SLAUGHTER AND MAY

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European Commission fines Qualcomm for predatory pricing

On 18 July 2019 the European Commission announced its **decision** to fine Qualcomm €242 million for abusing its market dominance in 3G chipsets by engaging in predatory pricing with the aim of forcing a competitor out of the market. The last time the Commission issued a fine for predatory pricing was 16 years ago.

Background

Qualcomm is the world's largest supplier of baseband chipsets. Baseband chipsets enable smartphones and tablets to connect to cellular networks and are used for both voice and data transmission.

On 16 July 2015 following complaints from various sources (including competitor Icera Inc), the Commission announced it had opened two formal investigations into whether Qualcomm had abused its dominant position in breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU) in the area of baseband chipsets. On 8 December 2015 the Commission sent **two separate statements of objections** to Qualcomm in relation to these investigations. The first statement of objections (SO) related to the Commission's investigation into Qualcomm's exclusivity payments. This investigation resulted in the Commission fining Qualcomm €997.4 million for abusing its dominant position in the global market for Long-Term Evolution baseband chipsets by entering into an illegal exclusivity agreement with a key customer (Apple), which was designed to exclude the competitor (Intel) from the market. (See a previous edition of our **Newsletter** for more details).

In its second SO the Commission took the preliminary view that between 2009 and 2011 Qualcomm had engaged in predatory pricing by selling certain quantities of its Universal Mobile Telecommunications System (UMTS) 3G chipsets below cost to two of its customers, with the intention of forcing Icera - its main competitor in the market for data card chipsets at the time - out of the market. In a **supplementary SO** sent on 19 July 2018 the Commission further focused on its 'price cost' test to assess the extent to which UMTS baseband chipsets were sold by Qualcomm at prices below cost (and therefore at a predatory level).

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

The predatory pricing test

The test for predatory pricing was established by the EU courts in Akzo.[1] The test establishes that products sold below 'average variable cost' (AVC) by a dominant firm are presumed to be anti-competitive, while products sold above AVC but below 'average total cost' (ATC) are only anti-competitive if there is evidence of an intent to eliminate a rival.

The test for assessing predatory pricing was also considered in the Commission's guidance on its Article 102 enforcement priorities, in which the Commission considers 'average avoidable cost' (AAC) – the average of the costs that could have been avoided if the company had not produced the amount of extra output allegedly the subject of the abusive conduct – and 'long-run average incremental cost' (LRAIC) – the average of all the costs that a company incurs to produce a particular product – as appropriate benchmarks to assess allegations of predatory pricing.

The Commission's investigation

The Commission concluded that Qualcomm had breached Article 102 TFEU by engaging in predatory pricing to eliminate a rival from the market for UMTS 3G chipsets. It based this conclusion on the following findings:

- That Qualcomm held a dominant position in the global market for UMTS baseband chipsets between 2009 and 2011. This was based in particular on: (i) Qualcomm holding a circa 60 per cent market share (i.e. almost three times greater than the market share of its biggest competitor); and (ii) high barriers to enter the market, such as significant initial investments in research and development to design UMTS chipsets, as well as barriers related to Qualcomm's intellectual property rights.
- That Qualcomm abused its dominant position between 2009 and 2011 by engaging in predatory pricing. The Commission calculated that Qualcomm had priced below cost certain quantities of three of its UMTS 3G chipsets sold to two strategically important customers, Huawei and ZTE.
- That pricing below cost is not *per se* evidence of predatory pricing where the pricing remains above AVC but below ATC; there must also be evidence that the company intended to eliminate a competitor by setting this price level. In this case, the Commission established that Qualcomm intended to use this level of pricing to eliminate Icera, which at the time was its main competitor in the market segment of chipsets for data cards. It further observed that Qualcomm's behaviour took place at a time when Icera was becoming a viable alternative supplier of UTMS chipsets providing advanced data rate performance and therefore presented a growing threat to Qualcomm's chipset business. Commissioner Vestager clarified in a **statement** that Qualcomm had identified the threat from Icera as "critical" in 2010. By then, Qualcomm not only had concerns about the growing success of Icera's chipsets for data cards – it was also concerned that Icera would start offering 3G chipsets for smartphones. To make sure that Icera's business could not reach a size that could endanger its market position, Qualcomm took what it described in internal documents as "preventive actions".

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[1] Case C-62/86 *Akzo* v. *Commission*, judgment of 3 July 1991.

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The Commission therefore concluded that Qualcomm engaged in predatory pricing during the period under investigation based on price-cost tests for the three chipsets concerned, and a broad range of qualitative evidence which showed the anti-competitive rationale behind Qualcomm's conduct. The Commission stated that the "*targeted nature of the price concessions […] allowed it [Qualcomm] to maximise the negative impact on Icera's business, while minimising the effect on Qualcomm's own overall revenues*". Moreover, Qualcomm was unable to adduce evidence that pricing products at this level produced efficiencies.

Therefore, the Commission concluded that Qualcomm's conduct had a significant detrimental impact on competition. It prevented Icera from competing in the market (eventually, Icera did not succeed as a self-standing competitor in the chipset industry). Furthermore, it stifled innovation and ultimately limited the choice available to consumers.

The fine

The Commission imposed a fine on Qualcomm of €242,041,000. This represents 1.27 per cent of Qualcomm's turnover in 2018, reflecting the duration and gravity of the infringement. The Commission states the size of the fine also aims to deter market participants from engaging in such practices in future. Qualcomm has **announced** that it will appeal the fining decision.

Conclusion

The Commission has demonstrated its readiness to tackle complex cases such as those involving predatory pricing. It has not applied its predatory pricing test since its decision fining Wanadoo in 2003 – a sign of how difficult these cases can be.

It is evident that future predatory pricing investigations may involve the assessment of very significant volumes of information. In this case, Qualcomm actually applied in 2017 to the European General Court (GC) for an injunction against the Commission's request for additional information relating to its predatory pricing investigation, on the grounds that the cost and resources required to comply with the request would cause significant harm to its business. However, the GC upheld the Commission decision, noting that Qualcomm had not sufficiently demonstrated it would suffer "serious and irreparable harm" by complying with the request. Moreover, the GC rejected another appeal from Qualcomm in 2019, finding that the Commission had not breached the principle of proportionality by creating a "significant workload" for the company. Qualcomm has also appealed this decision.

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Merger control

European Commission approves Vodafone's acquisition of Liberty Global's cable business in Czechia, Germany, Hungary and Romania

The European Commission conditionally **approved** the proposed acquisition by Vodafone of Liberty Global's cable business in Czechia, Germany, Hungary and Romania on 18 July 2019, following an in-depth Phase II review. The Commission had identified two competition concerns, both in Germany. The first was the parties' overlap in the market for retail supply of fixed broadband services. Both Vodafone and Liberty Global's subsidiary Unitymedia offer broadband services based on their own cable networks in Germany. These cable networks do not overlap but Vodafone does supply fixed broadband services in the Unitymedia cable area through access to Deutsche Telekom's network. The Commission's second concern was that the merger would increase the merged entity's market power in the market for the wholesale supply of signal for the transmission of TV channels. It argued this could lead to a decline in the quality of the TV offer to final viewers in Germany and hinder the broadcasters' ability to offer additional, innovative services, such as internet streaming and interactive services.

To address these concerns, Vodafone offered four commitments: (i) to provide Telefónica with access to the merged entity's cable network in Germany, allowing Telefónica to offer fixed broadband and TV services; (ii) not to restrict the broadcasters carried on the merged entity's TV platform from also offering their content via online streaming; (iii) not to increase the fees paid by free-to-air broadcasters for the transmission of their linear TV channels via the merged entity's cable network in Germany; and (iv) to continue to carry the required TV signal of free-to-air broadcasters for customers to access their interactive services. The Commission concluded that with these commitments, the transaction would no longer raise competition concerns, and cleared the transaction on this basis.

Antitrust

Shanghai court affirms decision that click farming amounts to unfair competition

On 23 July 2019 the Shanghai Intellectual Property Court (SIPC) announced that it had affirmed the lower court's decision in a lawsuit brought by Beijing iQIYI Science & Technology Co Ltd (iQIYI) against Hangzhou Feiyi Information Technology Co Ltd (Feiyi) and two shareholder individuals. The SIPC held that click farming amounts to false advertising, which breaches the Anti-Unfair Competition Law (AUCL) in China. The AUCL is distinct from the Anti-Monopoly Law and was recently amended in 2018 to minimise the overlaps between them.

iQIYI is an online video platform that derives income from advertisements and memberships, whereas Feiyi offers services to help boost video visits and improve video popularity on websites such as iQIYI. The two individuals involved would visit iQIYI with different domain names and IP addresses to artificially increase the number of views of videos. iQIYI commenced legal proceedings against Feiyi, claiming that

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Feiyi's conduct had seriously harmed iQIYI's legitimate interests and damaged the fair competitive order of the video industry. In defence, Feiyi argued that the companies were not competitors and click farming does not fall within any of the unfair competitive conducts listed in the AUCL.

In the first-instance trial, the Xuhui District Court in Shanghai noted the important commercial value of click data to iQIYI, video suppliers and advertising agencies. While accepting that click farming is not expressly prohibited in the AUCL, the court held that the conduct of Feiyi went against commonly accepted business ethics and damaged the legitimate interests of iQIYI, amounting to unfair competition under Article 2 of the AUCL, which defines "unfair competition" as "*conduct that contravenes the AUCL, damages legitimate business interests and disrupts the socio-economic order*". The court granted RMB 500,000 (approximately £58,300) in compensation to iQIYI (although it had sought to claim RMB 5 million (approximately £583,000)) and ordered the defendants to issue an announcement to reverse the adverse impact.

On appeal, the SIPC considered that Feiyi's click-farming conduct in fact conveyed a false impression to Internet users as to the quality and popularity of videos and therefore should be treated as "false advertising", which is prohibited by Article 9 of the AUCL. An SIPC judge He Yuan commented that in relation to novel unfair competition disputes, one should apply the most relevant legal rule based on the essence of the conduct and avoid undue intervention with free market competition and excessive application of general provisions such as Article 2 of the AUCL. In any event, this is an interesting application of the AUCL to novel business situations and highlights the common use of standalone private actions in China, despite the limited compensation value in this particular case.

State aid

Study for European Commission identifies increase in State aid litigation before EU national courts

On 30 July the European Commission published a **study** on the state of play of State aid enforcement by national courts in the EU. The Commission has exclusive competence in determining the compatibility of State aid with the internal market, and the Court of Justice of the EU has exclusive jurisdiction to review the Commission's decisions. National courts however play a role in enforcing State aid rules in: (i) the implementation of recovery decisions (public enforcement); and (ii) the enforcement of the standstill obligation, which provides that an aid measure cannot be implemented before the Commission has completed its compatibility assessment (private enforcement). The study looked at national enforcement cases in the 28 Member States decided in the period 2007-2017 as well as any important cases decided in 2018.

The study identifies some emerging trends, including an upwards trend in the number of State aid rulings in national courts, with more private enforcement than public enforcement. Despite the increase in the number of cases, national courts however rarely ruled that unlawful aid had been granted and therefore rarely awarded remedies. In around one-third of public enforcement cases, and two-thirds of private enforcement cases, the national court rejected the claim. In only six cases (less than 1% of the cases identified) did the national court award compensation for harm caused by a breach of the standstill obligation. The study attributes this to a number of factors, including: a lack of familiarity with State aid

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rules; the complexity of applying them; and the difficulty for the claimant in proving damages. It suggests that further guidance for national courts might increase the number of successful claims.

The study also presents best practices in State aid enforcement (for example the adoption of a specific legal framework for the recovery of State aid and internal penalties for national authorities that do not enforce a Commission recovery decision in a proper and timely way). It recommends establishing a working group to facilitate the exchange of best practices among EU Member States. Finally, the study provides insights on the use of cooperation tools by the Commission and national courts.

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