3. Comments by Carsten Reimann[9]

3.1 Electric vehicles in the new competition law framework

With the LEAF project Nissan is driving the first real revolution in the automotive industry since the Henry Ford Model T. This marks a shift in automotive history and of the modern society. The Zero Emission vision by Nissan and Renault is changing the direction of the market and will make our planet a better place to live. In the near future, a substantial share of the vehicles circulating around the world will feature an electric engine. Based on the expert conference at CEU San Pablo University in Madrid on 12 November 2010, this article looks at the legal framework for vertical restraints in the automotive sector after its latest review and how it will apply to electric vehicles. This will be done in two steps. Firstly, I will give a brief overview on the factual and political background of electric vehicles (EVs) and their mass-market introduction. Secondly, I will address the key questions from a competition law perspective.

3.2 Has the time arrived for EVs?

For many years, electric cars were stuck in a classic chicken-or-the-egg scenario for two reasons — the lack of demand and the lack of a mass-marketed product. Why would governments create the required infrastructure with no demand? Why would consumers create demand for a car they could not afford or could not use as a practical alternative to their regular car? Why would car makers invest to make electric cars when there was neither mass-market demand for them nor public-sector investments to create the required infrastructure?

It was a vicious circle. This situation is changing now. Zero-emission mobility is within our reach because of a powerful combination of technology and collaboration. The Renault-Nissan Alliance has developed the technology and has been involving more than 80 official public and private sector partnerships around the world to develop a complete sustainable mobil-

9 Attorney-at-Law and currently serves as Head of External Affairs at Nissan in Europe as well as Director of Nissan's Brussels Office. The views expressed in this article are those of the author and not necessarily those of Nissan. For helpful discussion and comments on this article I am most grateful to my Nissan colleagues Friederike Kienitz and Catharina Tauson-Denysiak and also to Arne Möller of Renault Germany.

ity system.[10] The first affordable 100% electric cars will be introduced in European markets in 2011. To start with, Renault and Nissan together will have four different models available.

But why are electric vehicles so important? The answer is simple — because EVs offer the best solution for achieving zero emission mobility. Electric cars have no tailpipe — therefore emit zero emissions. They have a lower CO_2 rating than any hybrid. At the same time, the electricity grid is cleaner than gasoline. And if renewable energy sources are used, the result is even lower emissions overall compared with oil-dependent cars.

When we started telling people in Brussels about electric vehicles in 2008, most still were non-believers and more or less sceptical. Many had heard about hybrids, some were still dreaming of running their cars on bio-fuel. Meanwhile, the paradigm has changed. According to independent market studies, there will be 10% of electric vehicles on the market by 2020. Even the German car manufacturers, some of whom announced to launch their first pure EVs as from 2013, have recently sent a prototype driving from Munich to Berlin with the message that electric mobility is possible.[11] If we look at countries like China, it is clear that the introduction of large-scale volumes of electric vehicles will happen, with or without us Europeans.

The EU Industry Ministers have understood the urgency and need of public intervention to get this innovative market kick-started.[12] At the Competitiveness Council in Brussels on 26 November they reached, *inter alia*, the following key conclusions:

— EU authorities need to use public procurement, existing funding tools and regulatory framework to speed up the market uptake of clean vehicles;

— A well-timed public policy sending the automotive industry a signal will improve European competitiveness in the global market for clean cars;

— European standardisation bodies must develop, as a matter of priority by mid-2011, a harmonised solution for the interoperability between EVs and the charging infrastructure;

— The adoption of innovations is driven by demand side incentives. A coordinated European approach to clean vehicle purchase incentives is urgently needed.

---

10 For details see www.nissan-zeroemission.com; www.electric-mobility.com.

11 See "Deutschland fällt beim Elektroauto weiter zurück", Wirtschaftswoche 22 Jan 2011.

12 See Common Declaration on Electric Cars — information from the Presidency, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/608&format=HTML&aged=0&language=EN&guiLanguage=en.

The EU Council presented a joint declaration giving the electric vehicle introduction and industrialisation the highest priority in the European automotive industry: "The electric vehicle is not only a solution for efficient and sustainable mobility, but an important opportunity for the European automotive industry and connected sectors. We believe that the electric vehicle needs to be put at the centre of development and competitiveness prospects, linking research and development, innovation, industrial development and sustainability."[13]

Depending on how many governments follow this call and best in class governments like the UK provide consumer incentives in the early market phase, there still appears to be a realistic chance that Europe will keep up with the US and Asian countries.

3.3 Competitive assessment

3.3.1 Which rules apply?

Regulation 1400/2002 and the new Regulation 461/2010 refer to motor vehicles. There is no distinction between cars with internal combustion engines (ICE) and cars with electric drive. "Motor vehicle" means a self-propelled vehicle intended for use in public roads and having three or more road wheels. Electric engines also "self-propel" the car. Thus, electric vehicles fall under the new competition framework for the automotive sector.

Accordingly, like for gasoline cars, the repair and maintenance services for EVs would now be considered under the General Vertical Block Exemption. Following such a purely formalistic approach, the sale for EVs would still be regarded under the old Motor Vehicle Block Exemption (Reg 1400/2002) until 1 June 2013. This conclusion, however, seems questionable when looking at why the regulator decided to abolish the sector-specific rules and move to the general regime step-by-step.

The Commission on the primary market gave operators a three-year delay, during which time Regulation 1400 would continue to apply, in order to allow for the amortisation of investments dealers had made pursuant to that regulation.[14] As the first electric vehicles are currently being launched in Europe, there are no such grandfather investments made in

13 The Declaration on Electric Cars was signed by the following countries: France, Spain, Germany, Portugal, Ireland, Belgium, Bulgaria, Lithuania and Slovenia.

14 *Clark/Csiszar*, Motor vehicles — is there still room for sector-specific treatment as regards vertical restraints?, p. 2.

the past. Thus, there are no running business cases to protect, no former amortisations to pay off. On the contrary, the launch of a completely new type of vehicle and the pro-competitive effects related to it may justify the protection of totally different business cases. An EV dealer investing in special battery-related equipment will have a special interest to be able to recover these investments within a reasonable period of time.

Against the above background, car manufacturers can use selective distribution systems for electric vehicles. Quantitative selection is allowed for the sale of EVs depending on market shares. The arguments given to justify the delayed phase-out of the sector-specific regulations on the primary market do not fit in the context of electric vehicles.

3.3.2 What are the relevant product markets?

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use.

The consumer will compare the benefits of ICE and EV models and then choose the car he finds the best fit for his individual mobility pattern and price he wants to spend on a car. Even if the product market segments are defined according to type of car (sports car, small car, SUV etc), ICE and EV versions will usually be available in most of those segments and always be regarded as interchangeable.

One may argue that driving range is an important factor determining consumers' choice of product. With the current generation of battery technology 100% electric cars like the Nissan LEAF allow a driving range of 175 km without recharging. A consumer who must often cover long distances between cities by car may therefore "exclude" such an EV from his list of product choices that he regards as interchangeable alternatives for his particular mobility pattern. However, even if a substantial group of consumers was in the same situation as in the above example, this does not mean that EVs would constitute a separate product market.

This is because driving range is just one among a number of other factors like environmental impact or technical specs of the car. Firstly, this consumer group may also prefer diesel cars to normal petrol driven cars as more appropriate for their long-distance mobility pattern. Yet no one has ever argued that diesel cars should be regarded as a separate product market. And secondly, 80% of the population in the world (for UK the figure is even at 90%) have a predominantly urban driving pattern which means that a driving range of 175 km will cover more than 90% of their individual mobility needs. This majority group will regard electric vehicles

as a valid alternative to petrol-consuming cars. The other 20% described as long-distance drivers may still think of EVs as a second city car. Again, no one has ever argued that small cars which are "typical" city cars should be regarded as a separate product market.

In conclusion, electric vehicles may be seen as another segment on the overall product market for automotives. This becomes even more evident as some define — unlike at present — electric vehicles not only as 100% battery-driven cars but also as including hybrid variants.

3.3.3 Will there be a market for repair and maintenance services that is separate from that for the sale of new motor vehicles?

Based on the fundamentally different technological concepts, there are some special issues to be taken into account.[15] Electric cars have fewer moving parts so maintenance costs will be lower. Also, buying behaviour is likely to be different because for the first time the "normal" consumer can easily monitor his Total Cost of Ownership (TCO). Until now, operators of car fleets were the only ones really basing their purchase decision on the overall running costs of their vehicles. Life-time costs were less an issue for the private individual who is mainly looking at the initial purchase price. Even if the price-sensitive consumer is watching petrol prices in general, who is in fact making a bill adding the price of all the litres of petrol he will need in the next 5 or 10 years plus the maintenance costs on top of the initial purchase price?

EVs will allow all users, SMEs and also private persons, to closely monitor their driving patterns, power consumption and TCO. Electric vehicles are not simply traditional cars with a new drive but rather "battery-powered computers on wheels" more and more connected to external IT systems and grids. Finally, also opting for an energy arrangement, the consumer will look for a mobility system including the car and an energy supply contract. From a demand-side perspective, there are thus strong arguments for EV system markets.

Indeed reading in context some explanatory statements from the Commission confirms such a system market including motor vehicles, spare parts and after-sales services. Firstly, the distinction that the new framework makes between the markets for the sale of new motor vehicles and the

15 See US Department of Energy, How do gasoline and electric vehicles compare? http://www1.eere.energy.gov/vehiclesandfuels/avta/light_duty/fsev/fsev_gas_elec1.html.

motor vehicle aftermarkets is said to reflect the differing competitive conditions on these markets.[16] Secondly, this distinction is justified by the assumption that repair and maintenance as a whole represent a very high proportion of total consumer expenditure on motor vehicles which itself accounts for a significant slice of the average consumer's budget.[17] As seen above, this may not be true anymore for electric vehicles.

Thirdly, the Commission clarifies the question whether a market exists for repair and maintenance services that is separate from that for the sale of new vehicles: in some circumstances, a system market which includes motor vehicles and spare parts together may be defined, taking into account the life-time of the motor vehicle as well as the preferences and buying behaviour of the users.[18] One important factor is whether a significant proportion of buyers make their choice taking into account the life-time costs of the motor vehicle or not.[19] Here the Commission is discussing the example of the fleet owner: Buying behaviour may significantly differ between buyers of trucks who purchase and operate a fleet, and who take into account maintenance costs at the moment of purchasing the vehicle and buyers of individual motor vehicles because the majority of the buyers and private individuals or SMEs do not have systematic access to data permitting them to assess the overall costs of motor vehicle ownership in advance.[20]

Even with no empirical evidence on consumer buying behaviour of EVs being available at the time it seems most likely that the Commission's example of the fleet owner will also apply for the private owner of an electric vehicle. As a consequence, there will be one single market for sales and after-sales services for electric vehicles. Such system markets would then allow manufacturers again to have sales and after-sales in one distribution contract with the EV dealer. There would be no franchisees doing only repair.

3.4 Conclusions

Electric vehicles will emerge as a new market segment. This will bring a number of new chances and opportunities. Not only technology and the

16 Sector-specific Guidelines, para. 11.
17 Sector-specific Guidelines, para. 15.
18 Sector-specific Guidelines, para. 57.
19 Sector-specific Guidelines, para. 57.
20 Sector-specific Guidelines, para. 57.

concept of the car as such will be more environmentally-friendly and innovative, but also business models, distribution channels and market players will significantly differ. New after-markets and related markets in sectors other than automotive will be the consequence.

Given multiple players from many sectors such as battery producers and electric mobility operators (EMOs) selling "car electricity" and related infrastructure, the newly emerging market environment will be highly competitive. A sector-specific competition framework distinguishing between sales and after-sales of cars is unlikely to reflect business reality. Therefore it is very positive that the Commission is finally phasing out the sector-specific rules of the old Motor Vehicle Block exemption.

The new framework will allow a cross-sector assessment which will be required in the new markets of electric mobility solutions. As shown above, there are some strong arguments for emerging systems markets on which OEMs should be allowed to operate separate EV distribution networks right from the start. In fact, the competition law framework should provide more freedom under the General Vertical Block Exemption as of the launch of electric vehicles today and not only as from 2013 when the last sector-specific rules are phased out for the sale of oil-dependent cars.