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ANTITRUST TRADE AND PRACTICE

Expert Analysis

Takeaways From the Recent Qualcomm Decision

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On May 21, California federal judge Lucy Koh ordered a sweeping injunction against cellphone chipmaker Qualcomm, requiring the company to renegotiate its licenses and alter its business model. Qualcomm's "no license, no chips" policy, which required cellphone manufacturers to license Qualcomm's patents in order to access Qualcomm's modem chips, was challenged by the Federal Trade Commission in January 2017. Apple also sued Qualcomm for its patent-licensing practices but, in April of this year, reached a surprising settlement on the first day of trial. See Daniel Siegal, *Apple, Qualcomm Drop Multibillion-Dollar Licensing War*, Law360 (April 16, 2019).

The case was long-anticipated to have a significant impact on intellectual property law and the technology industry by clarifying the obligations of standard essential patent holders to license their technology on fair terms and deal with competitors. Given the case's potential impact, the Department of Justice took the unusual step of filing a statement of interest after the bench trial to encourage additional briefing on a potential remedy should the court side with the FTC. The DOJ's intervention, and the judge's ultimate decision, has exposed tensions between the DOJ and FTC, and within the FTC itself, and public scrutiny is far from over as the case heads to the Ninth Circuit on appeal.

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Asserted Harm And Proposed Remedy

Judge Koh's decision put in place a permanent injunction that requires Qualcomm to license its modem chips on what are known as fair, reasonable, and non-discriminatory (FRAND) terms. Typically, a patent holder can unilaterally decide whether to license its patented technology and under what terms. However, Qualcomm's modem chips are "standard essential patents," which means the technology is necessary to meet cellular standards set by industry participants worldwide. Because a standard essential patent holder could prevent other industry participants from meeting this standard and thereby stifle competition, these patent holders are required to commit to licensing on FRAND terms. See Findings of

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Fact and Conclusions of Law, *FTC v. Qualcomm*, No. 17-CV-00220-LHK (N.D. Cal. May 21, 2019).

The court agreed with the FTC that Qualcomm violated its FRAND commitment through its "no license, no chips" policy. Under this policy, the court found that Qualcomm threatened to not to sell its modem chips to cellphone manufacturers unless manufacturers agreed to sign patent license agreements on Qualcomm's preferred terms, allowing Qualcomm to charge unreasonably high royalty rates. The court also found that Qualcomm refused to license its standard essential patents to rival modem chip suppliers, which prevented entry, hampered competition, and further limited manufacturers' chip supply options, maintaining Qualcomm's ability to charge supra-competitive royalties.

The court issued a five-part injunction: (1) prohibiting Qualcomm from conditioning the supply of modem chips on whether a customer has purchased a license and requiring Qualcomm to negotiate or renegotiate license terms with customers "free from the threat of lack of access to or discriminatory provision of modem chip supply"; (2) ordering Qualcomm to make its patents available to rival modem chip suppliers on FRAND terms; (3) prohibiting Qualcomm from entering into exclusive dealing agreements for the supply of modem chips; (4) prohibiting Qualcomm from interfering with any customer's ability to communicate with a government agency about a potential law enforcement or regulatory matter; and (5) requiring Qualcomm to submit to monitoring for seven years and make annual reports to the FTC regarding compliance.

The court's injunction takes the unusual step of requiring Qualcomm to license its chips both to manufacturers and rival chip suppliers. This is notable because antitrust laws do not require a company to deal with competitors beyond of the limited exception established in *Aspen Skiing*, 472 U.S. 585 (1985). As the Supreme Court explained in *Verizon v. Trinko*, 540 U.S. 398 (2004), *Aspen Skiing* established that there may be circumstances when a monopolist has a duty to deal with rivals, such as when the defendant's "unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing suggest[s] a willingness to forsake short-term profits to achieve an anticompetitive end." However, *Verizon v. Trinko* also noted that "*Aspen Skiing* is at or near the outer boundary of §2 liability," and like subsequent cases, declined to apply or extend this exception.

The District Court here found that Qualcomm's conduct satisfied the factors in *Aspen Skiing* relevant to imposing an antitrust duty to deal: (i) Qualcomm previously licensed its modem chips to rival modem chip suppliers and voluntarily terminated this profitable practice; (ii) Qualcomm's refusal to sell to rivals even at retail prices evidenced anti-competitive malice and (iii) Qualcomm already sold these products at retail. Accordingly, the court held that Qualcomm's licensing practices were anti-competitive and violated §2 of the Sherman Act and §5 of the FTC Act. This portion of the opinion, in particular, will be the subject of much debate as the case works its way through the appellate process, as it is at the outer bounds of—if not beyond—refusal to deal precedent.

Intra- and Inter-Agency Friction

Judge Koh's holding in favor of the FTC that Qualcomm's licensing practices violated antitrust laws caused controversy even within the FTC. A week after the ruling, FTC Commissioner Christine Wilson published an op-ed on May 28 criticizing Judge Koh's opinion for "creat[ing] new legal obligations, undermin[ing] intellectual property rights, and expand[ing] the applications of our antitrust laws beyond U.S. borders." Christine Wilson, *A Court's Dangerous Antitrust Overreach*, Wall St. J. (May 28, 2019). She took issue with two points in particular, the first being the judge's expansive reading of *Aspen Skiing*. Wilson argued the limited evidence that Qualcomm had licensed some patents to some chip makers in 1999 was not sufficient to create a duty to continue to license its patents today. She argued that holding otherwise expanded a company's obligations

"light years" beyond the outer boundary of antitrust law.

Second, Wilson criticized the judge's failure to specify any territorial limitations to her order. As a result, Qualcomm is seemingly required to negotiate or renegotiate contracts with customers worldwide, even with foreign companies that solely make, assemble, and sell phones outside the United States. Wilson suggests this remedy will lead to the continued "expropriation of American technology" and will discourage companies from investing in innovation if they will then be required to share their technology with competitors. She called the ruling "both bad law and bad policy."

Commissioner Rebecca Kelly Slaughter, on the other hand, praised the decision in a statement to MLex the day after Commissioner Wilson's article, calling it "a testament to the hard work and dedication of the FTC staff" and a "thorough accounting of the calculated and pervasive illegal actions that Qualcomm took to impede and prevent competition." Commissioner Rohit Chopra also issued a statement praising the decision on May 22, calling it "a huge victory for every consumer who uses a smartphone and every American who believes in competitive markets."

While these statements expose tensions within the FTC, the litigation also caused friction between the FTC and DOJ. On May 2, three months after trial concluded, the DOJ took the unusual step of filing a statement of interest. See Statement of Interest of the United States of America, *FTC v. Qualcomm*, No. 17-CV-00220-LHK (N.D. Cal. May 2, 2019). We previously commented on the DOJ's increasing use of statements of interest at the district court level, see *Antitrust Division Increasingly Weighs in As Amicus Curiae*, N.Y.L.J. (Feb. 11, 2019), but this filing was unique in that the agencies typically do not weigh in on each other's cases.

The DOJ's brief statement expressed no opinion on the underlying merits of the case but rather urged the court to order additional briefing and hold a hearing on issues related to a remedy should the court find Qualcomm violated the antitrust laws. The statement emphasized that "[h]olding a hearing on the appropriate remedy is vital in monopolization cases because the obligations courts impose often have far-reaching effects and can re-shape entire industries." In particular, the DOJ noted the "plausible prospect" that an overly broad remedy, such as requiring Qualcomm to renegotiate all their existing licensing agreements, as the FTC seemed to request, could reduce innovation in the markets for 5G technology.

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Assistant Attorney General Makan Delrahim was recused from the Qualcomm cases due to a past relationship with Qualcomm in private practice. But, the DOJ's statement echoes Delrahim's public statements about the Antitrust Division's changing approach to applying antitrust laws in intellectual property disputes. He has argued that "antitrust law should not be used as a tool to police FRAND commitments" and that an "antitrust duty to license on FRAND terms would also contravene the patent laws' policy of promoting innovation[.]" See Assistant Attorney General Makan Delrahim Remarks at the IAM Patent Licensing Conference (Sept. 18, 2018); Assistant Attorney General Makan Delrahim Remarks at the USC Gould School Law (Nov. 10, 2017) (cautioning that with intellectual property rights, "if we inject antitrust law where it does not belong, it can actually subvert the competitive process and do serious harm to American consumers and to innovation itself"). This policy marks a shift from the Obama Administration, which had focused more on preventing patent holders from "holding up" the license bargaining process in order to receive supracompetitive payments. See, e.g., Matthew Perlman, *DOJ's Stance On SEPS Gets a Very Mixed Response*,

Law360 (June 4, 2018). The FTC's suit against Qualcomm, filed in the last days of the Obama Administration, alleged the chipmaker had done exactly that.

The FTC filed a terse, one-paragraph response to the DOJ's statement of interest. See Plaintiff Federal Trade Commission's Response to Statement of Interest Filed by U.S. Department of Justice Antitrust Division, *FTC v. Qualcomm*, No. 17-CV-00220-LHK (N.D. Cal. May 9, 2019). The response clarified that "the FTC did not participate in or request this filing" and stated that while it disagreed with several of the DOJ's contentions, it would refrain from further briefing unless requested by the court due to the case's voluminous existing briefing. In a footnote, the FTC highlighted that it was already established that the trial and briefing would address both liability and remedy, a point that Judge Koh also made when issuing her opinion without further briefing on the injunction.

Next Steps

Qualcomm has already moved to stay the court's order pending appeal, pointing to the "obvious and irreparable" harm Qualcomm would experience if it is required to renegotiate all its existing licensing agreements and begin licensing its chips to competitors. See Defendant Qualcomm Incorporated's Motion for Stay Pending Appeal, *FTC v. Qualcomm*, No. 17-CV-00220-LHK (N.D. Cal. May 28, 2019). Qualcomm argues the order requires it to "fundamentally restructure the very nature of its business," changes it will be unable to undo should the Ninth Circuit alter the decision. For instance, Qualcomm could not "unsell the modem chips this court's injunction forced it to sell exhaustively" or reinstate its prior licensing agreements.

The company also argues a stay would be appropriate in light of "serious questions" about the appropriate legal standard for awarding injunctive relief under the FTC Act and the FTC's theory of antitrust liability and duty to deal. Qualcomm cites to remarks from Assistant Attorney General Delrahim that an antitrust duty to license on FRAND terms would contravene patent law policy, as well as a similar holding from the Northern District of California. Qualcomm argues that the DOJ, FTC, and numerous courts have recognized *Aspen Skiing* as the "outer boundary of §2 liability" under the Sherman Act. The DOJ's amicus curiae brief in *Viamedia v. Comcast*, filed in November 2018, argued that a company's refusal to deal with a competitor violates §2 only if the refusal would make no economic sense but for its tendency to lessen competition. Qualcomm argues it clearly has legitimate business reasons for its licensing structure. Like Commissioner Wilson, it claims there was no prior history of exhaustively licensing its patents at the chip level, but rather the company has always followed widespread industry practice of licensing its patents to manufacturers at the device level.

Qualcomm has already filed a notice of appeal to the Ninth Circuit. See Notice of Appeal, *FTC v. Qualcomm*, No. 17-CV-00220-LHK (N.D. Cal. May 31, 2019). The appeal provides another forum for the continued debate between the DOJ and FTC, and we will likely see these differing views expressed through the DOJ filing an amicus brief. Following Commissioner Wilson's article, it also remains to be seen whether her rationale will influence the positions taken by the FTC in its appellate briefing, particularly on the scope of the district court's remedy. Companies with a high market share will be paying attention to this remedy and the case's development to better understand their obligations to license to, or continue to deal with, competitors.