



Some Thoughts on the Counterfactual Analysis in the General Court's

Qualcomm Ruling

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1. Introduction

Kreuz and Lange are two former German competition law professors who enjoy their retirement on the French Côte d'Azur. Both regularly meet to play chess and discuss the newest competition law developments. One day, their erudite discussions get out of hand over a disagreement on whether *Bronner* has been wrongly decided. In the heat of the argument, Kreuz sets fire to Lange's house. Simultaneously, a wildfire breaks out. Both fires converge and Lange's house is burned to the ground.¹ Lange and presumably many readers of this short article would emphatically reject the proposition that Kreuz should not be held liable for the damage inflicted to Lange's house by the fire he set just because the house would have been destroyed in any event by the second

(wild)fire. And yet, the General Court of the European Union ('General Court' or 'Court') in the recent *Qualcomm*² case seemed to embrace exactly this line of reasoning.

In *Qualcomm*, the General Court reaffirmed the principle that dominant firm conduct must be capable of excluding an as-efficient competitor to be considered an abuse of dominance under Article 102 TFEU.³ It further clarified that such a foreclosure effect must also be substantiated by means of a counterfactual analysis which indicates that in the absence of the impugned conduct the customers of the dominant firm were likely to enter into supply relationships with its competitors.⁴ In short, the Commission has to compare the conditions of competition prevailing in the absence of the conduct (*status quo ante*) with the market situation affected by the conduct to draw the legitimate

¹ This example draws on RW Wright, 'Causation in Tort Law' (1985) 73 *California Law Review* 1735, 1775–76.

² Case T-235/18 *Qualcomm v Commission* ECLI:EU:T:2022:358.

³ *ibid* paras. 351, 416.

⁴ *ibid* para. 415, see also paras. 400–14, 476–78.

conclusion that the impugned was capable of harming competition. In introducing this counterfactual requirement, *Qualcomm* further raised the evidentiary burden for competition authorities and private plaintiffs to establish an abuse of dominance under Article 102 TFEU.

The introduction of a counterfactual analysis in the *Qualcomm* ruling has been welcomed as another important step in the evolution of the abuse of dominance case law towards the so-called ‘more economic’ or ‘effects-based’ approach.⁵ This short article will critically reflect on this important, albeit so far widely overlooked, evolution in the recent exegesis of Article 102 TFEU and discuss its fundamental misconception. It argues that the holding by the General Court that dominant firm conduct is not capable of generating potential foreclosure effects if customers would have bought their requirements from the dominant firm regardless of that conduct is less convincing than it might appear at first sight.

2. The *Qualcomm* case

At the heart of the *Qualcomm* case lie so-called exclusivity payments in the market for LTE (4 G) baseband chipsets. Baseband chipsets enable the connectivity of electronic handsets (e.g., smartphones and tablets) to the mobile broadband network. From 2011 to 2016, the dominant chipmaker Qualcomm⁶ offered its most important customer Apple in total 2-3 billion USD of different incentive payments and discount schemes.⁷ These payments were conditional upon Apple’s commitment to purchase its entire requirement of baseband chipsets for the production of various generations of its Apple iPhones and iPads exclusively from Qualcomm.⁸

In 2018, the Commission issued an infringement decision against Qualcomm that found its exclusivity payments to be in breach of Article 102 TFEU. The Commission based its finding of an abuse of dominance on the qualification of Qualcomm’s exclusivity payments as loyalty rebates. Relying on the *Hoffmann-La Roche* presumption,⁹ the Commission took the view that Qualcomm’s exclusivity payments

⁵ See, for instance, A Lamadrid de Pablo, ‘Case T-235/18, *Qualcomm v European Commission* (Part II: Substance)’ ([https://chillingcompetition.com/11 July 2022/](https://chillingcompetition.com/11-July-2022/)). Auer and Radic do not focus on the counterfactual analysis but fully endorse the *Qualcomm* ruling D Auer and L Radic, ‘The Growing Legacy of Intel’ [2022] *Journal of European Competition Law & Practice*, 3–4.

⁶ Qualcomm held a market share of 90-100 % in the world-wide market for LTE chipsets during the period

2010-14. AT.40220 *Qualcomm* (exclusivity payments). C(2018) 240 final para. 310.

⁷ *ibid* paras. 172, 140–67.

⁸ *ibid* paras. 152, 158, 162, 166–67.

⁹ *ibid* para. 382; Case 85/76 *Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36 paras. 89–90; Case C-413/14 P *Intel v Commission* ECLI:EU:C:2017:632 paras. 137–38.

amounted to a *prima facie* abuse of dominance.¹⁰ The Commission further observed that this presumption was corroborated by additional evidence showing that the exclusivity payments, which in total amounted to around 10-20% of Apple's yearly expenditure on baseband chipsets,¹¹ had materially diminished Apple's incentives to switch to competing baseband chipset suppliers.¹² For most of the period during which the exclusivity payments were granted, Apple sourced its LTE baseband chipsets exclusively from Qualcomm.¹³ The Commission also highlighted that the exclusivity payments covered a considerable share of the relevant market because Apple was a strategically important customer whose LTE chipset requirements amounted to a significant share of up to 40-50% and on average 25% of the worldwide LTE chipset demand.¹⁴ The Commission also rebutted a critical margin study produced by Qualcomm to demonstrate, pursuant to *Intel*,¹⁵ that its exclusivity payments were not capable of excluding an equally efficient competitor.¹⁶ Concluding that Qualcomm had failed to provide any objective justification for its exclusivity rebates, the Commission fined Qualcomm almost 1 billion EUR.

In June 2022, the General Court quashed the Commission's decision in its entirety. The Court criticised the Commission's analysis not only on procedural grounds for infringing on Qualcomm's rights of defence,¹⁷ but it also identified a fundamental flaw in the Commission's substantive analysis. The thrust of the General Court's criticism centred on the Commission's finding that there was no alternative supplier to Qualcomm from which Apple could have purchased its LTE chipsets for all iPhones launched during most of the period of the alleged abuse.¹⁸ The General Court took this finding as an indication that there was no competitor to which Apple could have realistically switched part or all of its chipset requirements for iPhones in the absence of the impugned conduct.¹⁹ In other words, even in a counterfactual but-for-world where Qualcomm had not offered any exclusivity payments, no competitor could have supplied Apple with chipsets fulfilling its technical specifications.

The General Court took the view that the lack of Apple's incentives to move its requirements from the dominant supplier Qualcomm to competitors could not be attributed to the alleged anticompetitive

¹⁰ AT.40220 Qualcomm (exclusivity payments) (n 6) paras. 382, 389–96, 405–6; Case T-235/18 *Qualcomm v Commission* (n 2) para. 382.

¹¹ AT.40220 Qualcomm (exclusivity payments) (n 6) para. 413.

¹² *ibid* paras. 383, 409–22.

¹³ *ibid* para. 168.

¹⁴ *ibid* para. 467.

¹⁵ Case C-413/14 P *Intel v Commission* (n 9) para. 138.

¹⁶ AT.40220 Qualcomm (exclusivity payments) (n 6) paras. 487–503.

¹⁷ Case T-235/18 *Qualcomm v Commission* (n 2) paras. 154–346.

¹⁸ *ibid* paras. 409–12, 476–78.

¹⁹ *ibid* paras. 412–13.

foreclosure effect of Qualcomm's exclusivity payments. Rather, it was exclusively caused by the absence of any credible, equally efficient competitor who could have satisfied Apple's quality and technical requirements.²⁰ On this account, the General Court concluded that the Commission had failed to establish that Qualcomm's exclusivity payments entailed the alleged anticompetitive foreclosure effect. It instead implied that it was equally plausible that Qualcomm's exclusivity payments fell within competition on the merits.²¹ The General Court held that the Commission had not properly accounted for Apple's alleged lack of incentives to switch to other competitors as a relevant factor calling into doubt the capacity of Qualcomm's rebates to foreclose competition.²² Accordingly, the Commission had failed to consider 'all the relevant factual circumstances',²³ including the evidence submitted by the defendants,²⁴ in order to sustain the finding that the impugned conduct was capable of entailing anticompetitive effects.²⁵ As a consequence, the Commission 'could not legitimately conclude that the payments concerned had reduced Apple's incentives to switch to [Qualcomm's] competitors [...] and that

those payments were, accordingly, capable of restricting competition in the entire relevant market for LTE chipsets.²⁶

3. The Counterfactual Analysis in *Qualcomm*: A Further Step Towards an Effects-based Analysis of Dominant Firm Conduct?

At first sight, the reasoning of the General Court underpinning this novel counterfactual requirement appears to be of rigorous logic. Who would seriously take issue with the proposition that impugned conduct by a dominant firm cannot be legitimately said to exclude competitors and restrict competition if the customer(s) of the dominant firm would have, in any event, purchased all their requirements from the dominant firm because there was no alternative competitor who could have possibly provided the product at the required quality? After all, as Professor Petit puts it, dominant firm conduct cannot harm 'ghost competitors'.²⁷ Accordingly, '[t]he Court says that the Commission's logic is simply wrong because it accused the company of killing competitors

²⁰ *ibid* paras. 414–17.

²¹ *ibid* para. 416.

²² *ibid* paras. 414, 417.

²³ *ibid* para. 417.

²⁴ This requirement arises from Case C-413/14 P *Intel v Commission* (n 9) paras. 138–39.

²⁵ Case T-235/18 *Qualcomm v Commission* (n 2) paras. 355-56, 397; Case C-307/18 *Generics (UK) and Others* ECLI:EU:C:2020:52 para. 154.

²⁶ Case T-235/18 *Qualcomm v Commission* (n 2) para. 414.

²⁷ N Petit (5 February 2023) twitter.com/CompetitionProf/status/1537342101960237057. See also N Petit (5 February 2023) twitter.com/competitionprof/status/1537063913149308931.

that did not exist.²⁸ Along similar lines, Professor Ibáñez Colomo contends that a ‘counterfactual analysis that is, the evaluation of the conditions of competition that would have prevailed had the practice [...] not been implemented²⁹ is a *sine qua non* for establishing the adverse effect of that practice on ‘competition that would have otherwise existed’ in the absence of the conduct.³⁰ The corollary of this proposition is that if no competition existed in the market in the absence of the conduct, the conduct could not have possibly restricted competition.³¹

The General Court’s use of a counterfactual analysis in *Qualcomm* thus seems to further align the interpretation of Article 102 TFEU with an effects-based approach. Indeed, learned scholars have repeatedly asserted that an analysis of the anticompetitive effects of a

given practice presupposes a counterfactual analysis.³² To them, the counterfactual analysis is nothing less than the ‘cornerstone³³ or ‘core component of any effects-based approach’.³⁴ Some perceive it even as consubstantial to the very notion of anticompetitive effects and the concept of restriction of competition itself.³⁵

In its Guidance Paper, the Commission also committed itself to revert to a counterfactual analysis as part of the assessment of the anticompetitive effects of dominant firm conduct. The Guidance Paper states that this counterfactual ‘assessment will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking’s conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question

²⁸ This statement on *Qualcomm* by Professor Petit is reported in L Bertuzzi, ‘EU court dismisses Commission’s €1 billion antitrust fine against Qualcomm’ *Euractiv* (25 January 2023). www.euractiv.com/section/digital/news/eu-court-dismisses-commissions-e1-billion-antitrust-fine-against-qualcomm/

²⁹ P Ibáñez Colomo, ‘Anticompetitive Effects in EU Competition Law’ (2021) 17(2) *Journal of Competition Law & Economics* 309, 314.

³⁰ *ibid* 327; P Ibáñez Colomo, ‘Pay-For-Delay and the Structure of Article 101(1) TFEU: Points of Law Raised in Lundbeck and Paroxetine’ [2020] *Journal of European Competition Law & Practice*, 8.

³¹ This logic underpins, for instance, Professor Ibáñez Colomo’s contention that a pay-for-delay settlement cannot restrict competition if the generic entrant could enter the market only by infringing the originator’s patent and that, hence, the scope of the patent predetermines the existence of (a restriction of) competition. Ibáñez Colomo (n 30) 8–9.

³² Ibáñez Colomo (n 29); P Ibáñez Colomo, ‘Is the counterfactual relevant under Article 102 TFEU? How could it not?’ (3 December 2021) chillingcompetition.com/2021/12/03/is-the-counterfactual-relevant-under-article-102-tfeu-how-could-it-not/.

³³ D Geradin and I Girgenson, ‘The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach’ in JHJ Bourgeois and DF Waelbroeck (eds), *Ten years of effects-based approach in EU competition law: State of play and perspectives* (GCLC annual conference series vol 3, Bruxelles. Bruylant 2013).

³⁴ M Rato and N Petit, ‘Abuse of Dominance in Technology-Enabled Markets: Established Standards Reconsidered?’ (2013) 9(1) *European Competition Journal* 1, 21; incidentally one of the co-authors of this article, M Rato, represented Qualcomm as legal counsel before the General Court.

³⁵ In this sense, Ibáñez Colomo (n 30) 2–3, 5–8; P Ibáñez Colomo, ‘The legal status of pay-for-delay agreements in EU competition law: Generics (Paroxetine): Case C-307/18, Generics (UK) Ltd and Others v. Competition and Markets Authority, Judgment of the Court (Fourth Chamber) of 30 January 2020, EU:C:2020:52’ (2020) 57 *Common Market Law Review* 1933, 1940, 1947. P Ibáñez Colomo, ‘Counterfactual analysis and restrictions by object: myths and misconceptions’ (3 February 2023) chillingcompetition.com/2017/03/17/counterfactual-analysis-and-restrictions-by-object-myths-and-misconceptions/.

or with another realistic alternative scenario, having regard to established business practices.³⁶ From this perspective, the counterfactual analysis in *Qualcomm* is just the logical continuation of the incremental transition of Article 102 TFEU towards a more effects-based approach under which the Commission is increasingly required to show that the alleged anticompetitive effects are attributable to the conduct of the dominant firm.³⁷ The counterfactual analysis is thus considered the predilect tool for competition authorities and courts to establish that an alleged exclusionary effect can, with sufficient confidence, be attributed to the impugned conduct of the dominant firm and is not the result of extraneous economic factors, such as changes in consumption patterns or the inefficiency of competing rivals.³⁸

4. The Counterfactual Analysis in *Qualcomm* and the Problem of Overdetermination

Upon further reflection, however, the logic underpinning the General Court's counterfactual is neither as cogent as some³⁹ appear to believe; nor is it necessarily consistent with an effects-based approach – at least if we understand the effects-based approach as a competition law analysis that seeks to catch dominant firm conduct that is 'capable'⁴⁰ of foreclosing competitors and distorting competition to a greater extent or with a greater probability than this would be the case in the absence of the conduct.⁴¹ There are indeed a number of considerations that cast doubt on the General Court's reasoning or even suggest that it is deeply flawed.

To better understand the shortcomings of the General Court's counterfactual analysis, it is worthwhile turning our attention again to the scenario of the two fires devouring Lange's

³⁶ Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, Guidance Paper. [2009] OJ C 45/7 para. 21; emphasis added. See in a similar vein Commission Guidelines on the Assessment of Horizontal Mergers 2004. [2004] OJ C 31/5 para. 9.

³⁷ Case C-23/14 *Post Danmark II* ECLI:EU:C:2015:651 para. 47; Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* ECLI:EU:T:2021:763 para. 441.

³⁸ This argument has been recently advanced by Google's legal counsel in Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* (n 37) paras. 366, 389. See also to this effect Ibáñez Colomo (n 29) 328.

³⁹ For instance Professor Petit as reported in Bertuzzi (n 28).

⁴⁰ Case 85/76 *Hoffmann-La Roche v Commission* (n 9) paras. 90, 127; Case 322/81 *Michelin v Commission* ECLI:EU:C:1983:313 paras. 71, 73; Case C-95/04 P *British Airways plc v Commission of the European Communities* ECLI:EU:C:2007:166 paras. 67–8.

⁴¹ Note that the General Court's counterfactual analysis pertains to the passages of the Commission decision where the Commission sought to establish the potential – not actual – effects of the exclusivity payments on competition Case T-235/18 *Qualcomm v Commission* (n 2) paras. 392–3, 395. By contrast, the General Court reviewed the Commission's assessment of the impact of Qualcomm's exclusivity rebates on Apple's incentives to source its requirements of chipsets for iPads from Qualcomm with respect to their actual – not potential effects. *ibid* paras. 395, 429 et seq. This part of the judgment focusing on the actual effects is not discussed here.

house that opens this article. This scenario describes what legal theorists often refer to as the overdetermination problem that plagues the counterfactual analysis of causation. Overdetermination occurs where an event has multiple sufficient causes.⁴² In Lange's case, two independent factors or events – the fire set by Kreuz (c1) and the wildfire (c2) – are independently sufficient to cause the occurrence of a third event (e) – the destruction of Lange's house. However, as neither of the two is necessary for the destruction of Lange's house to materialise, the counterfactual analysis suggests that neither Kreuz' fire (c1) nor the wildfire (c2) could have caused the destruction of Lange's house. For even in the absence of Kreuz' fire (c1), the wildfire (c2) would cause Lange's house to burn down (e) and *vice versa*. Arguably, this problem of overdetermination is also at stake in *Qualcomm*.

Many cases involving dominant firm conduct concern markets that usually exhibit high barriers to entry. In these markets, market entry is difficult, and the number of competitors is low, *even in the absence* of any anticompetitive conduct. The market for LTE chipsets in *Qualcomm* is no exception. It is characterised by high entry barriers stemming from substantial R&D costs,⁴³ the

importance of standards, complex thickets of standard-essential patents,⁴⁴ reputational advantages,⁴⁵ and, most notably, relationship-specific investments.⁴⁶ These relationship-specific investments arise from the fact that original equipment manufacturers (OEMs), such as Apple, and Mobile Network Operators (MNOs) must ensure the compatibility of baseband chipsets with their handsets and existing telecommunication standards. The launch of new baseband chipsets thus involves the prior certification of chipsets by OEMs and MNOs.⁴⁷ The adoption of a new type of baseband chipsets requires OEMs to make considerable investments in the definition of specific technical requirements, testing processes, and the design of their devices in compliance with the suppliers' chipsets. These investments are often sunk. Once such a certification process is completed and a chipset is adopted, any change of chipset suppliers involves substantial additional investments, transaction costs, and risks on the part of OEMs. Therefore, OEMs often have limited incentives to switch their requirements of chipsets for existing product lines from an established supplier to an alternative provider.⁴⁸ The switching costs arising from relationship-specific investments may lock

⁴² LA Paul, 'Counterfactual Theories' in H Beebe, C Hitchcock and PC Menzies (eds), *The Oxford handbook of causation* (Oxford handbooks in philosophy, Oxford, Oxford University Press 2012) 178–182; M Moore, 'Causation in the Law' plato.stanford.edu/entries/causation-law/.

⁴³ AT.40220 *Qualcomm* (exclusivity payments) (n 6) paras. 326–330.

⁴⁴ *ibid* paras. 118–34, 331–45, 360–67.

⁴⁵ *ibid* paras. 352–59.

⁴⁶ *ibid* para. 347, 349.

⁴⁷ *ibid* paras. 346–51.

⁴⁸ *ibid*.

OEMs into existing supply relationships even where alternative suppliers are as efficient as their existing supplier.

The high entry barriers prevailing in the baseband chipsets market may, in themselves, be sufficient to cause (c1) the absence of any meaningful competitor, regardless of any additional anticompetitive conduct on the part of *Qualcomm*. The presence of high entry barriers however does not *a priori* preclude *Qualcomm*'s exclusivity payments from being capable of foreclosing competitors. On the contrary, it is equally conceivable that such loyalty rebates are also in themselves a sufficient cause for the exclusion of a competitor (c2). The General Court's mechanic counterfactual analysis disregards the possibility that the absence of competitors in the baseband chipset market can be the result of the concurrence of multiple sufficient causes – that is, entry barriers (c1) and exclusionary conduct (c2). Instead, it simply took the fact that even in the absence of the impugned conduct (c2) no actual competitor was able to compete for Apple's demand as an indication of the impossibility of *Qualcomm*'s exclusivity payments to cause any anticompetitive effects.

The General Court thus failed to appreciate that even if *Qualcomm*'s rebates were not in themselves *necessary* to foreclose a competitor this does not mean that they are not in

themselves *sufficient* to cause such foreclosure. It is for instance conceivable that the impugned exclusivity payments reinforced *Qualcomm*'s incumbency advantages and existing entry barriers that prevented the emergence of meaningful competitors. By turning a blind eye to the possibility of concurrent causes of exclusion, the General Court disregards that dominant firm conduct may amplify entry barriers that explain why there are even without any anticompetitive conduct no or only a limited number of competitive alternatives to the dominant firm.

The disregard of the General Court for potential overdetermination renders its counterfactual analysis underinclusive and constitutes a major source of under-enforcement (type II errors). In its ultimate consequence, *Qualcomm* implies that in exactly those markets where competition is already weakened by the presence of incumbency advantages,⁴⁹ for instance in the form of high relationship-specific investments, switching costs or network effects, dominant firms have free rein to engage in anticompetitive conduct. On a counterfactual analysis, both the entry barriers and the dominant firm conduct would each be sufficient to cause foreclosure regardless of the other. Under the General Court's mechanic but-for-test, neither of the two would appear as the cause of the absence of competitors. According to

⁴⁹ *ibid* para. 349.

the logic of the counterfactual analysis in *Qualcomm*, exclusionary conduct by a dominant firm in markets characterised by high entry barriers could never be found to have caused anticompetitive foreclosure because, in any event, even without the conduct entry barriers would have prevented competitors from entering the market. Suppose, *arguendo*, that the Commission was correct in finding that Qualcomm's exclusivity payments resulted in below-average variable cost (AVC) pricing that would have foreclosed an equally efficient competitor. From the perspective of the counterfactual analysis in *Qualcomm*, this below-AVC pricing would be beyond the scope of Article 102 TFEU because the dominant firm's customers are in any event unlikely to source their inputs from alternative suppliers who are unable to enter the market with and without the exclusivity rebates.

This implication of the counterfactual analysis in *Qualcomm* is extremely troublesome. It suggests that in markets where they already possess an entrenched position of market power due to important incumbency advantages, dominant firms have complete freedom to engage in conduct that makes their market position unassailable. If elevated to a new evidentiary requirement to find an abuse of dominance, the flawed counterfactual analysis in *Qualcomm* will hand

out a *carte blanche* to dominant firms in markets characterised by high entry barriers. It would send the signal that dominant firms may adopt exclusionary conduct, such as exclusivity payments, to reinforce existing entry barriers and dig another moat around their already fortified market positions without having to worry about any Article 102 TFEU liability. This implication of *Qualcomm* is difficult to square with the fundamental principle of the special responsibility of dominant firms not to allow their conduct to further reduce competition in a market where competition is already weakened as a result of the presence of entry barriers and incumbency advantages that underpin their dominant position.⁵⁰

5. Conclusion

On closer inspection, the apparently so straightforward logic underpinning the General Court's counterfactual analysis in *Qualcomm* appears not as cogent and robust as some commentators seem to suggest. Indeed, the conclusion that an impugned conduct cannot entail any potential anticompetitive effects if customers would have sourced all their requirements from the dominant firm with and without that conduct is a *non sequitur*. It disregards the problem of overdetermination that occurs when there is

⁵⁰ Case 322/81 *Michelin v Commission* (n 40) para. 57.

a concurrence of several factors – for instance entry barriers and dominant firm conduct – that are each sufficient to hinder competition. The counterfactual analysis in *Qualcomm* hence gives little consideration to the anticompetitive effects of dominant firm conduct in markets characterised by high entry barriers and incumbency benefits. It fails to take into account that Qualcomm’s exclusivity payments could have generated potential anticompetitive effects even though Apple did not have the possibility to switch its LTE chipset requirements to an actual competitor of Qualcomm at the time when the exclusivity payments were implemented. This might in particular be the case if the impugned exclusivity rebates enabled Qualcomm to deter entry. By disregarding their impact on potential competitors, the counterfactual analysis in *Qualcomm* notably discounts the potential harm that Qualcomm’s exclusivity payments may cause to dynamic competition.

An unexpected consequence of the counterfactual requirement in *Qualcomm* is hence that it raises the evidentiary burden for antitrust authorities for exactly those markets and practices in relation to which competition law intervention can generate the greatest benefit. This implication of the General Court’s counterfactual analysis is at odds with standard error-cost analysis. Markets

characterised by an entrenched dominant position and high entry barriers are normally those markets where antitrust intervention against exclusionary conduct that harms actual or potential competition can make a real difference. In these markets, even the presence of a limited number of competitors may intensify rivalry and innovation and their foreclosure may generate greater harm relative to similar conduct in fairly competitive markets characterised by relatively low entry barriers and the presence of a reasonable number of competitors. The failure of competition authorities to intervene against truly anticompetitive conduct (type II errors) may in these circumstances generate harm of considerable magnitude.

The Commission has decided not to appeal the General Court’s *Qualcomm* ruling before the Court of Justice.⁵¹ *Qualcomm* is hence a missed opportunity for the Court of Justice to clarify important questions about the requisite standard of harm and the role of the counterfactual analysis under Article 102 TFEU. This however should not preclude the competition law community from engaging in a serious and critical discussion on the role of the counterfactual analysis in modern competition law that goes beyond the conventional wisdom that any counterfactual analysis is good because it is a ‘core

⁵¹ Competition Policy International, ‘In A Win For Qualcomm, EU Will Not Appeal Court Ruling In \$991B Fine’

www.competitionpolicyinternational.com/in-a-win-for-qualcomm-eu-will-not-appeal-court-ruling-in-991b-fine/.

component' or 'prerequisite' of an effects-based approach.

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