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Qualcomm-FTC Antitrust Case Important to Tech Ecosystem



By David Balto

David Balto is a private antitrust attorney with over 30 years of experience, including over 15 years of government antitrust experience where he was a primary author of the 1995 IP Guidelines. He was the policy director of the Bureau of Competition of the Federal Trade Commission (1998-2001) and attorney advisor to Chairman Robert Pitofsky (1995-1997). Recently he led the successful consumer opposition to the proposed Anthem/Cigna and Aetna/Humana health insurance mergers. He is nationally known for his expertise on competition policy and is a prolific author on antitrust regulation, consumer protection, financial services, intellectual property, and health care competition.

Who would have thought that antitrust policy would become so important to modern day politics? We antitrust practitioners tend to think of ourselves as more like lyricist Leonard Cohen than the Beatles, relatively unknown and yet still fairly influential. Yet everywhere you look today someone is talking about industry concentration and debating whether we need some grand new antitrust policy (we don't) or vigilant enforcers (we do).

Competition policy is one of those rare instances where Democrats and Republicans largely agree. What do Sen. Elizabeth Warren (D-Mass.) and former Trump White House aide Steve Bannon have in common? They are both deeply concerned about competition. And Senate Minority Leader Chuck Schumer (D-N.Y.) has made antitrust a major policy tentpole in convincing Americans that the Democratic platform can provide real value to their everyday lives. It's easy to agree on something that objectively saves Americans money and increases innovation that improves our daily lives. It also helps that fair competition on a level playing field is a core ideal of the American economic system.

The case against Qualcomm Inc. by the Federal Trade Commission shows that despite some calls for a new antitrust policy framework, the tools to promote competition today are still in place.

The FTC has a good case that Qualcomm leveraged its dominance in chips to skew negotiations with hardware manufacturers and harm rivals. While it's hard to tell at this point just how much harm this could amount to, we do know that, separate from the FTC suit, Apple Inc. is suing Qualcomm for \$1 billion in damages in the U.S. alone. (Apple also has several suits in other countries based on the same facts.) That's money that could have been used to build better and lower cost iPhones.

While the FTC's suit against Qualcomm is not nearly as glamorous or headline grabbing as threatening to rein in major tech companies, it is nonetheless extremely important for protecting Americans. Qualcomm's chips put the connection in connected devices. Any abuse of this dominance not only increases costs, but pumps the brakes on important technologies in our horizon, like fifth-generation "5G" wireless and the Internet of Things.

The entire technology industry is at risk if the production of new products and devices is subject to any company's anticompetitive behavior that ignores its obligations and knowingly cuts off — or unfairly restricts — its competitors from accessing essential technology.

What makes the Qualcomm case so important is that it concerns technological standards, a critical ingredient for growth of the technology economy. Standard setting provides a common language so that devices can work together. In its simplest form, standards are how you can use an iPhone to call a Samsung S8. The effective development and implementation of industry standards depends upon all industry participants playing by the same rules when licensing the patents critical to a technology standard.

These standards are essential for interconnected devices like the Internet of Things and the development of 5G. Soon, not just your phone, but your car, your home, and many of your everyday devices will all be connected. 5G will bring lightning-fast speeds with virtually no transmission delays that will enable everything from self-driving cars to remote precision surgeries to state-of-the-art 21st century smart cities. The Internet of Things is developing rapidly and will soon be integrated into most aspects of our daily lives. These technologies will create thousands of new products, applications, and high-tech jobs.

But 5G and the Internet of Things will never reach their full transformative potential if a few big companies gain control of the essential technologies that support them and refuse to grant others fair, reasonable, and nondiscriminatory access. (It's worth noting that controlling essential technologies is Qualcomm's stated corporate goal.)

The FTC's case will answer the question of how far a company can go when it controls patents essential to a specific standard. The FTC's case revolves around three bullish Qualcomm practices — "no license, no chips," refusal to license standard-essential patents to competing chip manufacturers, and an exclusive deal with Apple that was negotiated as part of an effort by Apple to reduce its royalty burden. The FTC alleges that these practices violate the law and the commitments Qualcomm made in order for its technology to be included in the standard.

The FTC recently cleared a preliminary hurdle in this case, with Judge Lucy Koh of the U.S. District Court for the Northern District of California tossing Qualcomm's motion to dismiss and finding that the FTC adequately alleged that all three practices violate the law. (The FTC still has to prove their case). Judge Koh also found that the FTC adequately showed royalties that were above Qualcomm's commitments to license on fair, reasonable, and non-discriminatory terms — an element of the case that the current acting FTC Chairman, Maureen Ohlhausen, believed to be missing when, as an FTC commissioner, she dissented in the Democratic-controlled commission's 2-1 vote to bring the case.

President Donald Trump is reportedly close to nominating a new FTC chairman and two other commissioners. Once that process is completed, some suggest that the FTC should withdraw its complaint when the agency has a full complement of commissioners. (It takes a majority of commissioners to withdraw a lawsuit. The two commissioners on the normally five-member body are deadlocked, which means the case stays.)

However, withdrawing the case would be unwise because we should not encourage independent agencies to change course in the middle of an ongoing case based on political considerations. Nor should we politicize antitrust enforcement, which has for many years consistently been enforced in an even-handed, non-partisan way.

The impact of Qualcomm's licensing practices extends deep into the technology world. Its leading competitors, legal analysts, and the app developer community all agree that the FTC case must move forward as it's time to fully investigate Qualcomm's damaging licensing practices in a U.S. Court. Judge Koh's decision showed why and how the harm to competition Qualcomm could be causing is real and why this case clearly warrants the U.S. government's attention.

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ISSN 2169-7515

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