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Qualcomm Courts Must Fully Weigh DOJ Nat'l Security Claim

By **David Turetsky** (October 18, 2019, 5:14 PM EDT)

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In an antitrust case brought by the Federal Trade Commission that is now on appeal in the U.S. Court of Appeals for the Ninth Circuit, the U.S. District Court for the Northern District of California held in FTC v. Qualcomm Inc. that Qualcomm violated the antitrust laws by engaging "in anti-competitive conduct by using its royalty rates to effectively impose a surcharge on its competitors' chips."[1]

Qualcomm, of course, is a major U.S. leader in technologies related to important aspects of cellular communications, including development of, and standard setting related to, 5G technology.

My focus here is not on the district court's finding of liability or the merits of the appeal of that holding. Rather, it is the U.S. Department of Justice's claim that national security is relevant to and needs to be considered in shaping a remedy. If the antitrust holding were to stand, it is vital that the courts ensure that there is a process that gives due consideration to whether there are indeed national security considerations that are relevant to fashioning a remedy in the public interest.

Initially, the DOJ requested that the district court hold a hearing on possible remedies in the FTC's antitrust case against Qualcomm. The district judge responded "no," that it had heard enough during the trial to fashion a remedy and proceeded to do so, without the hearing requested by the DOJ.

Now, the DOJ has made clear to the appellate court that, among other issues, it has national security concerns with the remedy and wants the case remanded for an evidentiary hearing on remedies. It has also submitted public affidavits from representatives of two other federal agencies on that subject.

It is not clear whether the national security issues publicly raised by the DOJ to date in connection with the appeal fully cover the range and depth of the DOJ's national security concerns. Since it is likely those concerns have not been presented in full, it is premature to draw any conclusions about their validity. I understand as well that depending on what else the DOJ might wish to tell the courts on this subject, I may not be able to listen to all of it.

There may be a need for a closed hearing or otherwise restricted proceeding. I no longer have the high security clearances I held when I served as deputy assistant attorney general for the Antitrust Division in the administration of former president Bill Clinton, or in two senior roles at the Federal Communications Commission during the Obama years, chief of the Public Safety and Homeland Security Bureau and

deputy chief of the International Bureau.

What is clear, however, is that the DOJ has special competence to speak to the courts about national security issues. As part of the executive branch, the DOJ plays a leading role in national security and coordinates with other national security and intelligence agencies.

Many parts of the DOJ are deeply involved, from the National Security Division, to the Criminal Division, to the Federal Bureau of Investigation and sometimes, yes, even the Antitrust Division. The DOJ includes many people with very high-level security clearances and access to the most sensitive national security and intelligence information.

Qualcomm's intellectual property and business deeply involve a critical U.S. national infrastructure industry: telecommunications. The telecom sector is critical not only in its own right, but also because other critical infrastructure industries depend on it. In the U.S., the private sector owns and operates most critical communications infrastructure.

This makes it especially important that the U.S. government gather and communicate information about threats and national security interests related to communications networks and technologies since companies may not glean the whole picture themselves.

Moreover, it is not only the security of sensitive communications implicating national security that are potentially at stake, but also confidential information vital to businesses, and even to the life and safety of the public, such as emergency calls for help to 911, that depend on the security, reliability and resilience of these networks and technologies.

Therefore, it is certainly plausible that the DOJ could have something important and relevant to tell the courts, which the courts should assess, about whether a remedy implicates "national security" interests.

Sure, the FTC is a capable antitrust enforcer and includes some individuals with high security clearances. Nevertheless, it is an independent agency without the national security role and related breadth, depth and interconnectedness of the DOJ.

Moreover, the DOJ has long played a leading role in telecommunications antitrust matters. In fact, it supported breaking up the monopoly Bell System as an antitrust remedy in federal court decades ago, after a dialogue with other federal agencies which had initially expressed national security concerns about a break-up remedy. How and whether national security interests affect antitrust remedies in this sector is not a new question.

One of my former agencies, the FCC, recognizes that as an independent decision maker there are times that it will make a more informed and potentially better decision about what is in the public interest if it obtains input from executive branch entities, including the DOJ, which have wider national security responsibilities and access to potentially relevant intelligence.

The FCC established a process to receive and consider that expert national security input, which has been in place in one form or another for over 20 years. Some results were on display recently when the FCC denied China Mobile International (USA) Inc.'s application for authorization to provide telecommunications services between the United States and foreign destinations pursuant to Section 214 of the Communications Act.

The FCC had to consider whether the application was in the public interest. Citing and discussing submissions from the executive branch, which included the DOJ, the FBI, and other entities, the FCC found that "there is a significant risk that the Chinese government would use the grant of authority to China Mobile USA to conduct activities that would seriously jeopardize the national security and law enforcement interests of the United States."[2]

The commission also considered whether there were remedies available to prevent this but concluded "those risks cannot be adequately addressed through a mitigation agreement."[3]

My concern that there be a process to ensure that any national security aspects of an antitrust remedy be considered fully where the DOJ asserts there are such aspects is not in any way an attempt to preempt or limit the scope of the antitrust laws. The appeals court will review the merits of the district court's liability decision, with briefing by the parties to the case and anyone else the appellate court may agree to hear from.

While antitrust defendants sometimes argue that antitrust law should be preempted or displaced as inconsistent with certain regulatory statutes and law, I am not raising that issue. It is a red herring. The only question I am addressing is whether the courts should ensure that the DOJ can present for consideration any national security issues that it wants the court to consider in fashioning antitrust relief in the public interest if a violation is upheld. The answer to that question should be "yes."

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Disclosure: Turetsky consults with his prior law firm Akin Gump Strauss Hauer & Feld LLP regarding its client Qualcomm, but he is not directly involved as counsel in the FTC case or other legal matters.

[1] FTC v. Qualcomm, Stay Order at 2 (9th Cir. Aug. 23, 2019).

[2] See In the Matter of China Mobile International (USA) Inc., FCC 19-38 Par 5 at fn. 24, and Par 8 et seq (May 9, 2019).

[3] Id.