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Analysis: "Lesson *almost* learnt: 1+1 does not equal anticompetitive effects when applying the Intel test in exclusive payments cases (Case T-235/18)" by Nora Lampecco

On 15 June 2022, the General Court (GC) released its judgment in *Qualcomm v European Commission* (T-235/18) and annulled the Commission's decision on appeal fining Qualcomm for abusing its dominance in offering payments to Apple for exclusive use of Qualcomm's chipsets in its devices from 2011 to 2016. In its first review of the Commission's application of the so-called *Intel* test, the GC has reaffirmed the need for a strong case by case effect-based analysis of exclusivity payments.

In addition to procedural irregularities affecting Qualcomm's right of defence, explained in a nutshell here, the GC found that the Commission erred in its application of the *Intel* test. In its decision, the Commission had argued that the exclusivity payments could lead to exclusionary effects because of their *capability* to reduce Apple's incentives to use competing chipsets on all its devices from 2011 to 2016 and by *actually having reduced* these incentives regarding its iPads (those launched in 2014-2015).

The Commission's finding was based on: (i) the part of the market covered by the exclusivity; (ii) Qualcomm's dominance; (iii) Apple's importance for competitors; (iv) the conditions, as well as; (v) the duration and amount of these payments.

The GC however declared that the Commission had failed to examine all the relevant elements and was not coherent in its assessment. Concerning the *potential exclusionary effects*, it concluded that the Commission's analysis did not include the absence of technical alternatives to Qualcomm chipsets for a significant part of Apple's needs during the infringement period. Indeed, only half of the 2016 iPhones-market was contestable and iPhones were representing 90% of Apple's sales. While the GC recognised that the five factors on which the Commission's reasoning was based ma the examination of anticompetitive effects, it considered that they were not demonstrative of the exclusionary effects in this particular case. It also underlined that no economic models, such as an 'as efficient' competitor test, had been used to demonstrate these potential effects. With regard to the *actual reduction* of Apple's incentives for its iPads to be launched in 2014-2015, the GC found that the Commission was not coherent in its identification of the concerned devices and failed to consider some relevant elements such as probative documents casting doubts on the technical adequacy of competing chipsets.

In *Intel* (C-413/14 P) the Court of Justice had made it clear that the presumption that exclusivity payments are abusive is a rebuttable one, and unveiled a test in order to assess that. Consequently, if the concerned undertaking provides evidence during the administrative phase that its conduct is not capable of causing exclusionary effects, the Commission must *at least* assess five factors. These are: (i) the extent of the concerned undertaking's dominance; (ii) the part of the market covered by the conduct; (iii) the conditions of the exclusivity payments; (iv) the duration and amount of these payments; and (v) the existence of a possible strategy to exclude 'as efficient' competitors. *Qualcomm* is the first case in which the application of this *Intel* test is subject to judicial review, which is of major significance for future exclusivity-inducing payments cases such as, notably, the *Google Android* judgment on appeal, pending delivery in September 2022.

Some highlights regarding the *Intel* test can be drawn from the *Qualcomm* judgment.

First, the GC reaffirms that there is no mathematical formula to apply in exclusivity payments cases. The need to demonstrate that the conduct has the capability of causing exclusionary effects relies on all the relevant elements of the case and the presence of the *Intel* factors are not always enough to demonstrate such effects.

Second, the GC underlines the absence of the 'as efficient' competitor test. This seems to support AG Wahl's Opinion that, although not imposed in each case, the *AEC* test should be performed when the other factors do not unequivocally support the finding of exclusionary effects.

Third, while *Intel* required the analysis of the five factors described above, the wording in *Qualcomm* is unclear. Indeed, the GC states that these factors 'may be relevant'. Moreover, it remains silent on the absence of a reference to a potential exclusionary strategy in its review of the Commission's consideration of all the relevant factors.

These three highlights are auspicious for Google as the Commission applied a similar reasoning in its Google Android decision.

The General Court's first review of the Commission's application of the *Intel* test in *Qualcomm therefore saw it* reasserting a strong case by case effect-based approach towards exclusivity payments abuses while rendering unclear the place of the five factors test previously set out in *Intel* – possibly to the delight of Google's lawyers.

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