its term and outstanding payments were sufficiently limited, Apple started to source part of its LTE baseband chipset requirements from Intel. This evidence will likely play an important role in the Commission's demonstration that Qualcomm's behavior had an effect on the market.

On the other hand, Ms. Vestager admitted having "carefully examined" the evidence to make sure the decision "fully complies with the guidance given by the court" and to have used "a variety of qualitative and quantitative evidence" in addition to Apple's internal documents.<sup>9</sup> It however remains to be seen what the practical impact of the *Intel* judgment will be on the Commission's use of economic evidence to establish anticompetitive effects.

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The Qualcomm decision is a further reminder that EU competition law severely limits the actions that dominant companies can take to safeguard their customers' loyalty.

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### ENDNOTES

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- <sup>1</sup> Commission Press Release of January 24, 2018, IP/18/421.
- <sup>2</sup> Commission Press Release of November 24, 2009, MEMO/09/516.
- <sup>3</sup> Commission Decision of May 13, 2009, Intel Corporation, COMP/37.990.
- <sup>4</sup> Commission Decision of January 18, 2018, Qualcomm / NXP Semiconductors, M.8306.
- <sup>5</sup> Commission Press Release of July 16, 2015, IP/15/5383.
- <sup>6</sup> Qualcomm Press Release of January 24, 2018, *available at* <https://www.qualcomm.com/news/releases/2018/01/24/qualcomm-appeal-european-commission-decision-regarding-modem-chip-agreement>.
- <sup>7</sup> ECJ, Judgment of September 6, 2017, Intel Corporation v. Commission, C-413/14 P.
- <sup>8</sup> Statement by Commissioner Vestager on Commission decision to fine Qualcomm for abuse of market dominance in LTE baseband chipsets, January 24, 2018, *available at* [http://europa.eu/rapid/press-release\\_STATEMENT-18-427\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-18-427_en.htm).
- <sup>9</sup> Statement by Commissioner Vestager on Commission decision to fine Qualcomm for abuse of market dominance in LTE baseband chipsets, January 24, 2018, *available at* [http://europa.eu/rapid/press-release\\_STATEMENT-18-427\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-18-427_en.htm).

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