

Connected Cars and Autonomous Driving— EU Antitrust Challenges (Part II)

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, including those related to competition law.

The Issue: Smart cars will collect, process, and store huge amounts of data. Holding or having access to that data can drive new multi-sided and platform business models and also, it could be argued by competition authorities, lead to market power. Part II of this series looks at platform regulation and access to data. Part I dealt with standards and FRAND licensing terms.

Looking Ahead: Antitrust rules on platform regulation and access to data must not impede innovation and new business models but also must ensure a level playing field. Business needs to navigate the emerging landscape of antitrust enforcement with sometimes diverging enforcement priorities around the globe.

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.



One of the main concerns is potential anti-competitive behavior by original equipment manufacturers, in particular excessive pricing demands for access to data or discriminatory access to data.



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.

THREE KEY TAKEAWAYS

1. Businesses should closely monitor to what degree competition authorities will intervene on the emerging platform markets and take note as to how this affects their business model.
2. In the context of autonomous vehicles, data will be of utmost importance with business models already looking to monetize the vehicle-generated data. The evolving interaction between data ownership, data protection, and antitrust laws will be a key factor in the business.
3. Being in possession of data as well as restricting access to the data might bear antitrust risks. Businesses should seek legal advice to ensure compliance with competition law and data protection rules.



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