JONES DAY

COMMENTARY

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IN SHORT

The Background: The automotive industry has achieved a number of technological advances aimed at developing connected cars, automated vehicles, and ultimately autonomous driving. These innovations are expected to pose a series of legal challenges. Among the different fields of law concerned, competition law will play a key role.

The Issue: Smart car technologies are currently under development, and new standards will necessarily be set or will emerge during the development. EU antitrust law imposes certain rules on standard-setting and access to standard-essential patents to level the playing field. Part I of this series looks at standards and FRAND licensing terms. Part II will deal with platform regulation and access to data.

Looking Ahead: The emerging connected car industry is well advised to take antitrust rules into account from the outset to maximize the business opportunity related to autonomous driving.

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.

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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.

FIVE KEY TAKEAWAYS

1. Traditional original equipment manufacturers are progressively resorting to cooperation and partnership agreements with technology companies and software suppliers aiming at developing the self-driving car industry. This raises a number of potential antitrust issues that businesses should observe.
2. Standardization and similar patent pooling cross-licensing arrangements are key to achieving interconnectivity and interoperability facilitating widespread implementation of the technology. However, standardization agreements are subject to competition rules, which put the focus on transparency as an important compliance factor and require unrestricted participation to the standard-setting process.
3. When joining a standard-setting process, participants should consider that IPR policies by standard-setting organizations might apply, compelling them to disclose their IP rights upfront and to commit to licensing their SEP on FRAND terms.
4. In the event of a patent infringement, SEP holders should first approach the infringer, offering a licensing agreement on FRAND terms before seeking injunctive relief.
5. More clarification on calculation methodologies for FRAND licensing terms is likely to follow in the near future, as the automotive industry will increasingly face negotiations with SEP holders.


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