

## EU GENERAL COURT CONFIRMS EC FINDING OF QUALCOMM PREDATORY PRICING ABUSE OF DOMINANCE

On September 18, 2024, the EU General Court (GC) issued its judgment rejecting Qualcomm's arguments to annul a European Commission (EC) decision finding that the company had engaged in predatory pricing of its mobile chipsets (**Decision**). The judgment confirms and elaborates on key principles of predatory pricing abuses under EU antitrust law. It is open to a further appeal to the EU Court of Justice (CJEU).

The GC did grant Qualcomm a slight reduction in the fine of 1.4% on account of the EC using a different basis for the calculation of the fine than set out in the EC's fining guidelines and failing to provide Qualcomm an adequate opportunity to address this divergence. The judgment follows the GC's 2022 annulment of an EC decision finding Qualcomm abused its dominant position in LTE chipsets by entering into an agreement with Apple providing for payments conditioned upon Apple buying LTE chipsets exclusively from Qualcomm. In that case, the GC found that the EC had committed procedural errors and failed appropriately to establish effects. The EC opted not to appeal that judgment.

### THE JUDGMENT

In its all-out appeal, Qualcomm raised fifteen pleas, each of which the GC wholly rejected, with exception of the fourteenth plea in relation to the calculation of the fine, which the GC at least partially accepted, leading to the 1.4% fine reduction. In particular,

- The GC rejected all of Qualcomm's arguments related to the investigative procedure and its rights of defense:
  - A procedure of seven years since the first allegations of predation was not deemed excessively long considering the complexity of the case. The fact that the allegations had changed over the course of the procedure was held as evidence of observance of Qualcomm's rights of

### Key takeaways

- The judgment recalls that the assessment of predatory pricing under Article 102 TFEU relies on comparing prices and costs of the dominant company, and not of its competitors;
- The EC does not need to show recoupment of losses as part of a predatory pricing infringement;
- The EC can take into account a variety of discounts and payments of the dominant company to reconstitute the price actually charged to determine whether it is predatory;
- The EC is not required, when assessing predation, to examine whether the share of the market covered by the contested practice is of sufficient magnitude for that practice to have anticompetitive effects;
- By undertaking a predatory pricing analysis that compares costs and prices, the EC is inherently undertaking an as efficient competitor assessment, and is not required to run such an assessment separately; and
- A "meeting competition" defense is not a valid objective justification for below-cost pricing if the dominant company does not establish the objective necessity of this pricing or how it produces benefits to consumers that outweigh the negative effects of the conduct.

defence. Moreover, Qualcomm failed to show how changes in EC staff affected its rights of defence.

- Qualcomm failed to explain why the EC erred in concluding that the investigation of the case had been sufficient and how the potentially exculpatory information which the EC had failed to gather. Moreover, the GC pointed to established case law holding that the EC is not required to continue the investigation in order to gather all potentially exculpatory evidence, where it considers that the investigation of a case has been sufficient.
- The EC's conduct of the procedure did not show bias by virtue of the requests for information issued or new arguments included in the Decision. The GC recalled the EC's broad powers to request all information necessary to its investigation and deemed that the EC's vast numbers of requests for data did not amount to a prolonged "fishing expedition".
- Qualcomm's arguments related to access to the investigative file were also rejected. Of note is the fact that the GC rejected a similar argument to the one Qualcomm successfully ran in the context of the 2022 annulment, concerning the lack or the sparsity of notes of EC meetings with third parties. The GC observed that unlike in the 2022 annulment, Qualcomm did have access to notes before the adoption of the Decision. While these notes were not very detailed, Qualcomm in this case, unlike in the context of the 2022 annulment, had not submitted an annex to support its argument that the notes were incomplete by highlighting issues that might have been discussed during those interviews and how that material could have assisted its defence.
- The GC also rejected Qualcomm's arguments contesting the EC's market definition. In particular, it found that the EC could not be faulted for not conducting a "small but significant and non-transitory increase in price" (**SSNIP**) test, which it noted is not a requirement for market definition under EU law, and that Qualcomm failed to establish that captive supply exerted a meaningful competitive constraint under the facts.
- The GC further found that the EC did not commit errors in applying the legal standard for predatory pricing and did not infringe the principle of legal certainty. It found that the EC had not departed from its own 2009 Enforcement Priorities Communication. It rejected Qualcomm's claim that the EC was required to show recoupment of losses incurred during the predation to establish a predatory pricing abuse. As regards the claim that the EC failed to undertake an as efficient competitor analysis, the GC held that the EC did carry out an as efficient competitor analysis, by virtue of comparing the prices charged by the dominant undertaking with certain of its costs for the purposes of assessing whether that undertaking charged predatory prices.
- The GC rejected Qualcomm's claim that the EC's predatory theory was illogical because the target of the predatory strategy, Icera, charged lower prices for products of inferior quality. The GC noted among other reasons that the test for predation refers to a dominant undertaking's own prices and costs and not those of competitors.

- The GC equally rejected Qualcomm's argument that the EC improperly reconstructed the prices that Qualcomm charged, on the basis that the EC was entitled to adjust Qualcomm accounting data to take into account the revenue accounting principle and was not shown to make errors in methodology.
- Notwithstanding that Qualcomm took issue with the EC's assessment of non-recurring engineering expenses paid to equipment manufacturers, the GC found that the EC had properly allocated them as an effective rebate.
- Over Qualcomm's objections, the GC confirmed the legitimacy of the EC's reliance on long-run average incremental costs (**LRAIC**) (which is lower for individual products as it excludes common costs) as a measure for predation, rather than average total costs (**ATC**). The EC had properly calculated these costs, including by accounting for spillover benefits of costs generated by the products sold at predatory prices for other chips.
- The GC rejected Qualcomm's argument that EC's assessment of foreclosure of Icera and harm to consumers was manifestly incorrect, such as by not determining the part of the market that is affected. The GC found that the EC is not required in assessing the existence of illegal predation to examine whether the share of the market covered by the contested practice is of sufficient magnitude for that practice to have anticompetitive effects. The GC noted all the EC is required to establish where it alleges the dominant company charged prices below ATC but above variable costs (**AVC**) is a) the below-cost price and b) the strategy to exclude a competitor, given that predatory prices as such are capable of driving equally efficient competitors from the market. It endorsed the EC's reasoning that it may be easier for the dominant firm to engage in predatory conduct if it selectively targets specific customers with low prices, as that will limit the losses incurred by the dominant undertaking. If penalties could be imposed only where the predation concerned a large share of the market, any selective predatory practice could escape enforcement, even though the practice might lead to an as-efficient competitor being eliminated.
- The GC further found that the EC properly showed including based on internal emails that Qualcomm had a strategy to exclude Icera, and that this was not a failing of the infringement decision.
- The GC rejected Qualcomm's arguments that customer pricing pressures, the need to align prices with competition, or efforts to deplete obsolete stock could amount to an objective justification for Qualcomm's behaviour. The GC acknowledged that predation can be objectively justified where it produces pro-competitive advantages, or if it serves legitimate interests. However, the GC found Qualcomm failed in its burden to show that its below-cost pricing for the claimed purposes of customer pricing pressures, meeting competition, or depleting obsolete stock was objectively necessary or produced countervailing efficiencies, and it did not eliminate all or most existing sources of actual or potential competition.
- The GC also rejected Qualcomm's jurisdictional argument as it claimed that there were no direct sales of its chipsets in or into the EEA. However, Qualcomm's customers sold devices incorporating the chips in the EEA and Qualcomm's strategy was aimed at excluding a competitor (the

complainant) based in the EU. These elements were sufficient for the EC to assert jurisdiction over Qualcomm's predatory conduct.

- The GC rejected other Qualcomm pleas on the basis that they had already been answered as part of other pleas, as was the case for Qualcomm's allegations of failures of reasoning of the decision.

As noted above, the one plea that the GC did accept in part and ultimately led to a 1.4% fine reduction of slightly over EUR 3.3 million was Qualcomm's argument in its fourteenth plea that the EC erred in calculating the fine by failing to justify why it used the value of sales relating to the total duration of the infringement (rather than sales during the last year of the infringement). The fine reduction provided scant consolation to Qualcomm, as the GC's reduced fine still amounted to EUR 238,732,659.33.

## **BACKGROUND**

In 2009, UK chipset supplier Icera (subsequently acquired by Nvidia) complained to the EC that Qualcomm had abused its dominant position by supplying, during the relevant period, certain quantities of three of its UMTS chipsets, namely the MDM8200, MDM6200 and MDM8200A chipsets, to two of its key customers, namely Huawei and ZTE, below cost prices, with the intention of eliminating Icera, its main competitor at the time in the leading-edge segment of the UMTS chipsets market. Qualcomm paid Huawei and ZTE sums for NRE related to the one-time cost to research, design, develop and test products incorporating the chipsets. In July 2019, the EC found that Qualcomm had engaged in predatory pricing below LRAIC with the strategy to exclude Icera, among other things qualifying the NRE payments as effective rebates. Qualcomm appealed the EC's decision to the GC, leading to the September 18, 2024 judgment.

## EU ANTITRUST CONTACTS

### Aniko Adam

Counsel, London  
T +44 207006 2201  
E aniko.adam  
@cliffordchance.com

### Luciano Di Via

Partner, Rome  
T +39 064229 1265  
E luciano.divia  
@cliffordchance.com

### Michael Grenfell

Partner, London  
T +44 207006 1199  
E michael.grenfell  
@cliffordchance.com

### Katharine Missenden

Counsel, Brussels  
T +32 2 533 5913  
E katharine.missenden  
@cliffordchance.com

### Dieter Paemen

Partner, Brussels  
T +32 2 533 5012  
E dieter.paemen  
@cliffordchance.com

### Michael Rueter

Counsel, London  
T +44 207006 2855  
E michael.rueter  
@cliffordchance.com

### Dimitri Slobodenjuk

Partner, Düsseldorf  
T +49 211 4355 5315  
E dimitri.slobodenjuk  
@cliffordchance.com

### Iwona Terlecka

Counsel, Warsaw  
T +48 22429 9410  
E iwona.terlecka  
@cliffordchance.com

### Eleonora Udroi

Of Counsel, Bucharest  
T +40 756012261  
E eleonora.udroi  
@cliffordchance.com

### Samantha Ward

Partner, London  
T +44 207006 8546  
E samantha.ward  
@cliffordchance.com

### Begoña Barrantes

Counsel, Madrid  
T +34 91 590 4113  
E begona.barrantes  
@cliffordchance.com

### Jan Dobrý

Counsel, Prague  
T +420 222 55 5252  
E jan.dobry  
@cliffordchance.com

### Sue Hinchliffe

Partner, London  
T +44 207006 1378  
E sue.hinchliffe  
@cliffordchance.com

### Alex Noury

Consultant, London  
T +44 207006 8001  
E alex.noury  
@cliffordchance.com

### Michel Petite

Of Counsel, Paris  
T +33 1 4405 5244  
E michel.petite  
@cliffordchance.com

### Katrin Schallenberg

Partner, Paris  
T 33 1 4405 2457  
E katrin.schallenberg  
@cliffordchance.com

### Jennifer Storey

Partner, London  
T +44 207006 8482  
E jennifer.storey  
@cliffordchance.com

### Luke Tolaini

Partner, London  
T +44 207006 4666  
E luke.tolaini  
@cliffordchance.com

### Ashwin van Rooijen

Partner, Brussels  
T +32 2 533 5091  
E ashwin.vanrooijen  
@cliffordchance.com

### Georgios

**Yannouchos**  
Counsel, Brussels  
T +32 2 533 5054  
E georgios.yannouchos  
@cliffordchance.com

### Marc Besen

Partner, Düsseldorf  
T +49 211 4355 5312  
E marc.besen  
@cliffordchance.com

### Anne Filzmoser

Counsel, Düsseldorf  
T +49 211 4355 5308  
E anne.filzmoser  
@cliffordchance.com

### Belén Irissarry

Counsel, Madrid  
T +34 685157716  
E belen.irissarry  
@cliffordchance.com

### Miguel Odriozola

Partner, Madrid  
T +34 91 590 9460  
E miguel.odriozola  
@cliffordchance.com

### Ulrich Pfeffer

Counsel, Düsseldorf  
T +49 211 4355 5455  
E ulrich.pfeffer  
@cliffordchance.com

### Caroline Scholke

Counsel, Düsseldorf  
T +49 211 4355 5311  
E caroline.scholke  
@cliffordchance.com

### Torsten Syrbe

Partner, Düsseldorf  
T +49 211 4355 5120  
E torsten.syrbe  
@cliffordchance.com

### Aleksander

**Tombiński**  
Counsel, Brussels  
T +32 2 533 5045  
E aleksander.tombinski  
@cliffordchance.com

### Thomas Vinje

Chairman Emeritus,  
Washington DC  
T +32 2 533 5929  
E thomas.vinje  
@cliffordchance.com

### Richard Blewett

Partner, Brussels  
T +32 2 533 5023  
E richard.blewett  
@cliffordchance.com

### Chandralekha Ghosh

Counsel, London  
T +44 207006 8438  
E chandralekha.ghosh  
@cliffordchance.com

### Nelson Jung

Partner, London  
T +44 207006 6675  
E nelson.jung  
@cliffordchance.com

### Sara Ortoli

Counsel, Paris  
T +33 1 4405 5130  
E sara.ortoli  
@cliffordchance.com

### Milena Robotham

Partner, Brussels  
T +32 2 533 5074  
E milena.robatham  
@cliffordchance.com

### Matthew Scully

Partner, London  
T +44 207006 1468  
E matthew.scully  
@cliffordchance.com

### David Tayar

Partner, Paris  
T +33 1 4405 5422  
E david.tayar  
@cliffordchance.com

### Anastasios Tomtsis

Partner, Brussels  
T +32 2 533 5933  
E anastasios.tomtsis  
@cliffordchance.com

### Stavroula Vryna

Partner, London  
T +44 20 70064106  
E stavroula.vryna  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2024

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to

nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.