Automakers and suppliers in the U.S. and EU grapple with increased scrutiny, new emissions requirements, and evolving guidance from authorities

21 May 2018

In this hoganlovells.com interview, Joanne Rotondi, a partner in the Hogan Lovells Washington, D.C. office, and Sabine Chromek, a senior associate in the firm’s Munich office, discuss recent regulatory impacts on auto manufacturers and suppliers. They note that a lack of guidance from authorities on how to implement new emissions policies and disclosures, and political uncertainties as to how requirements will be addressed, are adding to substantial information gaps for regulated entities.

There's been a sustained heightened awareness around the importance of compliance with emissions requirements. What are your clients’ primary concerns?

Rotondi: In the United States, the emissions-related cases from 2015 are having a secondary impact, primarily on the light duty vehicle emissions side, in the sense that there's greater scrutiny by the agencies and authorities. Every automobile manufacturer and supplier is experiencing heightened scrutiny and additional requirements from authorities, so every manufacturer and supplier needs guidance in this regard.

How clear are the guidelines for disclosure to authorities of CO₂ and greenhouse gas (GHG) for mobile sources?

Rotondi: The events of the past two years have resulted in a fairly quick sea change for the automotive industry. Very quickly, suppliers and manufacturers were looking at their internal processes and re-evaluating how they assess product compliance and provide disclosures to the authorities.

Regulatory compliance counseling is something we have always done for clients at Hogan Lovells. On these topics, there is some guidance publicly available to manufacturers, but a lot of it is outdated and does not address the interface with newer requirements in the United States, which relate to CO₂ and GHG regulations for mobile sources.

At the same time, after the emissions-related events of 2015, authorities are saying that they need a lot more information and disclosure on these types of technologies, but they're not
providing much guidance on what that is. There's a huge gray area there and a lot of room for interpretation and many questions in the industry.

Why are disclosures to authorities and compliance with CO₂ emissions such a challenge in the United States right now?

**Rotondi:** Disclosures and compliance, particularly with CO₂ emissions related requirements in the United States for mobile sources, are a challenge. And part of what's making it a challenge in the United States is the uncertainty surrounding how the current administration is implementing CO₂ emissions related requirements.

What have you observed in the European Union (EU)? Do things continue to be heavily regulated or is there some uncertainty, like there is in the United States?

**Chromek:** I think there are a lot of similarities to the United States, but there are differences, also. Before the emissions issues in 2015, there had been a legal framework in place, but there was not too much focus in the European Union as to nitrogen oxide (NOx) emissions of passenger cars. Now, and since September 2015, everyone pays attention to emissions, in particular NOx and CO₂ emissions. It's not only authorities and lawmakers — who introduced a new law on emissions testing in September 2017 — it's also on the political agenda on the national level and the European level. So it has had a big impact.

As regards to uncertainties, I think there might be even more in the EU than in the United States, as there had been no real focus on emissions in the past with guidance from authorities comparable to the United States. In the EU, they are beginning to develop a focus and more detailed guidance, but it had been a challenge for everyone in the past two and a half years — for the authorities and for the people applying the law. So there's a huge gray area with a lot of room for interpretation for which manufacturers and suppliers seek guidance on, and we have been providing advice on these specific questions from the beginning in 2015.

What is the most important new aspect of these new EU emissions laws?

**Chromek:** First of all, the EU has improved and strengthened the applicable test procedures for emissions. Since September 2017, there has been mandatory real driving emissions (RDE) testing. This means that vehicles will be tested on the road with portable emissions measurement systems instead of only being tested in a laboratory test cycle. In addition, there is a new laboratory test cycle which shall ensure more realistic test results for criteria pollutants as well as CO₂ and fuel consumption.

Also, manufacturers now need to disclose their emissions strategies to type-approval authorities
— which was not a requirement in the past.

And finally, there will be a major overhaul of the EU type-approval system itself. This was already planned before the emissions issues in 2015, but it was then decided that a more far-reaching reform is needed. A respective draft regulation shall raise the quality level and independence of EU type-approval / testing before a car is placed on the market as well as increase checks of vehicles that are already on the market. That said, the most important change is the introduction of direct EU oversight. Under current rules, the EU sets the legal framework, but national authorities are responsible for ensuring and overseeing manufacturers' compliance. In the future, the Commission itself will be able to carry out checks on vehicles, trigger EU-wide recalls, and impose fines of up to €30,000 per vehicle when the law is broken.

The legislative process is expected to be finalized soon and the new regulation will then be directly applicable in all Member States and become mandatory on 1 September 2020.

Is there an increased risk that the disclosures automakers and suppliers make to the authorities will be reviewed with increased scrutiny?

Chromek: Right, and even the political level may have an impact here. In the past year, the authorities have been being investigated, too. From the European parliament to the national parliaments, the authorities themselves were being investigated to see if they acted correctly, so they are kind of attentive to not doing something wrong. At the same time, they have to handle the new laws which introduce new testing procedures and several new requirements as set out above and which get into very great detail. This pressure is then transferred to the automotive industry, which has to deal with it.

So the secondary impact of the emissions cases in 2015 involves a political aspect?

Rotondi: Yes, absolutely. And even though the Trump administration has taken a more flexible approach on climate change and GHG regulations than prior administrations, at least on the mobile sources side, there are still a number of manufacturers being investigated and certainly being scrutinized both by the U.S. Environmental Protection Agency (EPA) and also by the state of California. So we have this dichotomy, where the current administration has a less rigid approach for some emissions but not all, and then, on the other extreme, there's the California approach, which is almost overcompensating.

So investigations in the United States are continuing and are almost a certainty if you're trying to sell a diesel vehicle in the United States. That's not just focused on GHG, but also NOx, as Sabine mentioned, and fine particulate matter (PM2.5), which is really more relevant for older diesel cars.
And I completely agree with Sabine: federally, in the United States, we don’t have the same political focus right now, but state-wise, certainly with California, we have that political element as well. The EPA and California authorities are still proceeding and essentially demanding a lot more from manufacturers, who are then, in turn, demanding a lot more from their suppliers. So there’s a sort of walking-on-eggshells feeling now for our clients.

What kind of environmental impact will connected cars and autonomously driven vehicles have globally?

**Rotondi:** At the moment, connected and autonomous vehicles is an emerging space primarily affecting safety regulations and requirements. I’m not saying it won’t affect environmental — it likely will, particularly with regard to fuel economy and CO₂ regulations. As vehicles get more autonomous and more connected, the thought is, driving gets more efficient and you see less congestion, and fewer emissions in an average drive. So, less traffic, in theory, means better miles per gallon.

**Chromek:** Yes, I agree. But as you said, Joanne, connected and autonomously driven cars are both an opportunity and a challenge for the car industry from an environmental perspective. When the carmaker decides how the vehicle behaves, it’s an opportunity, but also the expectation that vehicles are more fuel efficient and CO₂ efficient.

What are some of the safety benefits associated with connected cars and autonomous vehicles (AVs)?

**Rotondi:** Both our manufacturer and supplier clients are definitely coming to us with questions regarding U.S. safety regulations that are primarily before the National Highway Traffic Safety Administration (NHTSA). Federally, NHTSA and the Department of Transportation (DOT) are leading on the autonomous vehicle front with regard to the safety aspect, and there’s a lot of speculation on where that’s going. They’ve initiated an autonomous driving rulemaking process.

How might the upcoming midterm review in the United States affect emissions standards?

**Rotondi:** The midterm review (aka Mid-term Evaluation) is a process that requires the EPA and NHTSA to assess the fuel economy and GHG emissions standards for light duty vehicles for model years 2022 through 2025. Those standards are being reviewed right now. And that’s a long process. It’s statutorily required that the agencies have to review them by April 2018. The EPA just recently announced that it would withdraw the Obama-era determination for MY 2022-2025 GHG standards because it was based on outdated information. EPA and NHTSA will now work to produce a new rulemaking on the standards. So I think that, if anywhere, that’s where we’re going to see this interplay between environmental, emissions, and connectivity.
About Joanne Rotondi

Joanne Rotondi guides clients through critical regulatory approvals such as vehicle and engine certifications, as well as complex permitting processes for large development projects, including liquefied natural gas terminals, deepwater ports, and mining operations. Whether processing a complicated administrative record to support a winning litigation strategy, or leading the effort to receive regulatory approval for a large project, she has a talent for coordinating legal, expert, and client teams to achieve success.

About Sabine Chromek

Sabine Chromek focuses on all matters of contract, trade, and distribution law, including product-related regulatory issues. Her industry-specific experience mainly lies in the automotive, consumer goods, chemicals, and technologies industries. She advises on the restructuring of distribution systems and the drafting and revision of commercial contracts, such as supply, purchase, consignment, or research and development agreements in national or international context. Additionally, she advises on compliance in environmental and export control matters.

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