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Article 102 and rebates in a post-Intel world

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(speaking in a personal capacity - the views expressed are not necessarily those of the European Commission)

Competition

Legal standard under Article 102

- The debate on the legal standard under Article 102 TFEU has been ongoing for years
- In a nutshell, the debate is about how to balance an economically sound competition enforcement with administrability and speed of enforcement
- Important caveat: irrespective of the legal test, the Commission has over the years always analysed (potential) effects

Legal standard & conditional rebates

- Main battleground so far has been in conditional rebate cases:
  - Relatively wide-spread conduct
  - Well-developed case law
  - Economically established that rebates can have both pro- and anti-competitive effects
- Main point of contention is whether effects can be presumed on the basis of the typology of rebates (e.g. exclusivity rebates) or whether a detailed (quantitative?) analysis must be carried out

Intel: the General Court judgment

- Specified that anti-competitive effects can be presumed from the conduct
  - No need to carry out an analysis of the individual circumstances
- In case potential effects would need to be demonstrated, the Commission successfully did so via its qualitative and quantitative assessment
- No need to conduct an as-efficient competitor (AEC) price-cost test: Commission's analysis not examined

Intel: the ECJ judgment (1)

- Considers conditional rebates as pricing practices, which are illegal when they are capable of foreclosing as-efficient competitors
- Confirms that a presumption of illegality applies to exclusivity rebates by a dominant company
- However, clarifies that in case of substantiated submission by the dominant company, an analysis of potential effects has to be carried out

Intel: the ECJ judgment (2)

- List of factors to be considered (para 139):
  - Extent of dominant position
  - Market coverage
  - Conditions, arrangements, duration and amount of rebates
  - Possible existence of a strategy aiming to exclude
- Price-cost AEC test is not mentioned in para 139, but implicitly recognised as possible tool to prove effects

Some answers, more questions…

- Does the Commission need to consider all elements referred to at para 139?
- Are there other elements that can be taken into account? If so, which ones are those?
- Does dismissing the evidence submitted by DomCo always equate to proving effects?
- What does "as-efficient" mean? (see para 134)
- Does *Intel* apply to non-pricing conduct?
- What is the role of the Guidance Paper?

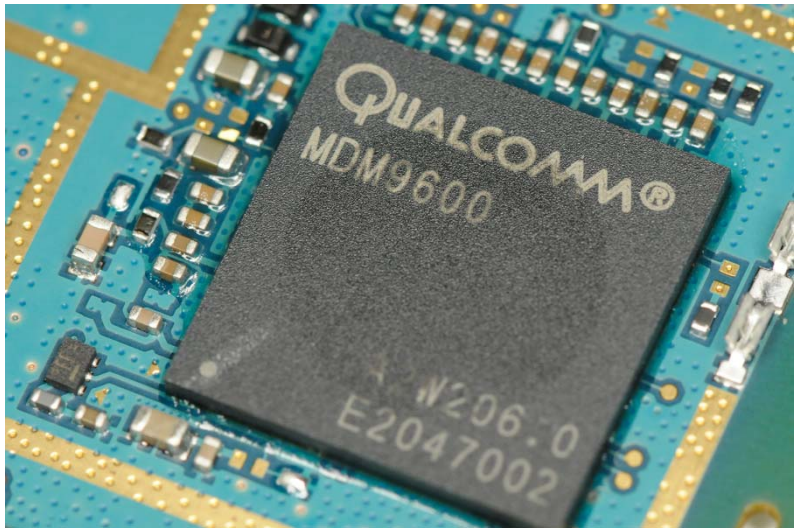
Commission cases post-Intel

- Commission post-*Intel* enforcement action will likely be key in shaping future policy on conditional rebates (and Article 102 more in general)
- Most relevant cases:
  - Qualcomm
  - Google Android
  - Google AdSense (ongoing)

QUALCOMM

Baseband chipsets (BCs)

- BCs process all cellular communications functions in smartphones and tablets
- Both voice and data transmission
- BCs incorporate different technologies, e.g. 4G (**LTE**), 3G (**UMTS**), 2G (**GSM**)



Qualcomm's dominance

- Qualcomm held a dominant position in the market for LTE baseband chipsets at least in the time period 2011-2016 based on particular on:
  - very high worldwide market shares, amounting to more than 90% for the majority of the period under investigation
  - barriers to entry and expansion, including:
    - R&D expenditure required before a supplier can launch an LTE chipset
    - Qualcomm's network of pass-through rights to third parties' intellectual property
    - Qualcomm's brand and established business relationships
    - The fact that it is important for baseband chipsets to support a variety of cellular communication standards

The conduct

- In 2011, Qualcomm and Apple signed an agreement according to which Qualcomm committed to grant significant payments to Apple
- Qualcomm's payments were conditional on Apple exclusively sourcing baseband chipsets for its "iPhone" and "iPad" devices from Qualcomm
- In 2013, the agreement was amended and extended to the end of 2016

Abuse

- Qualcomm's payment are exclusivity payments
- Presumption of anti-competitive effects
- During the administrative proceedings, Qualcomm submitted, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects
- Decision
  - Analyses potential anti-competitive effects
  - Rebuts Qualcomm's arguments (both on price-cost AEC test and alleged efficiencies)

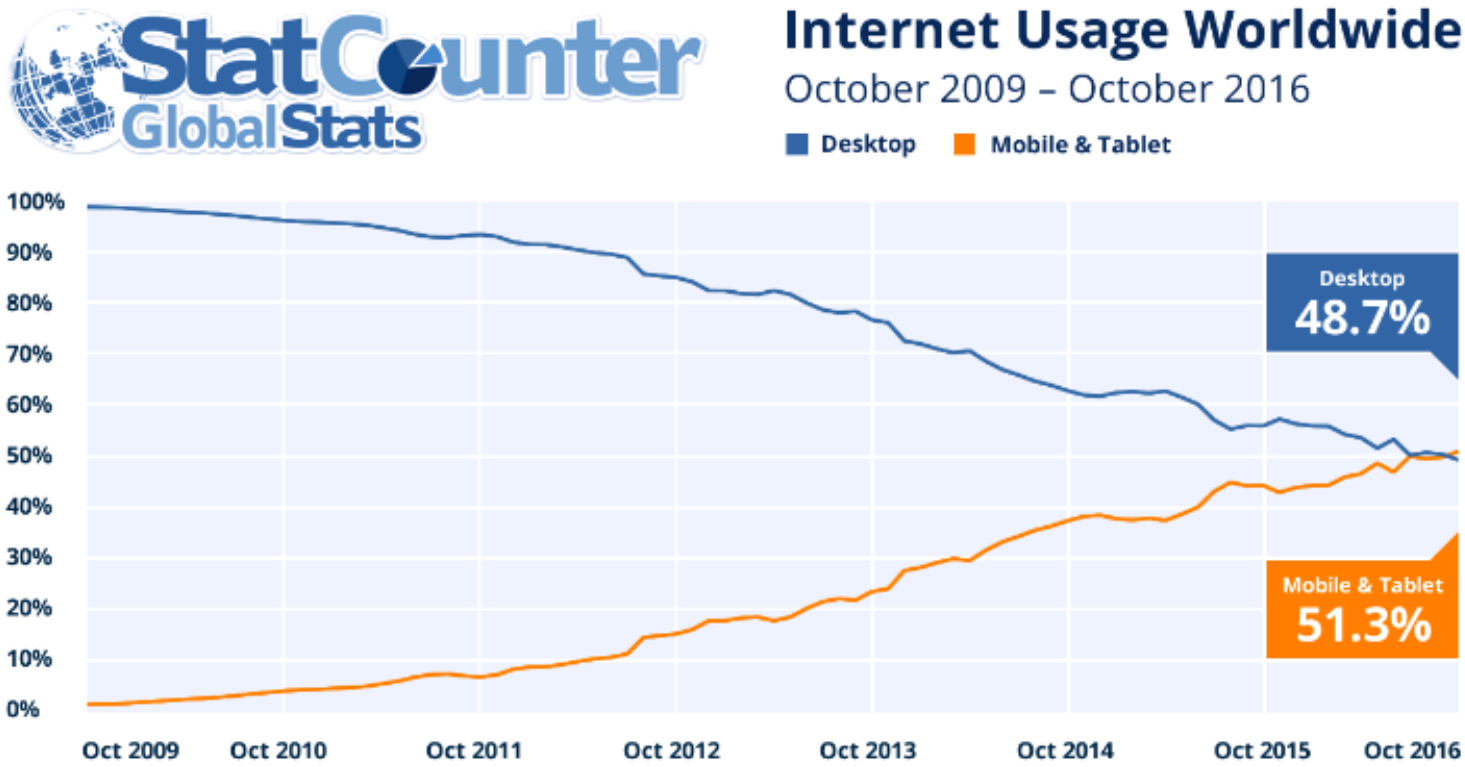
Sources of evidence

- The extent of Qualcomm's dominant position
- Amounts paid on condition of exclusivity were significant
- Exclusivity condition: Qualcomm's payments reduced Apple's incentives to switch to rivals
  - confirmed by a broad range of contemporaneous evidence
  - Apple gave serious consideration to switch in part to Intel
- Apple is a key customer for baseband chipset suppliers
  - accounts for a significant share of LTE chipset demand
  - leading smartphone manufacturer which can influence other customers' and manufacturers' procurement and design choices. By foreclosing Apple's demand, Qualcomm's conduct had an effect on the LTE baseband chipset market as a whole

Role of the Guidance Paper

- The Commission is not required to assess the legality of Qualcomm's conduct in accordance with the Guidance Paper
- Qualcomm did not show that it legitimately relied on the Guidance Paper
- Qualcomm's exclusivity payments satisfy the criteria set out in the Guidance Paper for being dealt with by the Commission as a priority
- In any event, Commission assessed the price-cost test submitted by Qualcomm and concluded that such test failed to support Qualcomm's position

GOOGLE ANDROID



- Google developed its business model in the **PC** environment, where the **web browser** is core entry point of Internet
- In mid '00, improvements in the Internet industry began to **shift its focus** from PCs **to smart mobile devices**

Summary of infringements

- This case is about Google protecting and strengthening its dominant position in search by:

  - **Tying** the Google Search app with the Play Store and by **tying** Google Chrome with the Play Store and the Google Search app;
  - Making the licensing of the Play Store and the Google Search app conditional on device manufacturers agreeing to **anti-fragmentation obligations**; and
  - Granting **revenue share payments** to device manufacturers or mobile network operators on condition that they did not pre-install any rival search engine on any device within an agreed portfolio.

Market definition and dominance

- Google holds a dominant position in the following markets:
  - Worldwide (excluding China) market for licensable smart mobile operating systems;
  - Worldwide (excluding China) market for Android app stores;
  - National markets for general search services in the EEA.
- Apple is not a direct competitor of Google in any of these markets
- Commission assessed and dismissed Apple's "indirect constraint" on Android and the Play Store

Infringements: tying

- Google Search app and the Google Chrome browser are the two most important entry points for search traffic on mobile devices
- Using its dominance in Android app stores and general search, Google imposed contractual conditions on manufacturers, via Mobile Application Distribution Agreements (**MADAs**), such that:
  - they had to pre-install Google Search if they wanted to sell devices that offer the Google Play Store;
  - they had to pre-install Google Chrome if they wanted to sell devices that offer the Google Play Store and Google Search
- These practices foreclosed competing internet search and and browser providers

Infringements: anti-fragmentation

- By means of anti-fragmentation agreements (**AFAs**) with manufacturers, Google made sure that they only use Google's version of Android and not any 3rd party versions, so-called Android forks
  - Manufacturers were not allowed to sell even a single device based on an Android fork if they want to sell any devices with the Play Store or Google Search pre-installed
- That closed off the possibility for devices with such Android forks to be sold, and for rival search engines and others to launch their services on such devices
- In 2012 and 2013, Amazon attempted to license its Fire OS, an Android fork, to a number of manufacturers but this venture did not go ahead due to the AFAs

Infringements: revenue sharing

- Google entered into Revenue Share Agreements (**RSAs**) with major manufacturers and mobile network operators, giving them a share of its search revenues, on condition that they exclusively pre-installed Google Search on all their Android devices

- The tying conduct ensures pre-installation of Google Search; revenue sharing ensured no rival search service was pre-installed on Android devices

- Evidence of foreclosure based *inter alia* on:
  - Coverage
  - Price-cost AEC test
  - Internal documents

CONCLUSIONS

Conclusions

- The Intel judgment brings clarity, but the way it will be interpreted matters for the development of EU competition law enforcement
- Such interpretation needs to be legally sound and must not preclude effective enforcement
- Qualcomm and Google Android demonstrate that:
  - The Commission can prove anti-competitive effects in a number of ways
  - There is no hierarchy between different types of evidence: depends on the case and the evidence
  - An AEC test is a tool, among many, that can be used to demonstrate effects