

Vertical Agreements Block Exemption Order Guidance: BVRLA Response to CMA Consultation

1 Introduction

- 1.1 This document sets out the British Vehicle Rental and Leasing Association's (**BVRLA**) response (the **Consultation Response**) to the CMA's consultation on the UK Vertical Agreements Block Exemption Order Guidance (**VABEO Guidance**).
- 1.2 The BVRLA has previously contributed to the CMA's consultation on the Retained Vertical Block Exemption Regulation (**Retained VBER**) by participating in roundtables held by the CMA in Spring 2021, and by submitting both a position paper and a consultation response in Summer 2021. As explained in those submissions, the BVRLA represents the demand side of the automotive industry. BVRLA members engage in vehicle rental, leasing and fleet management. BVRLA members own and operate more than 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.
- 1.3 The BVRLA's submissions support 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 is available to further discuss any of the matters set out in this Consultation Response should that be of assistance to the CMA.

2 General

- 2.1 The BVRLA welcomes the approach taken by the CMA in the Draft VABEO Guidance, and considers that the draft provides greater clarity and legal certainty for all members of the vehicle rental, leasing and distribution sectors, as well as other industries more generally. The BVRLA endorses the adoption of the Draft VABEO Guidance in its current form, subject to the points outlined in the following sections.

3 End user status

- 3.1 As explained in the BVRLA's Retained VBER consultation response, the definition of motor vehicle rental and leasing companies as "end users" for the purpose of the vertical block exemption regime is an important principle. It ensures that motor vehicle manufacturers may not prohibit members of their distribution systems from delivering vehicles to independent leasing companies if those companies were to make them available to lessees outside the relevant dealer's contract territory (including where such sales are conducted via intermediaries or brokers, in line with recital 52 of the current MVBER Supplementary Guidelines). This 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.

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- 3.2 The BVRLA strongly supports the CMA's proposal to include an express statement clarifying the application of the "end user" status to motor vehicle rental and leasing companies at footnote 87 of the Draft VABEO Guidance. The BVRLA agrees with the CMA that it is more appropriate for this clarification to be included within the VABEO Guidance rather than the MVBER Supplementary Guidelines, which is the current position under the Retained VBER regime as a result of the way in which EU competition rules applicable to the sale of new vehicles have developed over time.
- 3.3 The BVRLA notes that reference is made to the MVBER Supplementary Guidelines at footnote 87 of the Draft VABEO Guidance. As explained in further detail below, the BVRLA considers that further clarification in relation to the interaction between the future VABEO regime and the MVBER regime (which is due to expire in May 2023) would be beneficial.

Conclusion: The BVRLA welcomes the position adopted by the CMA as regards the application of the "end user" status to motor vehicle rental and leasing companies, and would strongly endorse the inclusion of this clarification in the final VABEO Guidance. The BVRLA considers that the final text of the VABEO Guidance should confirm that the "end user" status applies equally to situations where sales are conducted via intermediaries or brokers, as is currently the position under recital 52 of the MVBER Supplementary Guidelines.

4 Exclusion of rent and lease agreements

- 4.1 The BVRLA supports the CMA's suggestion to retain the express exclusion of rent and lease agreements from the scope of the VABEO at paragraph 6.12 of the Draft VABEO Guidance. Nevertheless, as submitted in its position paper, the BVRLA considers that given the importance of this provision in determining the scope of the application of the vertical block exemption regime, it would have been preferable for it to also be included in the VABEO itself.
- 4.2 The BVRLA welcomes the CMA's addition at footnote 43 clarifying the interrelation between this exclusion and the application of the "end user" status for motor vehicle leasing and rental companies. The BVRLA considers that this clarification will serve to provide greater legal certainty to members of the motor vehicle distribution industry.

Conclusion: Whilst the BVRLA supports the express exclusion of rent and lease agreements from the scope of the VABEO in the Draft VABEO Guidance, it considers that this provision may be more appropriately included in the VABEO itself. Nevertheless, to the extent that the exclusion remains in the VABEO Guidance, the BVRLA welcomes the clarification on its relationship with the "end user" status of motor vehicle leasing and rental companies.

5 Dual distribution and provision of information by end users

- 5.1 The BVRLA welcomes the CMA's engagement in the Draft VABEO Guidance with the question of information exchange in the context of dual distribution at paragraphs 10.170-10.179 of the Draft VABEO Guidance. As the CMA has identified, dual distribution can give rise to problematic information exchanges, where a supplier and its distributor share competitively sensitive information. In particular, the Draft VABEO Guidance clarifies at paragraph 10.176(b) that "the exchange of customer-specific sales data, including non-aggregated information on the value and volume of sales per customer, or information that identifies particular customers, unless in each

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case such information is necessary” is likely to either restrict competition by object or otherwise would be unlikely to be genuinely vertical.

5.2 As mentioned in its VABEO consultation response, a related concern for BVRLA members is the common requirement imposed by motor vehicle manufacturers (directly or indirectly) that rental and leasing companies must supply the motor vehicle manufacturer with the details of the rental/leasing company’s customer. This is particularly problematic when, as is increasingly the case, motor vehicle manufacturers set up their own leasing operations to compete with those of independent leasing companies. Requiring leasing companies to provide the personal data of customers to such motor vehicle manufacturers may enable the latter to win customers back from independent leasing companies when the leasing contract is due to expire. This reduces leasing companies’ incentives to invest and innovate, and over time could lead to a reduction in the overall level of competition in the leasing market.

5.3 The clarifications in the Draft VABEO Guidance in relation to exchange in the context of dual distribution arguably apply by analogy to the situation described above, where independent leasing companies are required to provide information to a supplier operating its own leasing operations. The BVRLA considers that a clarification is necessary indicating that in such situations suppliers may only require their customers to disclose the personal data of the ultimate users of the products or services where strictly necessary in order to enable the provision of those goods or services.

Conclusion: The BVRLA welcomes the CMA’s clarifications in relation to information exchange in the context of dual distribution. The BVRLA considers however that a further clarification should be included in the VABEO Guidance, specifying that supplier may not require “end users” to disclose data of the ultimate user of the goods supplied other than what is strictly necessary to enable the use of the goods.

6 Online intermediation service providers

6.1 The BVRLA notes that the Draft VABEO Guidance contains welcome clarification as regards the application of the concept of agency to online intermediation service providers (OISPs). The BVRLA considers that the introduction of this concept in the VABEO is particularly helpful in the context of the motor vehicle industry, which has developed significantly since the introduction of the Retained VBER and has seen a number of new types of players in the market, including online services providers. The clarifications suggested by the CMA in the Draft VABEO Guidance will allow members of the BVRLA who engage in vehicle leasing and rental services to determine whether the online intermediaries and brokers that they deal with are to be classified as agents or as suppliers of services for the purpose of the block exemption regime.

6.2 In the context of the vehicle rental and leasing industries, OISPs – or “brokers” – provide services such as advertising the company’s offering and introducing customers. The Draft VABEO Guidance provides at paragraphs 6.25-6.26 that “*an undertaking which provides online intermediation services qualifies as a supplier under the VABEO when it is providing those services*”, and that “*the undertaking providing online intermediation services cannot qualify simultaneously as a buyer*”. In relation to the motor vehicle rental and leasing markets, the OISPs do not themselves take any legal or factual responsibility for the car rental or leasing transaction, which is entered into between the rental/leasing company and the customer, and cannot therefore be considered

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buyers. Likewise, OISPs are not distributors of rental/leasing companies' services, given that they do not buy and resell car rental/leasing services and have no capability of providing vehicle rental/leasing services themselves.

6.3 It is therefore clear that OISPs are simply suppliers of services to rental/leasing companies, and cannot themselves be considered buyers or distributors of vehicle rental/leasing services. The BVRLA therefore understands that framework under the VABEO and the VABEO Guidance which relates to restrictions which may be imposed on buyers and distributors do not apply to dealings between motor vehicle rental/leasing companies and OISPs. The relationships which OISPs have with other participants in the industry, e.g. leasing and rental companies and, as applicable, vehicle manufacturers or distributors, remain subject to the broader competition law framework, but not for example to the hardcore restriction on retail price maintenance under Article 8(2)(a) of the draft VABEO (which relates to the restriction of a buyer's ability to determine its onward sale price, and does not apply when an OISP is facilitating a sale to a customer by a leasing or rental company). The BVRLA considers that the VABEO Guidance should clarify that such vertical hardcore restrictions do not apply to agreements with OISPs.

Conclusion: The BVRLA considers that the introduction of the concept of OISPs is helpful in clarifying the relationships between various players in the vehicle distribution industry. The BVRLA considers however that the final VABEO Guidance should clarify that the rules on vertical hardcore restrictions, which apply to agreements between suppliers and distributors, do not apply in the context of OISPs' relationships with the companies to whom they provide services.

7 Dual role agents

7.1 The BVRLA welcomes the clarifications included in the Draft VABEO Guidance in relation to the application of agency agreements to "dual role" agents and the application of the concept of agency more broadly, and considers that these will greatly facilitate the assessment of agency for the purpose of the vertical block exemption regime. It is important for leasing and rental companies acquiring vehicles to understand when a counterparty supplying vehicles is acting as an agent for the manufacturer, or as a distributor (subject to the VABEO framework). This additional guidance is helpful in that context.

Conclusion: The BVRLA supports the inclusion of the clarifications as regards the application of the concept of agency to dual role agents in the final VABEO Guidance.

8 Motor Vehicle Block Exemption Regulation

8.1 The BVRLA notes that at paragraph 6.48 of the Draft VABEO Guidance it states that the "VABEO applies to vertical agreements relating to the purchase, sale or resale of spare parts for motor vehicles and to the provision of repair and maintenance services for motor vehicles". It further provides that "such agreements only benefit from the block exemption provided by the VABEO if, in addition to the conditions exemption set out in the VABEO, they comply with the additional requirements of Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, and accompanying guidelines".

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8.2 The BVRLA appreciates that, in light of the fact that the retained MVBER are due to expire one year after the Retained VBER, it is desirable for the purpose of consistency that the changes introduced by the VABEO and VABEO Guidance apply equally to agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles during this intervening period. The BVRLA understands that the above provisions aim to effect this by specifying that the VABEO and retained MVBER and supplementary guidelines apply cumulatively. The BVRLA considers however that in the final text of the VABEO Guidance, the CMA should clarify (i) that the MVBER regime does not apply to the sale or resale of new motor vehicles (in accordance with recital 10 of the MVBER Supplementary Guidelines, and (ii) how the VABEO and VABEO Guidance interact with the retained MVBER.

Conclusion: The BVRLA considers that further clarification regarding the relationship between the VABEO regime, the retained MVBER regime and any future UK MVBER legislation should be clarified in the VABEO Guidance.

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