Kluwer Competition Law Blog

Connected Cars and Autonomous Driving—EU Antitrust Challenges

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Standards and Standard-Setting Organizations

Smart cars rely on interconnectivity and interoperability: in order to achieve autonomous driving, driverless vehicles will have to understand and engage with their environment so they can react and adapt accordingly. Connected cars will become one of the applications of the internet of things as vehicles will be constantly exchanging information with either other vehicles or the surrounding infrastructure.

Interconnectivity across multiple devices is based on technical specifications called "standards." These establish a common language for technologies, ensuring compatibility and cross-functionality of technology systems. Standards are usually set by standard-setting organizations ("SSOs"), such as the European Telecommunications Standards Institute, which is already involved in intelligent transportation systems; the European Committee for Standardisation; and the European Committee for Electrotechnical Standardization, among other international or regional organizations.

Standards require cooperation between companies and often between competitors. Standard-setting may therefore give rise to anticompetitive concerns such as price fixing or market divisions and also to potential negative effects on innovation. While a standard is in development, alternative technologies can compete for inclusion in the standard. But once a standard has been set and the industry is locked in, competitors of the chosen technology may face a barrier to entry and may potentially be excluded from the market. This is more likely to happen in cases where standards involve intellectual property rights ("IPR"). If the technology included in the standard is subject to IPR, the holder of that so-called standard-essential patent ("SEP")—a patent that protects technology essential to a standard—could be seen as acquiring an incremental degree of market power.

In this context, competition authorities call on the SSOs to ensure an open and transparent process that guarantees compliance with competition rules. Under the Commission's 2011 Horizontal Guidelines, where: (i) participation in standard-setting is unrestricted, (ii) the procedure for adopting the standard in question is transparent, (iii) standardization agreements contain no obligation to comply with the standard, and (iv) such agreements provide access to the standard on fair, reasonable and nondiscriminatory ("FRAND") terms, standard-setting will in principle be

compatible with EU antitrust rules.

FRAND Commitments and Compulsory Licensing

Competition concerns may arise in cases in which SEPs are involved. For the purpose of tackling these concerns, SSOs are asked to implement IPR policies. The EU Commission has published guidelines for such policies. First, SSO participants are required to disclose in good faith their IPR prior to the standard-setting, to prevent "patent ambushes" that would lead to artificially inflated monopoly prices after the industry is locked into the standard. Moreover, the EU Commission recommends that declared SEPs be subject to scrutiny of their essentiality, ideally by an independent party.

Second, IPR policies must require members to commit to licensing their SEPs on FRAND terms, preventing patent holders from refusing to license SEPs or requesting excessive and/or discriminatory royalties. However, it remains unclear what the exact definition of FRAND is and how to best determine the value of SEPs.

Injunctive relief is in principle available to SEP holders in cases of patent infringement. At the same time, there is a potential risk of abusive patent "hold ups" by dominant SEP holders to the detriment of standard users.

In its Huawei/ZTE judgment (Case C-170/13, ECLI:EU:C:2015:477), the CJEU determined the criteria under which injunctive relief is available in SEP settings. The holder of an SEP can seek injunctive relief against a patent infringer as long as, before the legal action, the patent holder has informed the infringer of the infringement by designating the patent and specifying the way in which it has been infringed; and after the infringer has expressed willingness to conclude a licensing agreement on FRAND terms, has presented a specific, written offer for a licence on FRAND terms, specifying the royalty and the calculation methodology. Relief is also available if the infringer continues to use the patent without having diligently responded to the offer, in accordance with recognized commercial practices and without delaying tactics.

SEPs do not develop only under SSOs but may also stem from a *de facto* standard—one that has been established by generalized custom or convention in an industry and that has achieved wide public acceptance and thus dominance in its field. Not having committed to SSOs' licensing policies, standard-setters may not be obliged to grant licenses on FRAND terms. However, in cases in which standard-setters enjoy a dominant position on the market, a refusal to license outright or to license on FRAND terms may infringe EU antitrust rules. Applying for an injunction may also constitute an abuse of dominance. Standard users may resort to the compulsory licensing defense based on antitrust law in order to obtain access to the standard and hence to the market.

Platform Regulation

Platforms are important for the exchange of data and information and the connection of a potentially large number of service and product providers for self-driving cars. Platforms are the

intermediary through which two or more different user groups interact, creating so-called two- or multi-sided markets, where the benefit for users on one side of the platform depends on and influences the benefits for users on other sides of the platform. Examples of two-sided markets include shopping malls and credit cards, among many others, with consumers being on one side and retailers/merchants on the other. Through positive network effects, platform markets have monopolistic tendencies.

EU antitrust rules may require a regulation of “market dominant” platforms in terms of access to the platform for users, customers, and competitors, as well as pricing. Whether a platform is “dominant” depends on the definition of the market—one side of the platform could be considered a market, but so could two or more sides of the platform together. Competition law intervention should also take into account that a new platform may emerge very quickly and replace the allegedly dominant existing platforms.

Competition authorities are currently looking into platform markets, mainly in the business-to-consumer (“B2C”) space. In the case of driverless cars, there could be B2C platforms but also business-to-business (“B2B”) platforms where both or more sides are business-facing, for product improvements, joint development, or supply-chain management. It remains to be seen whether competition authorities will take into account the particularities of B2B platforms before extending their current interventionist actions into that space.

Access to Data

Smart cars will collect and carry large amounts of data. Some plug-in hybrid cars already generate 25 GB of data in just one hour. Given its potential value, businesses are already focusing on data that cars generate. Cybersecurity issues aside, data privacy and competition law set the framework for the use of data for business purposes.

A differentiation needs to be made between personal data, which is subject to data protection rules, and other data. Vehicle-generated data comprises not only data that originates in the vehicle from internal sources (sensors, controllers, speed, battery status, vehicle location, fuel pump performance) or external sources (infrastructure data, surrounding vehicles, third-party apps) but also personal data (navigation destinations, the user’s address book, personalized in-car settings, etc.). Vehicle-generated data can also become personal data the moment it is linked to a personal identifier, such as a vehicle identification number.

Businesses want to use the collected multi-source data for business development purposes, for example by improving vehicle performance and thus customer satisfaction. Original equipment manufacturers (“OEMs”) will be able to use the data for predictive maintenance, to identify specific types of failure and fault patterns, and to determine the necessary work. Being in possession of the relevant data can confer a competitive advantage and potentially market power.

To ensure fair and undistorted competition, service providers (independent repair shops, spare parts manufacturers, distributors, automobile clubs, etc.) may require access to data in order to be able to offer services to consumers. One of the main concerns is potential anti-competitive behavior by OEMs, in particular excessive pricing demands for access to data or discriminatory access to data. These practices may lead to the establishment of digital market monopolies that could ultimately hinder innovation and competition.

EU antitrust rules may require a guarantee of fully nondiscriminatory (in terms of pricing, amount, and type of data) access to data, where access to a downstream market is restricted due to a market participant's market power and the access is deemed indispensable to operate on the downstream market. However, it is important to note that in certain cases, refusal to grant access might be justified when such conduct is deemed objectively necessary to compete effectively on a downstream market or when such conduct produces substantial efficiencies that outweigh any anticompetitive effects on consumers. In this context, data also is received and generated by companies as a result of a competition on the merits, and competition law should not require access to data where it diminishes the drive to innovate and bring new and better products to the market.

Where personal data is involved, consumers may also contribute to (indirect) access to data for competitors by invoking the data portability right pursuant to Art. 20 of the General Data Protection Regulation. However, due to cybersecurity and data protection concerns, "privacy by design" and "privacy by default" are the favored approaches, according to which data must be anonymized as much as possible.

The views and opinions set forth herein are the personal views of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

This entry was posted on Monday, September 17th, 2018 at 12:00 pm and is filed under Connected cars, European Union, Fair, reasonable and non-discriminatory (FRAND)
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