



**The European Commission's draft regulation and
supplementary guidelines on vertical restraints in the
motor vehicle sector SEC (2009) 1471**

Confidential Response from:

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BVRLA Response to Block Exemption Regulation

Executive Summary

The BVRLA is the representative trade body for companies engaged in leasing and rental of cars and commercial vehicles in the UK. Our members provide short-term self-drive rental, contract hire and fleet management services to corporate users and consumers. BVRLA Members operate a combined fleet of 2.3 million cars, vans and trucks of widely differing sizes.

The vehicle rental and leasing sector remain keen to ensure that both national and EU legal and economic policies facilitate growth and fairness in the market place. It is on this basis that we welcome the opportunity to comment on the European Commission's (EC) first draft proposal for a new motor vehicle block exemption regulation and guidelines. Our comments outlined in this paper demonstrate how the regulation could be improved and proposes some revised wording on the sector specific guidelines to strengthen and provide clarity on certain areas for the rental and leasing industry.

We note the EC has stated that it has not found any evidence of significant competition shortcomings in the EU with regards to the sale of new vehicles and it therefore has indicated its intention to remove sector specific exemption relating to vehicle distribution agreements three years after the current Regulation is due to expire. We do not agree with this view and believe that removal of the specific regulatory protection will result in market failure and consumer harm.

We do nevertheless welcome the EC's plans to extend the current BER on its expiry date of 2010 for a further three years as it relates to vehicle distribution, as this helpfully provides certainty during the turbulent and difficult market conditions. With regards to the market for repair and maintenance services and distribution of spare parts, we would agree with the EC that the competition is less intense. We are pleased to note that the EC intends to complement the general block exemption rules with sector specific guidelines designed to address areas of key concerns.

However, our initial thoughts with regards to these guidelines are worrying as there is a lack in transparency in certain areas, especially with regards to the definition of the 'end user'. The competitive role our members play is clearly underpinned by the fact the current legal framework recognises our members are the economic owner, the "end user of a motor vehicle", therefore we have recommended some improved wording in the guidelines which will clarify and ensure that our members' legal status as the end user is retained. However, we don't believe that the guidelines are sufficient to protect leasing



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companies from their end user status being eroded, therefore we would recommend that the EC clarify 'end user status' in the vertical agreements to ensure that this is robustly enforced and to prevent manufacturers from ignoring end user status.

The UK market has experienced a number of examples when motor manufacturers have attempted to 'high jack' our customers and force us to provide full details of our customers as a pre-requisite to being able to purchase vehicles. The robustness of the current BER has allowed us to fend off these moves but the support will be lost under the current 'guidelines' proposal.

In conclusion whilst we recognise the vital role manufacturers play in the European economy, we remain confident that the EC will not water down competition rules and will address the leasing sectors concerns over ensuring that the definition of end user status is reflected in the vertical agreements rather than in the guidelines.



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Specific Comments

End User definition

We believe it is of paramount importance that the law continues to protect our members' end user status if the EC wish to secure a competitive and effective marketplace. We remain mindful that the regulation, as it stands today, has played an effective role on securing this competitive market place for our members. To ensure that our members continue to receive this protection we recommend that a solid definition of end user status is reflected in the vertical agreements and not in the guidelines that accompanies the regulation.

It is regrettable that the current market structure continues to be tipped in favour of the motor manufacturers, which is clearly detrimental for a fair, open and competitive market place and it is therefore incumbent on the EC to ensure the benefits provided by the current legal framework are not removed or eroded as this would simply support the manufacturers' quest for market dominance.

In our previous response to the Commission we highlighted our concerns that some key vehicle manufacturers' are trying to prevent future regulation for our members to be considered as the end users. We provided the Commission with numerous examples of manufacturers attempts to dilute leasing companies end user status. These restrictive practices adversely impact our members' commercial freedom and importantly erode the pillars for a competitive market as well as reducing choice. The end user status is a key instrument to the industry as it has helped to ensure that authorised dealerships have the right to supply an independent rental or leasing company throughout Europe without our members having to produce a mandate from their own customer. Our members should be able to obtain vehicles at competitive conditions considering their scope and purchasing scale, thus maintaining a level playing field. They should also be able to provide aftermarket services in a way that consumers can benefit from the financial advantages gained thereof.

If our members were to lose their end-user status in the future, then our members would be regarded as being a business that is active in vehicle trading, purchasing, and reselling vehicles for commercial purposes. As a direct consequence, our members could be required to demonstrate that that have a valid customer mandate to operate the vehicle, when in fact they are the customer.



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Whilst our recommendation is to ensure that a definition of the end user status is reflected in the vertical agreements we have nonetheless recommended a number of changes to the guidelines published by the EC as this does not fully appreciate the underlying importance of the end user status for our members. Most notably we consider the definition under paragraph number (45) to be flawed, which states the following;

*(45). For the purposes of the application of the Block Exemptions **Regulations**, and in particular as regards the application of Article 4(c) of the General Vertical Block Exemption, the notion of "end users" includes leasing companies. This means in particular that distributors in selective distribution systems may not be prevented from **supplying new motor vehicles to a leasing company of his choice**. However, a supplier using selective distribution may prevent dealers from supplying contract goods to leasing companies when there is a verifiable risk that the leasing company will resell these motor vehicles while they are new.*

Leasing members have also stated that as it stands the wording would create a loophole in which manufacturers could easily find ways to exploit. We would recommend that the EC take into account the revised wording above and include the end user definition in the motor vehicle block exemption and the vertical block exemption regulation, rather than have the definition in the guidelines in which we believe is not sufficient. From a legal point of view a definition of end user status is not appropriate to be placed in the guidelines but in terms of clarification and enforceability the end user status should fit into one of the BER's.

By retaining the end user status within the legislation we strongly believe would go some way to help secure competitive conditions, especially for small to medium sized businesses and for the independent leasing companies, who collectively account for a significant part of the total market for passenger cars in Europe. By failing to clarify this in the vertical agreements would take away a much needed safeguard for the effective and balanced functioning of the vehicle rental and leasing market.



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Warranty

Our members have expressed their interest in efficient competition in the after-sales market. In particular with regards to the ability for authorised and independent dealers to be able to complete warranty work to free up the after-market and increase competition and choice for consumers. By having a competitive environment this will allow our leasing members to have more choice in the aftermarket and will be able to offer their customers a greater variety in aftermarket care. If there is a lack of competition in the aftermarket this will lead to an increase in repair costs and maintenance costs for consumers.

In our previous response we provided examples of where manufacturers were beginning to employ practices that aimed to tie customers to suppliers aftermarket networks, such as fleet service programmes. Our members are increasingly seeing some suppliers linking the purchase of new vehicle through leasing services with an after-sales service package, free of charge or at a reduced cost, to be carried out by the suppliers repairers. This is becoming a massive concern amongst leasing companies. By adopting this approach suppliers are marginalising independent repairers, preventing access to the market and stifling consumer choice. The Commission has indicated that it found the repair and maintenance market less competitive and has noted that manufacturers sometimes refused to honour warranties when a vehicle has been repaired outside of the authorised networks, this area needs to be addressed.

We are pleased that the commission has recognised and addressed warranty abuses in its guidelines however, we feel that this could be re-worded to address the issues we have highlighted above and allow for the development of a level playing field. We recommend the following changes to paragraph 59.

Misuse of warranties

59) Qualitative selective agreements may also be caught by Article 101(1) if the supplier acts more directly to reserve repairs on certain categories of vehicle to the members of its authorised networks, for instance by making the manufacturer's warranty, whether legal or extended, conditional on the end user having all repairs, including those not covered by warranty, carried out within the authorised repair networks.



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In relation to leasing services, a similar situation arises, if the supplier links the purchase of a new vehicle with after-sales service offerings to be provided by members of the supplier's network or if supply and after-sales service rights are made conditional upon a leasing company's membership in a supplier's fleet service programme. It seems doubtful that such a practice could bring benefits to consumers that could allow the agreements in question to benefit from the exception in Article 101(3) of the Treaty. However, if a supplier refuses to honour a particular warranty claim on the grounds that the situation leading to the claim has been caused by fault on the part of an independent repairer, this will have no bearing on the compatibility of its authorised repair agreements with the competition rules.

Access to authorised repair networks

We welcome the Commissions proposals to include rules on the supply of spare parts to ensure that independent repairers can obtain carmaker branded parts. We are also pleased with the proposals limiting the benefit of the Block Exemption for service and repair agreements to operators with a market share of up to 30%. This would make it easier for the Commission or for national competition authorities to prevent carmakers from withholding technical information from independent repairers.

The EC indicated in its last paper that competition from independent repairers imposes a powerful competitive constraint on the authorised networks as the independent sector offers consumers a comparable service, often at lower prices. In our previous response we stated that independent repairers can only compete effectively if they have access to both technical information and spare parts, which are key inputs for performing repair and maintenance work. We are satisfied that the guidelines begin to address this under sections (60 & 61).

There is no doubt that the introduction of authorised repair agents will continue to improve customer access to service and repair facilities. By creating a level playing field in this area would be of great benefit to our members and more significantly their customers. Overall, the BER has been successful in protecting competition between authorised repairers, which has led to the introduction of qualitative selective repair systems. As a consequence, market forces have led numbers of authorised repairers to increase, since all repairers meeting objective criteria can join a network. However, we feel that manufacturers should be forced to relax the currently onerous criteria for these authorised repair agents and encourage many more to be established to make service facilities available closer to where the customer lives and ultimately enhance competition and raise standards.



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By continuing to restrict the freeing up of technical information this could harm consumers by forcing independent repairers to exit the market place and thereby dilute competition. It is therefore paramount that vehicle manufacturers make vehicle data freely available, albeit at a reasonable cost, for all service and repair outlets qualifying to receive it.

Dealership agreements

We are concerned over dealership agreements and the criteria for the transfer of rights with regards to dealerships. Whilst there is no logical reason to deny dealers the right of transfer, the purchaser must meet the criteria for manufacturer standards. If manufacturers are permitted to refuse to allow such transfers or reject a proposed dealership on a basis that is not clear or transparent this could result in the monopolisation of dealerships which in turn could restrict competition and increase cost for consumers. The Commission must ensure that there is strict regulation in place to ensure that manufacturers are not placing unnecessary restrictions on the transfer of dealerships which in turn could restrict commercial freedom.

General Competition Rules

The EC's preferred approach relies on the application of the general Block Exemption Regulation 2790/1999 for Vertical Agreements, paired with guidelines, for the primary market as of June 2013 and the aftermarket as from 1 June 2010.

We remain concerned that the EC does not adequately address any issues specifically related to the automotive sector and lacks altogether a proper definition of end user, independent operator, dealer or repairer. At times the paper is too generic and it would be difficult to use this in a way that applies to the automotive sector, for example, the only reference to the end user status in a way that it could apply to the automotive sector can be found in the accompanying guidelines.

BER 1400/02 stipulates in its Article 1 (1) (w) that companies are to be considered as end-users under the terms of the BER, unless the legal contracts provide for a transfer of ownership or an option to purchase the vehicle prior to the expiry of the contract. A similar provision cannot be found in the general Block Exemption Regulation 2790/1999 for vertical agreements (hereafter BER 2790/1999).



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Conclusions

We recognise that there is a healthy level of competition in the motor industry at present, which has led to an unprecedented level of choice for vehicle buyers and improved the quality of after-sales service. Whilst we are supportive of simplifying some of the sector-specific regulations imposed by BER this should not be done so in such a manner that would lead to competition being eroded.

End user status is vitally important because of the potential for manufacturers to try and freeload on the back of our investment that we must be clearly recognised as the legal and economic owner of the vehicle. We do not expect the Commission to be involved in enforcement or protection of our position but if our true status is recognised within the legislation then we can ensure it is respected (if necessary through the legal system) and that the health of a competitive independent leasing sector is retained. In the same way that you wish to see a competitive independent service and repair sector.

We are keen to maintain positive dialogue with the EC as we are keen to ensure that the final conclusion help to secure a competitive and effective market. We therefore would welcome any further discussions and are happy to provide any additional information the EC may require.



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Bona-fides

BVRLA, the Industry and its Members

- The BVRLA is the trade body for companies engaged in the leasing and rental of cars and commercial vehicles. Its Members provide short-term self-drive rental, leasing and fleet management services to corporate users and consumers. They operate a combined fleet of 2.6 million cars, vans and trucks, buying 44% of all new vehicles sold in the UK.
- Through its Members and their customers, the BVRLA represents the interests of more than two million business car drivers and the 10 million people who use a rental vehicle each year. As well as informing the Government and policy makers on key issues affecting the sector, the BVRLA regulates the industry through a mandatory code of conduct.