Automotive Sector

European Union Antitrust

Future Perspectives
Introduction

This article is one of a series that provides Mayer Brown’s perspective on legal issues that might be faced by the automotive sector in the future, particularly in relation to the development of electric and autonomous vehicles. Each article addresses a single legal subject, such as trade, health and safety, antitrust, or IP. The articles assume some familiarity with the automotive sector, and identify business issues that follow from the legal developments.
Future Challenge

Electric cars in particular, but also autonomous cars, might create an environment for (more) anti-trust breaches, knowingly committed or otherwise, in the automotive sector. For the EU, such antitrust breaches include unlawful State aid. This suggestion arises because the complex supply and demand relationship between the current players in the automotive market will become more complex with the introduction of new market participants. Some new players will be manufacturing and supplying products such as new technology batteries, but many will be involved in the servicing of the new vehicles, whether electric or autonomous, the supply of energy or in new ownership structures.

We do not foresee important changes to antitrust legislation intended to address the foreseen changes in the automotive industry, although policy changes might occur that lead to a focus by antitrust authorities on the automotive sector or aspects of it. In one sense, there is already a focus on the sector, given the statement by the EU’s competition chief, Joaquín Almunia, that worldwide probes into cartels among car-part manufacturers take in more than 100 products and 70 companies. It is estimated that fines imposed around the world by antitrust authorities have totalled almost $2 billion in the past couple of years.

We address the likely future issues by reference to the foreseen new players, activities or products. To begin, however, one of the early questions that will need to be addressed, in the light of the issues raised in this paper, is a central issue under competition law: what is the product market? Existing precedent relates to combustion engine vehicles. Resolution of the market definition will have important consequences in terms of framing the ability of some businesses to engage in certain activities and in potentially limiting co-operation between certain stakeholders. Defining the relevant product market is not only important to the application of competition law but also to other areas, such as product regulation, customs and trade.
Defining the Market

The definition of the product market largely turns on appreciation of the substitutability between electric cars and combustion cars. In previous merger cases the EU Commission has subdivided the car market as follows, although this is not to suggest that this is correct or definitive:

- A: mini cars
- B: small cars
- C: medium cars
- D: large cars
- E: executive cars
- F: luxury cars
- S: sport coupes
- M: multi-purpose cars
- J: sport utility cars (including off-road vehicles).

The engine type has not been used as a differentiation criterion. It seems safe to assume that this was due to the very small amount of electric cars, but this segmentation might change. For example, given the current typical limits to the distance that electric vehicles are able to travel without additional charging, it might be that electric vehicles would constitute a separate market. Alternatively, noting that many electric vehicles are being acquired by urban users, perhaps there could be recognition that certain urban drivers, ones who typically acquire smaller cars, are related to the market for electric vehicles.
Car batteries

Issues concerning the battery may arise. The most obvious is replacement or the aftermarket, namely the market for spare parts used to repair or service vehicles. There seems no reason why a battery for an electric vehicle should not be considered a “spare part” as defined by the European Union’s so-called After Market Bloc-Exemption, which sets out the rules for categories of vertical agreements and concerted practices in the motor vehicle sector. Under these rules, an exemption exists for vertical agreements relating to the conditions under which parties may purchase, sell or resell spare parts for motor vehicles. However, the exemption does not apply to agreements that have as their object a restriction on the sales of spare parts by an original equipment manufacturer (“OEM”) selective distribution system to independent repairers, or a restriction between a supplier of spare parts and an OEM relating to the supplier’s ability to sell those spare parts. It would seem to follow that the market for replacement batteries is very much open to competition, and given the significant value of a battery (Nissan Leaf’s battery is reputed to cost $18,000), this would seem to be a market likely to be attacked by competitors.

The OEM might not be able to rely on intellectual property or similar rights to prevent third parties from being able to produce a replacement battery. Assuming no other suppliers exist for the battery of an OEM’s car, this suggests the result that the OEM holds a dominant position in relation to batteries for its cars. Such thinking has precedent in the EU through a line of cases going back to 1978. For OEMs this means, among other things, that there would be constraints on an OEM’s commercial freedom, including potentially a requirement to license third parties to produce generic versions of the battery for sale to end customers.

As the European Court of Justice stated in Volvo v. Veng, after noting that Volvo legitimately held the exclusive design right to a body panel, “the exercise of such an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by [the EU treaty article concerning an abuse of a dominant position] if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation.” The matter is broadly addressed in the Commission’s Guidance on Article 102 Enforcement Priorities, while the ability of OEM to block others’ use of their design rights has become more circumscribed pursuant to EU legislation on protection of designs. 

“...it might not be unrealistic to speculate that a consumer of an electric vehicle would consider buying the car without the battery..."
Such issues could arise when there will be a sufficient number of a particular battery on the market; it could become attractive for third parties to offer generic batteries as replacements. For car owners, if OEM battery costs remain high, then third parties selling equivalent batteries at a lower price are likely to be attractive. The scenario that could perhaps arise is that following an EU Commission investigation of a claim of an abuse of a dominant position, the OEM might be required to license its design or other intellectual property rights to a third party battery manufacturer.

We assume an OEM would seek to organize its business practices so that it was the only entity selling the battery for its electric vehicle upon first-sale. Problematic for OEMs is the possibility that antitrust authorities determine the market for the battery is a separate market from that for the car, and thus competition issues might arise even in relation to this first-sale. Such issues do not arise in relation to combustion engine cars. It is unrealistic to consider and not commercial practice that a consumer of, for example, a BMW 3 series would wish to buy the car without the engine. However, it might not be unrealistic to speculate that a consumer of an electric vehicle would consider buying the car without the battery, if the consumer could significantly save money by acquiring the battery from and having it installed by a third party, for example, from the entity that supplies the battery to the OEM.

The legal issue that is raised is one of tying or bundling. The argument is that the OEM is forcing the customer who wishes to buy the car to also buy a battery from the OEM. If certain criteria are met, this would be an abuse of a dominant position. Currently, we doubt that the abuse of dominance allegation could be successful because it would have to be the case that the OEM was deemed to be dominant in a market for cars. Given the nature and state of the automotive industry, it does not seem credible that an antitrust authority would find an OEM to be holding a dominant position in relation to a market for cars. For example, even if one speculated that Tesla holds a dominant position in relation to high-end electric vehicles, to be successful a claimant would need to argue that Tesla’s high-end vehicles are in a separate market to other (high-end) cars. Not impossible perhaps, but on current jurisprudence we suggest not probable.

Unfortunately for OEMs, thinking that a dominant position is not held and so no issues arise is not the end of the story because, at least under EU law, it is prohibited to “make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.” An example is where the life of a product is relatively long (as would be the case for batteries), it can become difficult for the customer to calculate the price consequences of tying, and thus the customer is not able to properly decide between an offer where there is a tied product and one where there is no tied product. Again, this perhaps has limited impact in practice as a constraint on an OEM, because under EU competition law, such tying is exempted under an automatic exemption as long as the supplier’s market share on the tying product market (the car) and the tied product market (the battery) does not exceed 30%, nor is the buyer’s market share exceeding 30%. It might be suggested that the market share for the battery supplier would likely be above 30% if the market is defined narrowly as batteries for a single car (e.g., the Nissan Leaf). It is less obvious that the OEM’s market share for that car type (mid-size or other categories) separately or together with other similar products would mean this market share is exceeded. It may be said, however, that it would be more probable to find a market share that exceeds 30% than to find a position of dominance.
State Support

Since the inception of electric vehicle development and the first commercialization of electric vehicles, there has been significant variation in state support. In the EU, state aid is unlawful unless consented to by the European Commission as being compatible with the criteria set out in the EU Treaty. The EU has provided funds, either from the EU itself or individual EU member states, and as of July 2013 there were reported to be 320 projects that had received EU or national public funding, with total funding over the period 2007-2015 estimated at €1.9 billion of which €1.4 billion was dedicated to R&D projects. France, the UK and Germany are the largest countries where funding occurs, which is not surprising as these are the three largest car manufacturing countries in the EU. The EU member states have had different emphasis and there have been and still are significant discrepancies in the EU in the field of financial incentives for the acquisition of electric vehicles. This discrepancy will lessen in the future according to a publication in 2013 of the EU Commission’s Guidelines on financial incentives for clean and energy-efficient vehicles. The Guidelines will apply to financial incentives granted in all forms, such as straight grants, loans, tax deductions, and other kinds of fiscal incentives or incentives in other monetary form, be it positive or negative (penalties). The Guidelines set out mandatory principles with which financial incentives must comply, such as non-discrimination, compatibility with EU type-approval legislation and EU State aid law.

In the EU, the Netherlands funded an electric vehicle purchasing scheme in the Amsterdam region. An element of the scheme was €500,000 in total and a maximum of €65,000 per applicant to set up charging stations, on the condition that the applicants (typically supermarkets, department stores, fast-food restaurants, cinemas, etc.) are not allowed to charge vehicle owners for providing battery charging services. The EU Commission raised no objections; the reason for this in relation to the charging stations was that the amount of money was too small to affect trade within the EU, and so was de minimis. It is of interest that the EU Commission investigated the state aid aspects following a complaint lodged by petrol station concessionaries in the Netherlands.

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Standards

In markets where intellectual property has played a leading role, notably smart phones, there have been a number of issues arising in relation to standards and the cross-licensing of intellectual property relevant to the adopted standard. Upstream issues also arise in the race between competitors seeking to have their particular intellectual property incorporated into the adopted license. To an extent the practical solution has been for the EU Commission and courts to insist that licenses that are incorporated in the standard are licensed to third parties on Fair Reasonable And Non-Discriminatory terms (FRAND). There remains a lack of clarity on what is fair and reasonable. In relation to electric vehicles and autonomous vehicles, OEMs, component suppliers, battery manufacturers and technology providers are working hard, within international and national standards bodies, to ensure that there is not a “standards war.” Once the market grows to a significant proportion, competitive rivalry will have material revenue consequences for whose technology wins and whose technology loses, so it is currently too early in the market evolution to take a view as to whether this cooperation will avoid the equivalent of the “smart phone wars.”

New stakeholders, New Issues

The current stakeholders in the automotive sector have been active for a long time - the OEMs and their component suppliers at the manufacturing end, franchise owners and dealers at the retail end, and garages engaged in servicing the vehicles. Electric vehicles, as suggested above, potentially introduce battery manufacturers, and those that take on the responsibility of recycling and disposing of car batteries. Those offering battery charging services will likely include service stations, but others are as likely to become important service providers. For example, supermarkets have for several years been operating petrol stations on site, and they might decide they are one of the better-placed entities to offer charging services, given the time customers spend at the supermarket. As a result, the organization and set-up of the infrastructure to supply such electricity charging units might be undertaken by the supermarkets, but, alternatively, it might be undertaken by the electricity distribution companies, keen to engage in the market in the same way as petroleum companies engaged in the retail of petrol.
These new entrants might have stand-alone business models, but, alternatively, they might seek to enter into commercial relationships with other stakeholders. If they do enter into relationships with other stakeholders, competition issues might arise. For example, an electricity supplier might wish to attract all of the supermarkets in its area of distribution, so reinforcing its presence within its natural footprint. Yet, any aggregation of exclusive agreements with supermarkets might foreclose the market to competing electricity suppliers. Likewise, supermarkets might seek to enter into local footprint agreements, giving them exclusivity within a particular location and arguably foreclosing the market to others, such as independent “energy” stations.

For cars where the battery is changed rather than charged, the battery changing stations might be used by the OEMs to reinforce their market presence, by favoring their own service stations/dealers/garages.

Another example, which exists, is agreement between car manufacturers and energy suppliers for the development of charging stations. These scenarios, to the extent they arise, will raise potentially both local market issues that likely will be addressed by the competition authority of the relevant EU Member State and/or EU-wide issues if they are regarded by the EU Commission as broadly based practices that it considers need to be addressed.

Many other possible combinational models apply. For example, Thierry Koskas, when he was the head of the electric vehicles unit at Renault, commented, “Your car dealer will offer the purchase of the car, the rental of the battery and the contract to supply you with energy”.

This introduces financing aspects, and we should then include insurance aspects. For example, specialist finance organizations, or perhaps incumbents such as banks or the financing arms of the OEMs, might act as aggregators, offering to customers the financing of the car, the leasing of the battery and special deals on charging. They can, as some already do, offer packages whereby customers with electric cars can, for a limited number of times per year, have the right to use a normal petrol engine car when making long journeys. There is no immediate suggestion that these packages in themselves might raise competition issues. However, in offering a package or one-stop shop to customers, these aggregators will likely be in cooperation with others to provide particular aspects. Such cooperation might be relatively ad hoc, but it could also be structural, through joint ventures. The longer the contractual arrangements between such entities, the extreme case of which would be a joint venture, the more likely their impact on the market is capable of having an anti-competitive effect.
The EU recognizes the importance of antitrust policy to the future of the automotive sector. As an EU report in 2012 identifies:

“...an integrated policy approach needs to be systematically put into practice, involving the following elements: ...

all policy areas having an impact on the automotive sector are strongly coordinated among the relevant authorities in charge, including trade, industrial, environmental, energy, transport and competition policy, innovation and internal market."

The coordinated changes in relation to competition policy will have their practical effect through decisions taken by the EU Commission, given that legislation in this area seems unlikely. While the decisional practice of the EU Commission cannot be fully stage managed, it will be interesting to see the early decisions the EU Commission decides to pursue. They will be an indication of where the EU Commission believes key messages should be communicated to the market. By analogy, the EU Commission acted relatively early in the development of the market for e-books when it commenced its investigation against book publishers and e-book retailers such as Apple, with an unannounced inspection (“dawn-raid”) in March 2011.

Two predictions are suggested after considering the competition law experience of the innovative technology that radically changed the mobile telephone market. First, the benefit of experience by industry and antitrust regulators suggests there should not be as many contentious EU competition issues arising. Second, however, predicting that there will be no competition issues arising, whether novel or mundane, as a result of the future development of the automotive sector would seem doubtful.
References

1. The international trade issues related to State aid are addressed in the publication “Automotive Sector: The Future Perspective, Trade.”

2. The EU has tended to move away from sector specific rules. The Motor Vehicle Block Exemption Regulation 1400/2002 expired in May 2010. Much of what was covered by that Regulation is included within the general rules applicable to all industries in Regulation 330/2010, while the rules governing after-market sales are contained in Regulation 461/2010.


4. “The auto parts investigation is the largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope and the potential volume of commerce affected by the alleged illegal conduct” Sharis A. Pozen, Acting AAGA, January 30, 2012. The American Antitrust Institute working paper No. 12-06.

5. See for example the decision of the Commission for the GM/Saab merger http://ec.europa.eu/competition/mergers/cases/ decisions/m1847_en.pdf


7. We understand that currently it is not possible to buy a new replacement battery. Nissan currently has a scheme, launched in 2013, where a user for $100 per month is able to replace a battery that does not reach a minimum recharge capacity, which will be the case for old/heavily used batteries or faulty batteries.


13. European Commission Guidelines on Vertical Restrains, para. 218; OJC 130/1 of 19.5.2010. The “buyer” would be the dealer or franchisee, a market share that might be relatively easily triggered if the relevant geographic market is deemed to be local.

14. At the general market level the largest OEM would unlikely have a market share much above 20%.

15. The international trade aspects of State aid are addressed in the publication “Automotive Sector: Future Perspectives, International Trade”.

16. For an overview of the situation in different Member States, see the website of EuropeanVoice.com www.thegreencarwebsite.co.uk/blog/index.php/2010/08/03/how-is-europe-supporting-electric-vehicles-the-green-piece/


18. An example between Renault and Spanish energy supplier Acciona for the offering of recharging stations of renewable energy.


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