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Draft Vertical Agreements Block Exemption Order: BVRLA Response to BEIS Consultation

1 Introduction

1.1 This document sets out the British Vehicle Rental and Leasing Association's (**BVRLA**) confidential response (**the Consultation Response**) to the Department for Business, Energy & Industrial Strategy's consultation on the Draft Vertical Agreements Block Exemption Order (**the Order**).

1.2 The BVRLA has previously contributed to the CMA's consultation process. The BVRLA submitted a position paper to the CMA outlining the key Retained VABER issues of interest to BVRLA members in June 2021 (**the BVRLA Position Paper**), and a Consultation Response in August 2021 (**the BVRLA Consultation Response**).

1.3 The BVRLA represents the demand side of the automotive industry. Our members engage in vehicle rental, leasing and fleet management. BVRLA members own and operate four million cars, vans and trucks. They spend more than £30 billion upgrading their fleets each year and are responsible for buying around 50% of new vehicles sold annually in the UK, including 83% of vehicles manufactured in the UK for sale in the UK.

1.4 The BVRLA welcomes the opportunity to comment on the Draft VABEO. While the Order is generally well crafted there are two key areas where the BVRLA believes greater legal certainty could be provided. The BVRLA suggestions would in no way change the scope or substance of the draft Order but reduce uncertainties that otherwise could lead to unwelcome, unexpected and unnecessary negative outcomes for our sector and the wider economy. The structure of this Consultation Response is as follows:

- Section 2 sets out the need for a definition of 'end user' to be included in the draft Order and what that dentition should include.
- Section 3 then sets out the need to update the definition of 'vertical agreements' to give clarity to the exclusion of rent and lease agreements.

1.5 The BVRLA's submissions support the legal clarity needed for a robust, fair, and transparent competitive framework in UK vehicle leasing, rental and fleet markets, and would protect the position of UK consumers in the post-Brexit environment. The BVRLA looks forward to the finalised Order and is available to further discuss any of the matters set out in this Consultation Response should that be of assistance to BEIS.

2 'End User' Status should be defined in the VABEO

Context

2.1 The term "end user" is used six times across the draft Order, including in application to key hardcore restrictions, such as those set out in 8;2;b;ii and 8;2;c:

> *"the restriction of active sales or passive sales to **end users** by a buyer operating at the wholesale level of trade,"*

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*"the restriction of active sales or passive sales to **end users** by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;"*

2.2 The term 'end user' is even used in the draft Order's interpretation section when setting out the definition of an "online intermediation service":

*"online intermediation service" means a service that allows undertakings to offer goods or services to other undertakings or to **end users** with a view to facilitating direct transactions between such undertakings or between such undertakings and **end users**, irrespective of whether and where those transactions are ultimately concluded and that constitutes an information society service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information on the field of technical regulations and of rules on Information Society services (codification)(a);,"*

2.3 However, the term 'end user' is itself not defined in the interpretation section of the draft Order. Creating a clear lack of clarity around how the Order should function, who it should apply to and even the definition of an "online intermediation service".

2.4 While there is no definition included in the draft Order. There is a historically accepted definition of the term 'end user'. There is no indication that the draft Order seeks to deviate from this definition, simply that it omits it. This omission should be rectified, and the accepted definition of 'end user' included in the interpretation section of the finalised VABEO.

2.5 The meaning of 'end user' in the Order's antecedent (the Retained VABER) is clarified by the Motor Vehicle Block Exemption Regulation (**MVBER**) Supplementary Guidelines, which state that:

- "*For the purposes of the application of the Block Exemption Regulations, and in particular as regards the application of Article 4(c) of the General Vertical Block Exemption Regulation, the notion of 'end users' includes leasing companies"* (paragraph 51); and

- *"The notion of 'end users' also encompasses consumers who purchase through an intermediary. An intermediary is a person or an undertaking which purchases a new motor vehicle on behalf of a named consumer without being a member of the distribution network."* (paragraph 52)

2.6 The application of 'end user' status to leasing companies is an important principle that derives from the case law of the Court of Justice of the EU. In Case C-70/93 *BMW v ALD Autoleasing*, the Court of Justice held that an agreement whereby a motor vehicle manufacturer prohibited members of its selective distribution system from delivering vehicles to independent leasing companies if those companies would make them available to lessees outside the relevant dealer's contract territory restricted competition by object and effect.

2.7 Under the current Retained VABER framework, 'end users' benefit from protections against sales restrictions imposed by a supplier upon members of its selective distribution system. That valuable protection currently applies to vehicle leasing companies and intermediary companies that purchase vehicles on behalf of consumers, but also other parties such as consumers themselves. It is important that the concept of 'end user' in the VABEO continues to be broadly interpreted to ensure that suppliers are not able to unduly restrict competition through the way they structure their distribution

networks. The omission of its definition from the draft Order places this at risk and could create an unintended and counterproductive reduction in protections.

Clarification of 'end user' status should be included in the VABEO

2.8 The BVRLA CMA representations set out how 'end user' status for leasing and intermediary companies provides benefits for consumers, including by promoting intra-brand competition between franchised dealers in the sale of new vehicles, and by making different purchase models available to consumers across a wide range of vehicles (e.g. leasing, hire purchase, personal contract purchase), thus enhancing consumer choice. The CMA did not make any comment that the intended scope of the VABEO would change 'end user' status for leasing and rental companies.

2.9 The BVRLA would be happy to provide further information on the consumer benefits provided by 'end user' status, if that would be of assistance to consumers. However, this Consultation Response focuses on the reasons why it would be beneficial to incorporate the interpretational provisions on 'end user' status in the VABEO itself.

2.10 It is important first to recognise that the location of the 'end user' interpretational provisions in the current MVBER Supplementary Guidelines is a result of the way in which the EU competition rules applicable to the sale of new vehicles have developed over time, and the sequencing of the relevant regulations. To briefly recap:

- Between 1985 and 2010, the motor vehicle sector was subject to a series of sectoral block exemption regulations which covered vertical agreements related to the distribution of new motor vehicles (Regulation 123/85, followed by Regulation 1475/95, and then Regulation 1400/2002). The last of these of these block exemption regulations also covered issues relating to spare parts distribution and repair and maintenance services (i.e. 'aftermarkets' services). Article 1(1)(w) of Regulation 1400/2002 clarified that the concept of 'end user' should be interpreted as including leasing companies, a point which was confirmed in Q46 of the accompanying Explanatory Brochure.

- In 2010, when the European Commission (**EC**) came to evaluate Regulation 1400/2002, it concluded that the "primary" market for the distribution of new motor vehicles was not subject to significant competition shortcomings. As a result, the EC's conclusion was that distribution of new motor vehicles would be more appropriately dealt with under the flexible effects-based approach of the general vertical agreements block exemption regime.

- Since 2010, the current MVBER, Regulation 461/2010, has covered vertical agreements relating to the purchase, sale or resale of spare parts or for the provision of repair or maintenance services (i.e. 'aftermarkets' services), but not vertical agreements for distribution of new motor vehicles. Instead, Regulation 461/2010 extended the application of Regulation 1400/2002 to vertical agreements for distribution of new motor vehicles until 31 May 2013. Since that date, such agreements have been assessed under the VABER.

2.11 It is counterintuitive that the meaning of 'end user' for the purposes of the VABER should be set out in the MVBER Supplementary Guidelines, and not in the VABER itself or only in the Vertical Guidelines. While the EC did not expressly set out its reasoning, it seems likely that this decision was based on the convenience of dealing with the issue in a similar way to the expiring Motor Vehicles regulation. Both Regulation 1400/2002 and the accompanying Explanatory Brochure had previously dealt with 'end

user' status, and so including similar wording in the new MVBER Supplementary Guidelines was likely seen as the most straightforward approach at the time.

2.12 However, there are several reasons why the MVBER Supplementary Guidelines is not the appropriate location for this important provision:

(a) Most obviously, this position is a hangover from the content of the previous MVBER (Regulation 1400/2002), and accompanying Explanatory Brochure. Given that new vehicle distribution now falls to be assessed under the draft Order, it no longer makes sense for companies and their advisors to have to refer to the MVBER Supplementary Guidelines, which chiefly focus on competition in aftermarkets.

(b) The current position raises the risk that the 'end user' interpretational provisions could inadvertently "slip through the cracks" if the sector-specific MVBER is permitted to expire without renewal in future. While the BVRLA is strongly in favour of the existing protections under the MVBER, and considers that they should be maintained, it cannot be ruled out that prevailing market conditions could change in future, such that the aftermarkets hardcore restrictions in the MVBER are no longer deemed necessary by the CMA. In that scenario, unless the 'end user' interpretational provisions had been captured elsewhere, the status of leasing and intermediary companies would no longer be protected in the UK, contrary to consumers' best interests.

(c) Even if the CMA remained alive to the issue identified in paragraph (b), and proposed to relocate the 'end user' interpretational provisions to the VABEO upon the future expiry of the MVBER, procedural difficulties might arise due to the schedule of review of the respective retained block exemptions, with the Retained MVBER due to expire one year *after* the retained VABER. A situation could therefore arise where the CMA is unable to recommend the inclusion of the 'end user' interpretational provisions in the UK VABEO until the next periodic review, which could be up to five years later. This would be highly damaging to legal certainty and business confidence in the motor vehicle rental and leasing sector.

(d) A period of uncertainty in the UK between the adoption of the VABEO and any supplementary interpretational provisions could prompt motor vehicle manufacturers to change their distribution policies and approaches in a manner which could potentially harm end users, and would put the onus and burden of proof on end users to challenge those approaches, which would harm consumers.

2.13 The BVRLA submits that the most appropriate place for the 'end user' interpretational provisions is in the text of the Order itself. This would:

(a) Improve legal certainty on this issue for all players in the motor vehicle sector (noting that similar issues may arise in other sectors, which would also benefit from clearer interpretational provisions – see paragraph (c) below). This is particularly important because BVRLA members have experienced cases where players in the supply chain have availed themselves of the ambiguity of the current verticals regime on the meaning of 'end user' to restrict the commercial freedom of leasing companies / intermediaries. For example, BVRLA members are aware of one motor vehicle manufacturer recently restricting access for leasing companies to a new model of vehicle it was launching in the UK, thereby limiting competition for its in-house leasing business;

(b) be consistent with the historical approach under Regulation 1400/2002, which was to include a definition of 'end user' in the text of the regulation (in addition to more detailed comments in the Explanatory Brochure); and

(c) clarify that 'end user' status applies to leasing and intermediary companies in other sectors, thus bringing similar benefits to consumers as are currently enjoyed in the automotive sector and reducing legal uncertainty.

2.14 In order to include the 'end user' interpretational provisions in the Order, the BVRLA proposes that BEIS:

(a) Include a new definition under the Interpretation section of the draft Order as follows:

"end user" includes leasing companies and consumers who purchase through an intermediary, being a person or an undertaking which purchases products on behalf of a named consumer without being a member of the distribution network

(b) Clarify that the reference to rent and lease agreements in the section on the scope of the VABER in the Vertical Guidelines does not conflict with 'end user' status for leasing and intermediary companies. Paragraph 26 of the Vertical Guidelines currently states that the VABER *"also applies to goods sold and purchased for renting to third parties. However, rent and lease agreements as such are not covered, as no good or service is sold by the supplier to the buyer"*.

2.15 The BVRLA notes that the EC has not proposed including the 'end user' interpretational provisions in the draft revised VABER or Vertical Guidelines, which were published on 9 July 2021. The BVRLA's view is that this is a regrettable omission from the EC's proposed approach. Although the EC received submissions in the context of its consultation on the MVBER and MVBER Supplementary Guidelines that the interpretational provisions on 'end user' status should also be included expressly in the VABER,[1] it may be that this proposal was not brought to the attention of the EC team leading the VABER review.

2.16 In any event, the BVRLA submits that BEIS is no longer constrained by the EC's approach to the VABER at EU level, and should take this opportunity to improve the clarity of the VABEO by incorporating the important interpretational provisions on 'end user' status as set out in paragraph 2.14.

3 Clarify the exclusion of rent and lease agreements from scope of VABEO

Current position

3.1 Paragraph 26 of the current EU Guidelines on Vertical Restraints notes that rent and lease agreements fall outside the scope of the VBER, "as no good or service is sold by the supplier to the buyer" and they are therefore not considered vertical agreements.

Clarification of the scope of the VABEO should be included in the finalised Order

3.2 The BVRLA proposes that BEIS should incorporate the express exclusion of rent and lease agreements in the text of the Order. This could be achieved by adding to the end of the existing definition 'vertical

[1] EC, Commission Staff Working Document on the MVBER (published 28 May 2021), page 96.

agreement' set out in 3(2) of the draft Order a line that states "(which for the avoidance of doubt does not include rent and lease agreements)".

3.3 While the CMA, UK Courts and authorities with concurrent competition powers in the UK must have regard to EU Guidelines when determining matters under the Competition Act 1998, due to the effect of section 60A, it does not appear that they would be bound to follow the approach set out in the EU Guidelines on Vertical Restraints. In fact, case law of the EU courts prior to the UK's exit from the European Union provided that European Commission guidelines, although persuasive, were not strictly speaking binding on the NCAs or the national courts (Pfleiderer AG v Bundeskartellamt).

3.4 Therefore, in the BVRLA's view, incorporating this important provision on the scope of the block exemption in the text of the Order would promote greater legal certainty for businesses active in the rental and leasing sectors. This would also be consistent with the remainder of the VBER framework, whereby the other elements of a qualifying vertical agreement (covered in paragraph 24 of the EU Guidelines on Vertical Restraints) are all set out in the draft Order definition of 'vertical agreement' at 3(2).

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About the BVRLA

The BVRLA represents over 1,000 companies engaged in vehicle rental, leasing and fleet management. Our membership is responsible for a combined fleet of four million cars, vans and trucks – one-in-ten of all vehicles on UK roads.

BVRLA members represent the demand-side of the automotive industry, buying around 50% of new vehicles, including over 80% of those manufactured and sold in the UK. In doing so, they support almost 500,000 jobs, add £7.6bn in tax revenues and contribute £49bn to the UK economy each year.

Together with our members, the association works with policymakers, public sector agencies, regulators, and other key stakeholders to ensure that road transport delivers environmental, social and economic benefits to everyone. BVRLA members are leading the charge to decarbonise road transport and are set to register 400,000 new battery electric cars and vans per year by 2025.

BVRLA membership provides customers with the reassurance that the company they are dealing with adheres to the highest standards of professionalism and fairness.

The association achieves this by reinforcing industry standards and regulatory compliance via its mandatory Codes of Conduct, inspection regime, government-approved Alternative Dispute Resolution service and an extensive range of learning and development programmes.

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