ALERT MEMORANDUM

EU General Court Upholds Qualcomm's Strategic Predation as Abusive in Landmark Ruling

October 28, 2024

On September 18, 2024, the General Court of the EU (the "Court") confirmed the Commission's 2019 decision finding that Qualcomm, the U.S. mobile phone chipmaker, engaged in unlawful, strategic predatory pricing aimed at foreclosing its rival Icera. The Court found that Qualcomm had abused its dominant position in the market for third-generation ("3G") baseband chipsets between 2009 and 2011, by specifically targeting Huawei and ZTE with below-cost pricing for certain of its 3G chipsets.[1] The Court rejected virtually all of Qualcomm's arguments and upheld the Commission's findings on dominance and abuse, while reducing Qualcomm's fine by around 1%.

This ruling is significant as it endorses the Commission's theory of harm that strategic and selective predatory pricing is an abuse of dominance. The Commission's 2019 decision was its first predatory pricing decision since 2003.[2] The Commission's draft guidelines on exclusionary abuses (the "Draft Guidelines"), published for public consultation in August 2024, draw substantially on the Commission's legal and economic reasoning in this case, which have now been confirmed by the General Court.[3] These Draft Guidelines will likely be revisited in light of the CJEU's recent judgment upholding the annulment of the Commission decision challenging Intel's loyalty rebates.[4]

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1 Qualcomm, Inc. v European Commission (Case T-671/19) EU:T:2024:626 ("Qualcomm, Inc. v European Commission").
2 Case COMP/38.233, *Wanadoo Interactive*, decision of July 16, 2003.
3 Communication from the Commission, Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings.
4 *European Commission v Intel* (Case C-240/22 P) EU:C:2024:915.

Background

On July 18, 2019, the Commission fined Qualcomm €242 million for below-cost pricing of 3G baseband chipsets sold to ZTE and Huawei between 2009 and 2011, with the aim of pushing Icera out of the market. Icera was a European start-up and Qualcomm's unlawful conduct took place when Icera was establishing itself as a viable alternative, particularly in leading-edge baseband chips (*i.e.*, chips capable of supporting the fastest data speeds). Icera was acquired by NVIDIA in May 2011, which subsequently wound down part of the business in September 2012, before exiting the market completely in 2015.

These chipsets, essential for connecting smartphones and tablets to cellular networks, adhered to the Universal Mobile Telecommunications System ("UMTS"), the standard for 3G mobile technology. Qualcomm targeted key transactions with core customers, Huawei and ZTE, to undercut Icera at the most commercially-significant moments when Icera was poised to win substantial business from these customers — to inflict maximum damage on competition at minimum cost. The Court referred to internal e-mails where Qualcomm "*expressly describes Icera as a 'threat' and refers to preventive measures to be taken in order to prevent Icera from reaching sufficient volumes and from making a breakthrough with major original equipment manufacturers.*"[5] Qualcomm also gave discounts to Huawei to enable it to undercut prices of ZTE phones containing Icera chipsets, a form of indirect strategic predation. The Commission found the predation was appreciable even though it affected only the high-end portion of the overall market, because that portion was particularly important for Icera to establish a bridgehead in the relevant market and expand. As the Commission concluded: "[b]*y containing Icera's growth at the two key customers in this segment* […]*, Qualcomm intended to prevent Icera, a small and financially constrained start-up, from gaining the reputation and scale necessary to challenge Qualcomm's dominance in the UMTS chipset market, in particular in view of the expected growth potential of the leading edge segment due to the global take-up of smart mobile devices thus depriving OEMs in this segment from access to an alternative source of chipsets for their mobile phones and reducing consumer choice.*"[6]

The Court's judgement follows a lengthy procedure. Icera first filed its complaint in 2009, leading to a formal investigation. The Commission issued a Statement of Objections in 2015, a Supplementary Statement of Objections in 2018, and a Letter of Facts in 2019, before adopting its decision later in 2019.

The Court's Ruling

The Court rejected virtually all of Qualcomm's arguments, except for the recalculation of the fine, which was reduced by around €3 million. The Court confirmed the Commission's findings of dominance and abuse.

Endorsement of the Commission's Theory of Strategic Predation

Predatory pricing occurs when a dominant undertaking sets its prices below cost, particularly if carried out with the intent to eliminate competitors from the market. The practice can occur on a specific market segment or be selectively targeted to specific customers.[7]

The Court concluded it was not necessary for the predatory pricing behaviour to span the entire market. Qualcomm alleged that the Commission's theory of harm only related to the leading-edge segment. The Court stressed that "*as regards predation, conduct entails a sacrifice if the dominant undertaking charges a lower price for all or a particular part of its output.*

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5 Qualcomm, Inc. v European Commission, para. 565.

6 Case AT.39711, *Qualcomm (predation*), decision of July 18, 2019, recital. 334 ("*Qualcomm (predation*)").

7 Draft Guidelines, para. 108, building on the Commission's decision (among other cases): "[i]n fact, pricing practices that target certain markets, market segments or specific customers can be an effective means of predation from the point of view of the dominant undertaking. This is because, as compared with a general policy of low prices, selective predation allows the dominant undertaking to limit the negative impact of the below-cost pricing on its profits".

It follows that predatory conduct can involve a limited segment of the market concerned, and not the whole of that market.", in line with the Commission's Enforcement Priorities Communications.[8] It was sufficient for the Commission to demonstrate that Qualcomm's sales to Huawei and ZTE failed the price-cost test for predatory pricing established in *AKZO*.[9]

Predatory Pricing as a Quasi Per Se Abuse

The Court reaffirmed the AKZO test to determine when low prices are unlawful. Under these principles, "[…]an undertaking in a dominant position abuses that position if it charges prices below AVC, or prices below ATC but above AVC, where such prices are determined as part of a strategy to eliminate a competitor".[10] Most importantly, the Court endorsed a broad view of the AKZO test, where the Commission is not required to assess anticompetitive effects or the counterfactual provided the test is met. It remains unclear whether the Commission is obliged to consider evidence put forward by the dominant firm that its pricing was incapable of having effects, but the Commission's draft Guidelines affirm that it will do so.

1. The Commission is not required to assess the anticompetitive effects of the practice. The Court held that "[t]*he Commission is therefore under no obligation to carry out analyses other than such a demonstration* [that the *AKZO* requirements are met] *to adduce evidence of the anticompetitive effects of the contested practice*". Similarly, "*the Commission is not required, when examining whether an undertaking in a dominant position charged predatory prices, to ascertain whether the share of the market covered by the practice at issue is of sufficient magnitude for that practice to have anticompetitive effects.*"[11]

2. The Commission was not required to carry out a counterfactual analysis once it had established an abuse of a dominant position under the *AKZO* test. The Court held that Qualcomm's claims that ZTE and Huawei "*would not in any event have obtained more supplies from Icera in the absence of such conduct, that Icera's technology was technically outperformed or that Icera attracted external financing and was acquired during the relevant period, even if they were proven, could not have influenced the Commission's conclusion that there was abuse, based on the finding that the applicant priced below its costs with the intention of eliminating its competitor Icera. That is all the more true given that those three factors relied on by the applicant are factors external to the applicant, over which it had no influence and those factors cannot therefore mean that the applicant is exempt from any penalty for the infringement which it committed.*"[12]

The Court's judgment is aligned with the Draft Guidelines, which state that "*predatory pricing has a high potential to produce exclusionary effects and is therefore presumed to do so*".[13] The Draft Guidelines hold that the pricing conduct will be shown to be capable of producing exclusionary effects if: (i) the Commission proves that the arguments put forward by the dominant undertaking are not sufficient to conclude that the "*conduct is not capable of producing exclusionary effects*"[14] or that such effects are "*purely hypothetical*";[15] or (ii) the Commission provides "*evidentiary elements demonstrating the capability of the conduct to have exclusionary effects*" on the basis of the "*scope and nature of the arguments and*

8 Qualcomm, Inc. v European Commission, para. 642.
9 *See AKZO v Commission* (Case C-62/86) EU:C:1991:286 ("*AKZO*").
10 Qualcomm, Inc. v European Commission, para. 662. See AKZO, paras. 71-72.
11 *Ibid.,* para. 521-522.
12 Qualcomm, Inc. v European Commission., para. 670.
13 Draft Guidelines, para. 112. Footnote 267 refers to the Commission's 2019 decision (among other cases).
14 Qualcomm, Inc. v European Commission., para. 112.
15 *Ibid.,* para. 60(b). The Draft Guidelines explain that a dominant undertaking may seek to rebut the presumption of exclusionary effects "*by submitting evidence showing that the circumstances of the case are substantially different from the background assumptions upon which the presumption is based, to the point of rendering any potential effect purely hypothetical*" (para. 60(b)).

evidence submitted by the dominant undertaking during the procedure".[16]

Benchmarks for the Price-Cost Test

The price-cost test serves to distinguish between legitimate competitive pricing and predatory behaviour by comparing the firm's prices against relevant cost benchmarks. Yet applying the price-cost test can be complex due to varying definitions of costs and business structures. The Court dismissed all of Qualcomm's claims of inconsistencies or methodological errors in the Commission's theory of harm. In particular, it rejected Qualcomm's argument that its prices were not predatory because they were higher than Icera's.

In line with the *AKZO* test, the Court confirmed the Commission is not required to determine whether the dominant firm's costs are below AVC or long run average incremental cost ("LRAIC") if an exclusionary strategy is proven, as in this case.[17,18] However, the Court also endorsed the Commission's view that LRAIC was an appropriate benchmark for the price-cost test. By demonstrating that Qualcomm's costs were under LRAIC, the Commission satisfied the *AKZO* test since LRAIC is below ATC.[19] LRAIC is "*suitable*" for identifying predatory prices in cases where R&D and intellectual property rights are significant cost centres, and "*the failure to include product-specific sunk costs, such as R&D investments, does not reflect the market reality for the costs associated with entering the market and competing on it, thereby making it very difficult, if not impossible, to detect predation aimed at eliminating a competitor.*"[20]

The Draft Guidelines state that LRAIC may be better suited than ATC to capture the undertaking's costs under certain circumstances.[21] This is notably the case for multi-product undertakings that benefit from significant economies of scope.[22]

The Court also endorsed the Commission's reconstruction of prices "effectively paid" by ZTE and Huawei to determine whether Qualcomm pursued a strategy of predatory pricing. The Court confirmed that the Commission can make adjustments to an undertaking's accounting data to "*reflect business reality more accurately during the relevant period.*"[23]

AKZO Price-Cost Test Is An "As Efficient Competitor" Test

The Court dismissed Qualcomm's argument that the Commission should have conducted an "as efficient competitor" ("AEC") test. While the Commission is under no duty to conduct an AEC test, the Court still considered that the Commission had "*implicitly applied the 'as efficient competitor test'*" by demonstrating that Qualcomm had priced below ATC and above ATC.[24] That is because such prices "*corresponds to what the Commission must*

16 *Ibid.,* para. 60(b). The Draft Guidelines stress that even when the Commission provides evidence demonstrating potential exclusionary effects, "*the evidentiary assessment must give due weight to the probative value of a presumption, reflecting the fact that the conduct at stake has a high potential to produce exclusionary effects, as part of the overall assessment of the body of evidence in the light of all the relevant legal and economic circumstances.*"

17 LRAIC is the average of all the variable and fixed costs incurred in producing a particular product during its lifecycle.

18 Qualcomm, Inc. v European Commission, para. 437.

19 *Ibid.,* para. 435.

20 *Ibid.,* para. 439.

21 Draft Guidelines, para. 110.

22 Draft Guidelines, para. 110, which refer to Qualcomm (predation), recital. 780: "the Commission considers LRAIC to be the most appropriate cost benchmark in this case. […] This is because Qualcomm is a multi-product undertaking which benefits from economies of scope, i.e. some of its business operations do not have to be replicated for each individual product, but can be shared by all products supplied by Qualcomm […] The costs incurred for such operations do not vary with the number of different products supplied ("common costs"), and are therefore not taken into account in LRAIC because the latter only comprises the production costs specific to the products under investigation. Therefore, the average of all variable and fixed costs that Qualcomm incurs to produce a particular product (i.e. LRAIC) is below ATC for each individual product."

23 *Ibid.,* para. 325.

24 Qualcomm, Inc. v European Commission, para. 527.

demonstrate when applying the 'as-efficient' competitor test in order to prove that an anticompetitive practice has foreclosure potential."[25]

Role of Internal Documents

The Commission's findings were supported by rich "*evidence in the form of internal and contemporaneous Qualcomm documents demonstrating Qualcomm's intention to eliminate Icera.*"[26] The documents exposed a strategy to financially pressure Icera by limiting its resources, demonstrating Qualcomm's anticompetitive intent. The Court found that these documents, along with contextual evidence, were enough to prove Qualcomm's anticompetitive intent and abuse of its dominant position, as established by case law. Communications from senior Qualcomm management, directly involved in pricing decisions, further undermined Qualcomm's defence that certain statements were made by low-ranking employees and not reflecting of its overall strategy.[27] Notable documents cited by the Court included internal e-mails containing statements such as "*we should not give Icera any opportunity in Huawei strategically*" and Qualcomm's goal to "*crush Icera at ZTE*", and a presentation in which it was suggested that Icera "*should be squeezed for approximately six months to burn out its very limited venture capital funds*".[28]

The Draft Guidelines stress the probative value of evidence of an exclusionary strategy by reference to, *inter alia*, the Commission's 2019 decision. While not required to prove an abuse, such evidence "*may still be relevant for the purposes of establishing an abuse*" and may include internal documents or concrete threats of exclusionary action.[29]

Reduction of the fine

The Court granted Qualcomm a fine reduction, as the Commission had unjustifiably deviated from its 2006 fining guidelines.[30] The basic amount of the fine should be calculated based on the value of sales in the last tax year, multiplied by the number of years the infringement occurred — not by adding up the value of Qualcomm's sales during the relevant period.

Landmark Ruling

This is a landmark ruling that endorses the Commission's first predatory pricing decision since 2003, which was based on a theory of harm of strategic, targeted predation focusing on select contracts with key customers, deliberately timed to inflict maximum damage on competition at minimum cost. Apart from the calculation of the fine, the Court rejected all of Qualcomm's many procedural and substantive pleas, thus strongly endorsing both the Commission's theory of harm and handling of the investigation. On procedural grounds, it dismissed Qualcomm's arguments for lack of substantiation and considered that the duration of the investigation was not excessive in light of the complexity of the case. The Court confirmed the *AKZO* principles remain the relevant test for predation, more than 33 years after they were first defined by the Court of Justice in the chemicals sector.

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25 *Ibid.,* para. 526.
26 *Ibid.,* para. 47.
27 *Ibid.,* para. 538.
28 *Ibid.,* para. 539.
29 Draft Guidelines, para. 70(f).
30 Qualcomm, Inc. v European Commission, para. 776. The 2006 fining guidelines state that: "[i]n determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement" (para. 13).