

FTC v. Qualcomm: Hypercompetitive or Anticompetitive?

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On August 11, 2020, in *FTC v. Qualcomm*, the U.S. Court of Appeals for the Ninth Circuit [reversed](#) a May 21, 2019 judgment by the U.S. District Court for the Northern District of California and vacated the district court's worldwide, permanent injunction prohibiting several of Qualcomm's core business practices.

Qualcomm manufactures and sells cellular modem chips and licenses its patent portfolios to original equipment manufacturers ("OEMs") whose products use Qualcomm's patented technologies. Qualcomm's licensed patents include cellular standard essential patents ("SEPs"), non-cellular SEPs, and non-SEPs. Qualcomm licenses its patents exclusively at the OEM level and does not sell chips to OEMs that do not take licenses to practice Qualcomm's SEPs under a "no license, no chips" policy. The FTC argued that the "no license, no chips" policy violated antitrust laws as well as its fair, reasonable, and nondiscriminatory (FRAND) commitments to license SEPs. The district court agreed and entered an injunction barring Qualcomm from engaging in the "no license, no chips" policy with any party around the world.

Given the breadth of the district court's injunctive relief, the Ninth Circuit stayed the injunction pending Qualcomm's appeal ([FTC v. Qualcomm Inc.](#)). It then reversed in a unanimous opinion and vacated the permanent injunction. Some key points:

- The Ninth Circuit stated that although the district court correctly defined the market as the CDMA and premium LTE modem chips, its analysis looked beyond these markets to evaluate economic harm. In particular, the district court's ruling "considered alleged economic harms to OEMs—who are Qualcomm's customers, not its competitors." Economic harms to OEMs, the Ninth Circuit held, are "not 'anticompetitive' in the antitrust sense—at least not directly—because they do not involve restraints on trade or exclusionary conduct in 'the area of effective competition.'" Further, because Qualcomm's "no license, no chips" policy is chip-supplier neutral, *i.e.*, the policy applies regardless of from whom the OEM

purchases its chips, it does not undermine competition in the relevant antitrust markets.

- In the Ninth Circuit's view, Qualcomm had no antitrust duty to license its SEPs to its direct competitors in the modem chip markets because it did not meet the limited exception provided by [*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*](#). Instead, Qualcomm's licensing practices developed in response to changes in patent law's exhaustion doctrine. Moreover, Qualcomm applied its OEM-level licensing policy equally to all its competitors, providing indemnifications instead.
- The Ninth Circuit also found Qualcomm's alleged breach of contractual obligations made to the standard-setting organizations ("SSOs") did not constitute an antitrust violation. Typically, SSOs require patent holders to commit to license their SEPs on FRAND terms before their patents are incorporated into standards, which Qualcomm allegedly did not do. Even if Qualcomm's conduct was a breach of its contractual obligations, there was no harm to competition itself. Further, the Court cautioned that any alleged breach of contractual obligations should be handled under contract or patent law, not antitrust law.
- While the district court found that Qualcomm's royalty rates were "unreasonably high," the Ninth Circuit refused to require FRAND royalties to be limited to the smallest saleable patent practicing unit approach to setting royalty rates. The Court declined "to adopt a theory of antitrust liability that would presume anticompetitive conduct any time a company could not prove that the 'fair value' of its SEP portfolios corresponds to the prices the market appears willing to pay for those SEPs in the form of licensing royalty rates." Additionally, the OEM customers paid the royalties, not the competitors, and thus any presumptive harm had no direct impact on competition in the market.

The FTC's petition for rehearing en banc was rejected. Unless the FTC seeks review from the Supreme Court, the Ninth Circuit's decision will likely have a significant impact on SEP holders accused of purported FRAND violations. According to the ruling, a plaintiff filing an action against SEP holders must meet the burden of demonstrating a substantial anticompetitive effect. Further, remedies for FRAND violations lie in patent and contract law, not in antitrust law.

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