

Qualcomm - “Intel” in action?

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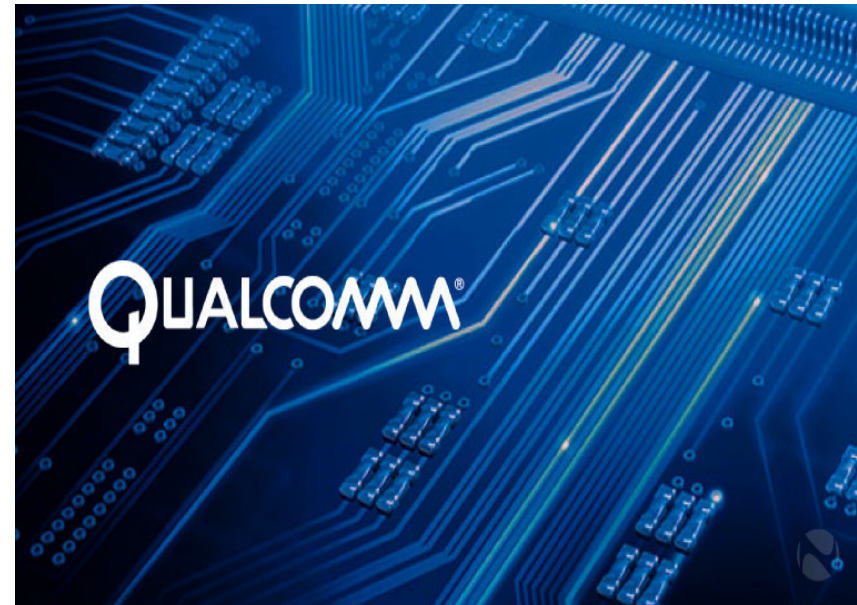
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The Qualcomm Facts

Qualcomm Facts

- Qualcomm is San Diego-based chip manufacturer supplied over 90% of 4G chips worldwide 2011 - 2016
- 4G Chips are input for smartphone manufacturers such as Apple, Samsung, HTC and others
- Apple accounted for approximately 1/3 of worldwide demand for 4G chips
- 4G chips are differentiated product tailored to purchaser's specifications and requiring significant client-specific sunk costs
- Prior to 2011, Infineon (Intel) were the sole supplier of mobile chips to Apple
- Exclusivity rebate agreement committed Qualcomm to making payments conditional on Apple *'exclusively [using] Qualcomm chipsets'*.
- Apple's internal documents showed that rebate dis-incentivised it from switching some of its demand to Intel

The Intel Framework

The Intel Framework: Main Implications

- Court of Justice set aside General Court's judgment for failing to address Intel's arguments that Commission's AEC Test was flawed in its analysis of *'whether the rebates at issue were capable of restricting competition'* (para. 147)
- Judgment made three core substantive findings in relation to exclusivity and loyalty-inducing rebate schemes:
 - First, where dominant firm submits *'on the basis of supporting evidence, that its conduct was not capable of restricting competition'*, the Commission must show that the rebate scheme was capable of anti-competitive foreclosure (the "**Intel Effects Test**")
 - Second, the Commission's foreclosure analysis must assess the *'intrinsic capacity ... to foreclose competitors which are at least as efficient as the dominant undertaking'* ("**AEC Standard**").
 - Third, "the exclusionary effects...may be counterbalanced or outweighed by advantages in terms of efficiencies which also benefit the consumer." ("**Efficiency defence**")

The Intel Framework: the Intel Effects Test (1)

- “Clarification” of Hoffmann-La Roche (para 138)
- Dominant firm can overcome the Hoffmann La Roche presumption by submitting “*supporting evidence that conduct was not capable of restricting competition*” (para 138)
- In this case, the Commission must analyse:
 - the extent of the undertaking’s dominant position on the relevant market
 - the share of the market covered by the challenged practice
 - the conditions and arrangements for granting the rebates in question, their duration and their amount;
 - the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant firm (para 139)

The Intel Framework: the Intel Effects Test (2)

Open questions

- (1) What “*supporting evidence*” does the dominant firm have to submit to reverse the *Hoffmann-La Roche* presumption?
- (2) What **type of analysis** is required once the presumption has been reversed by the dominant firm?
 - Full effects analysis in all cases; or
 - “Object abuse” analysis, taking into account “all circumstances”
- (3) Does it make a difference whether or not the dominant firm alleges an **efficiency defence**?

The Intel Framework: AEC standard(1)

- Court of Justice made clear that standard for exclusivity and loyalty rebates was the “as efficient competitor” standard:
 - *“Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient”* (para 134)
 - *“That balancing of the favourable and unfavourable effects ...can be carried out ... only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient.”* (para 140)
- Applying the AEC Standard, how to distinguish between:
 - Foreclosure effects on as efficient competitors (relevant)
 - Foreclosure effects on less efficient competitors (irrelevant)

The Intel Framework: AEC Standard (2)

Open questions:

- (1) Is the AEC standard always the correct standard?
- (2) Does the AEC standard always require the use of an AEC / Price Cost Test for exclusivity rebates rebates?
 - Need a methodology that reliably distinguishes between “good” foreclosure and “bad” anti-competitive foreclosure
 - Need to quantify exclusionary effect to test whether it can be counterbalanced by efficiency gains
 - NB. AEC Test becomes a predation test where competition is for the entire demand of a customer

The Intel Framework: Efficiency defence

- The Court makes clear that the efficiency defence exists “in addition” to the defence of objective justification (para 140)
- The mechanics seem to be modelled on Article 101 (1) and (3)
 - Efficiencies also have to benefit consumers
 - Such efficiencies may counterbalance or outweigh any exclusionary effects
 - The Commission to undertake “*an analysis of the intrinsic capacity to foreclose competitors which are at least as efficient as the dominant firm*”
(= quantification of harm)
 - The Commission then has to carry out a balancing exercise

Does Qualcomm comply with Intel Framework?

“[T]his is the Commission’s first decision on an abuse of a dominant market position since the Court of Justice ruling on the Intel case ... This judgement gave guidance on how the Commission has to prove its case and which tools it can rely on. We have carefully examined the ruling and the evidence in our case file, to make sure our decision fully complies with the guidance given by the Court.”



Does Qualcomm comply with Intel Effects Test?

“Intel”: <i>“The Commission is required to analyse ...”</i>	Commission (Press release from 24 January 2018): <i>“This assessment took into account, ...”</i>	Satisfied?
<i>“extent of the undertaking’s dominant position”</i>	<i>“the extent of Qualcomm’s dominant position”</i>	?
<i>“share of the market covered by the challenged practice”</i>	<i>“the importance of Apple as a customer”</i>	✓
<i>“conditions and arrangements for granting the rebates in question, their duration and their amount”</i>	<i>“the significant amounts paid by Qualcomm in exchange for exclusivity”</i>	?
<i>“possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market”</i>	<i>‘a broad range of contemporaneous evidence that Qualcomm’s payments reduced Apple’s incentives to switch to rivals</i>	?
<i>‘exclusionary effect ...may be counterbalanced or outweighed by advantages in terms of efficiency which also benefit the consumer’</i>	<i>‘Qualcomm did not demonstrate that its exclusivity condition generated any efficiencies which could have justified Qualcomm’s practices’</i>	?

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