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The Connected Car: How European Data Protection, Smart Transport Systems, and Competition Law Intersect

Winston Maxwell and Gianni De Stefano*

In this interview, Winston Maxwell and Gianni De Stefano of Hogan Lovells discuss how European data protection, smart transport systems, and competition law intersect and the impact they will have on the connected car.

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What Are Some of the European Policy Issues Affecting the Connected Car?

MAXWELL: What's interesting are all the security, environment, and other policy rules beyond privacy that affect data sharing. The European Commission is trying to develop what they call Intelligent Transport Systems ("ITS").[1] In that context, the Commission wants cars and road systems to be able to communicate effectively to reduce traffic and therefore reduce CO_2 emissions. The idea is to have smart transport systems so that you avoid traffic jams and fluidify traffic and thereby reduce greenhouse gas ("GHG") emissions. The Commission wants auto manufacturers to build intelligent cars that share data.

The European Commission's European Strategy on Cooperative Intelligent Transport Systems ("C-ITS")[2] emphasizes the role that data can play in enhancing road safety, road conditions, the environment, accident notifications, and so forth. Connected car makers need to have systems in place to actually share data in real time with other actors in the ecosystem.

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How do European Data Protection, Smart Transport Systems, and Competition Law Intersect?

Maxwell: You basically have three different policy environments that all come into play here. You have protection of personal data, you have intelligent transport systems, and then you have competition law. These three environments intersect and affect how you think about developing data governance policies for connected cars.

For example, in Europe, car manufacturers need to share data with independent repair shops under European Regulation 715/2007. If you buy a certain vehicle, the manufacturer can't lock out independent garages and force people to only go to an approved garage. An independent garage has to be able to access the data in the onboard diagnostics module so that car manufacturers don't monopolize the repair market.

That is also going to be very important in the connected car area because there will be service providers that want to access the data in the car to provide value-added services to the user. Some players in this space want to provide the digital interface in the connected car—so it is just an extension of your smart phone. The question is, will car manufacturers embrace the entry of independent service providers or will they try to keep control over the user interface? There may be valid cybersecurity concerns relating to opening up the user interface to independent service providers. Competition law may also come into play.

De Stefano: Antitrust-savvy advice in a connected car business and/or partnership is crucial to avoid any liability down the road. What a car manufacturer views as a valid safety-related limitation to data access may be perceived by service providers as impeding their business chances. This could end up in complaints or litigation.

How Will Competition Law Come into Play When Setting Standards for the Connected Car?

De Stefano: The automotive industry is currently developing a set of standards that apply to the connected car—as envisaged by the EU Intelligent Transport Systems legislation. From a

competition law perspective the questions relate to the potential restriction of access of independent operators to this new business model, and/or the monitoring of their activities by original equipment manufacturers ("OEMs"), which are competing with them. European competition law requires a constant balance of the legitimate concerns of OEMs (or other stakeholders that possess the data) to protect their intellectual property and the need to permit new market entry.

The other issue relates to sharing of information among existing stakeholders. To create standards these firms will need to work together. In some instances they will be actual or potential competitors. There is a concrete risk of "spill-over" discussions among stakeholders. There is a fine line between legitimate discussions about standards and talking about commercially sensitive information, which is forbidden.

When it comes to competition law compliance, it is important to offer to all stakeholders involved (i.e., OEMs; suppliers of car components, smart components, chips, or software; and insurance companies) business-friendly compliance programs to make sure competition and other rules are not breached while they work together within their partnerships or trade associations for purposes of standards setting or data pooling.

What are the Antitrust and Competition Risks Associated with the Connected Car's Data?

De Stefano: The future of the automotive industry is digital; vehicles will soon become like our smart phones. One of the main applications of the upcoming 5G infrastructure and services will be connected cars. One of the EU's priorities is to boost innovation and support the growth of Europe's data economy. However, from a competition law perspective, certain data is considered an asset that can potentially confer market power, especially in connected industries. There have not been any cases yet, but the competition authorities in Europe are really focusing on this issue, with Germany and France at the forefront.

First, European competition rules may warrant independent operators' access to certain technical information in the connected automotive industry. The notion of independent operators is broad: independent repair shops, spare parts manufacturers and

distributors, publishers of technical information, automobile clubs, roadside assistance operators, operators offering inspection and testing services, and operators offering training for repair technicians. And the notion of technical information is flexible and will no doubt give rise to debate.

Second, other practices may be subject to scrutiny (for example, discounts in return for the customer agreeing that the data belongs to the OEM or another stakeholder). There are many factors that can be taken into account. For example, will the data that each OEM obtains as a result of developing connected car standards represent one single market? Would the OEM be considered the owner of the data? Or will the car user? And what does "ownership" mean? It is something you have to focus on because competition law is about defining relevant markets and creating a level playing field. Companies considered as being dominant on a given market have a special responsibility to compete on the merits and not exclude other stakeholders.

Will the Increased Levels of Consolidation and/or Partnerships Related to the Connected Car Trigger More Antitrust Review in Europe?

De Stefano: In Europe, the current consolidation and/or partnerships between or among OEMs, component suppliers, hardware or software suppliers, technology companies, and/or insurance companies may need to be notified to the various merger control authorities worldwide—even when the target has limited revenues. Competition authorities have recently begun to take into account privacy and data protection concerns to some extent. When working with clients on global merger control filings, it is important to address the privacy and data protection aspects of their deal.

Notes

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1. https://ec.europa.eu/transport/themes/its_en.
2. http://europa.eu/rapid/press-release_IP-16-4009_en.htm.