

# EU Allegations of Qualcomm Market Abuse Indicative of Global Enforcement Trend

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On December 8, 2015, the European Commission filed two Statements of Objections against U.S. semiconductor-maker Qualcomm Inc., alleging that the company had abused its dominant position in the baseband chipset market through two separate types of conduct. Qualcomm is a world leader in 3G (UTMS), 4G (LTE) and next-generation wireless technologies, and is the world's largest supplier of baseband chipsets. Under EU antitrust law, dominant companies have a responsibility not to abuse their market power.

After formally investigating concerns since July of this year, the commission preliminarily concluded that Qualcomm paid a major smartphone/tablet manufacturer to exclusively use Qualcomm chipsets and also engaged in predatory pricing by selling chipsets below production cost with the aim of driving rising competitor Icera out of the market.

## Allegations of Market Power Abuse: Exclusivity Payments and Predatory Pricing

The first Statement of Objections is based on the allegation that, from 2011 to present, Qualcomm paid substantial rebates to an unnamed major smartphone/tablet manufacturer on the condition that the manufacturer agree to exclusively use Qualcomm chipsets in its devices. Based on its findings, the commission has taken the view that such conduct has reduced the manufacturer's incentives to source chipsets from Qualcomm competitors and consequently has harmed competition in the market for UTMS and LTE baseband chipsets.

The second Statement of Objections concerns Qualcomm's sales to two customers of three chipsets incorporated into dongles (the now-defunct, small USB devices that were used to provide cellular connectivity for laptops) from 2009-11. According to allegations initially filed with the European Commission in a 2010 complaint, Qualcomm engaged in predatory pricing practices in order to drive its rising competitor Icera out of the market. According to the commission's findings, this conduct appears to have taken place at a time when Icera posed a growing threat to Qualcomm's position as the market leader by offering a superior product and an advanced data rate performance. Based on this information, the commission believes that Qualcomm reacted to the threat of Icera by selling certain quantities of its UTMS baseband chipsets to two of its customers at prices that did not cover Qualcomm's costs. It is likely that the commission views Icera's subsequent exit from the market as clear proof of the harm. Icera was acquired in 2011 by Nvidia, and Nvidia announced in May 2015 that it planned to wind down the Icera business. The two companies have filed a competition claim against Qualcomm in a London court.

Margrethe Vestager, the EU commissioner in charge of competition policy, cited the absolute necessity of high-speed Internet, and thus, of baseband chipsets, in today's economy as central to the motivations behind the charging.

Following a 2014 ruling against Intel in a competitive pricing case, many have questioned what standards the commission ultimately will be required to apply in assessing Qualcomm's conduct. In its Intel judgment, the EU General Court rejected the relevance of a cost/price test for purposes of assessing the legality of Intel's discounts despite the commission's reliance on this test as a corroborating factor in its decision. In the words of the European Court, the purpose of such a test is to ascertain, from a price/cost comparison, whether a competitor as efficient as the dominant undertaking can compete with the latter or whether, on the contrary, the dominant undertaking's policy produces anticompetitive exclusionary effects on the relevant market. The general court's rejection of the "as efficient competitor" (AEC) test was a significant setback for those within the Directorate-General for Competition who have sought to develop an effects-based

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approach to Article 102. It also called into question the status of the commission's Article 102 guidance paper published in 2009, which advocated use of the AEC test as a screening mechanism. It remains to be seen whether the commission's charges against Qualcomm will apply the criteria laid out in its guidance paper in assessing Qualcomm's pricing. The Intel judgment also maintained the strict position that, at least where exclusivity is concerned, there is no need to show actual foreclosure effects or harm to consumers. The judgment is currently under appeal.

If found to have breached the EU's antitrust rules, Qualcomm could face fines of up to 10 percent of its annual global revenue (roughly \$26.5 billion in 2014) and could be required to change some of its business practices, many of which already have come under intense scrutiny in various investigations worldwide. In November 2015, Qualcomm was charged with antitrust viola-

tions in South Korea, and earlier this year it agreed to pay a \$975 million fine for violating China's antimonopoly law.

On December 9, 2015, Qualcomm also confirmed that it is facing a new investigation in Taiwan related to its patent licensing practices. Taken together, these investigations simply could be seen as the latest in a string of attacks on Qualcomm's substantial global position in baseband chipsets, which largely have been driven by regulators' wary approach to Qualcomm's licensing practices. However, global trends suggest that regulators in the EU and elsewhere are more rigorously pursuing stricter enforcement of antitrust laws. Along with the present case against Qualcomm, recent international actions against Intel, Microsoft and Google prove that even the most sophisticated of international players must consider the broad-reaching effects of their competitive practices.

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