

30 June 2022 // [Gerwin Van Gerven](#) - [Thomas Elkins](#) - [Daniel Green](#) // [LinkingCompetition](#)

Qualcomm high-profile decision annulled: how the General Court is putting pressure on the Commission to strengthen its demonstration of anticompetitive effects

In a long-awaited [judgment](#) handed down on 15 June 2022, the General Court struck down the European Commission's [decision](#) issued against Qualcomm in January 2018. The Commission had fined Qualcomm EUR 997 million for anti-competitive foreclosure of rival chipmakers in the market for 4G LTE baseband chipsets, when it agreed to pay Apple more than USD 2 billion on the condition that the latter did not buy other companies' chips for its iPhones and iPads. This annulment follows on the heels of the General Court's [Intel judgment](#) in January 2022, annulling the Commission's 2009 [decision](#) against Intel based on similar allegations.

The effectiveness of due process and rights of defence in EU competition law

The General Court found that the Commission made several procedural mistakes that negatively impacted Qualcomm's right of defence:

- **Putting together the case file.** The Court held that the Commission should have recorded the precise contents of all interviews conducted and included them in the case file. The Commission failed to do so, in particular as regards to interviews of third parties (in this case, two competitors and two customers of Qualcomm). This failure infringed Qualcomm's rights of defence, as the undisclosed information could have been helpful to its defence.
- **Differences between the statement of objections and the infringement decision.** The Court held that the Commission infringed Qualcomm's rights of defence by making key changes to its theory of harm between the statement of objections and its final decision, without giving Qualcomm the opportunity to make its views known. In response to the statement of objections, Qualcomm submitted a margin analysis to demonstrate that the payments made to Apple were not capable of foreclosure on the two relevant markets initially considered by the Commission. However, the Commission had changed its concerns in the statement of objections, which affected the relevance of the data on which the Qualcomm margin analysis was based. While the General Court recognised that a statement of objections is a provisional document and subject to changes, the Commission should have allowed Qualcomm to submit comments on such changes and to adapt its margin analysis. In not doing so, the Commission breached its duty to provide companies with an opportunity to present comments on the changed view.

Errors and omissions in assessing the capability to produce anticompetitive effects

The General Court analysed the Commission's findings in light of the established EU case law, according to which, in order to be abusive, conduct must be capable of restricting competition and producing the alleged exclusionary effects. This



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assessment must be made taking into account all the relevant circumstances surrounding the conduct at stake. In other words, the Commission's analysis cannot be purely hypothetical.

In the present case, the General Court found that the Commission's assessment was insufficient to confirm how the exclusive payments made by Qualcomm were capable of producing the alleged exclusionary effects:

- **Failure to take into account all relevant circumstances.** First, the Commission failed to consider all of the relevant factors underpinning the conduct at issue. Qualcomm had submitted that Apple did not reject rival chipsets as a result of its payments, but because those chipsets did not comply with its technical and scheduling requirements. This was confirmed by Apple's internal documents.
- **Limits to the demonstration of anticompetitive effects.** Secondly, the Commission's finding that Qualcomm's payments reduced Apple's incentives to switch to competing suppliers for certain iPad models in 2014 and 2015 was not sufficient to conclude that such payments were anticompetitive with respect to all of Apple's products. The demonstration of the anticompetitive effects cannot be limited to only a fraction of the practices at stake, be it from a temporal or material point of view.
- **Lack of consistency of the evidence:** Finally, the General Court found that the Commission's findings relied on evidence that was either not relevant, was contradicted by other evidence, or was insufficient to substantiate the Commission's general conclusions. These conclusions were within the context of a broad analysis that encompassed all of Apple's products, and mixed models and years.

Impact of the annulment on EU competition policy and future Article 102 TFEU investigations

The annulment of the Commission's decision will give rise to revived questions about whether the procedures followed by the Commission in antitrust investigations need to be reformed. It certainly shows that the General Court is adopting an increasingly rigorous stance with respect to the demonstration of how the conduct at stake is "capable" of restricting competition.

This new high-profile annulment raises questions about the shape of future enforcement by the Commission:

- **Towards a revamp of the 2009 Guidance, or a return to a more formalistic approach?** It will be interesting to see how these judgments will impact the Commission's ongoing and future investigations, in particular for pricing abuses. It was the Commission that encouraged a more effects-based approach with the publication of its [Guidance](#) on Article 102 TFEU back in 2009, but it appears that the methodology described therein does not meet the legal standard required or that it was not properly applied by the Commission. This could lead to the Commission revisiting the Guidance.
- **A need for a structural reform of the EU watchdog's procedure?** While the lack of recording of interviews was already an issue in the Intel case, it has now led to the annulment of a Commission decision. The Commission will need to set up its procedural rules in this respect and formalize the interviewing process – a process that was admittedly already under way. Moreover, after the annulment of the UPS/TNT decision for not allowing defendants to comment on post-statement of objections changes, the Commission will need to be even more careful, and this may lead to longer processes.

The next cases and judgments will be followed closely, starting with the Google Android judgment expected later this year.

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