

VBER consultation

This document sets out Leaseurope's response to Commission Public consultation on the draft revised Regulation on vertical agreements and vertical guidelines. Leaseurope brings together 45 member associations representing the leasing, long term and/or short term automotive rental industries in the 33 European countries in which they are present. The scope of products covered by Leaseurope members' ranges from hire purchase and finance leases to operating leases of all asset categories (automotive, equipment, machinery, ICT and real estate). It also includes the short-term rental of cars, vans and trucks. It is estimated that Leaseurope represents approximately 93% of the European leasing market.

1. Initial observations

Leaseurope welcomes the Commission's recognition of the need to maintain and update the VBER and accompanying VGL, in addition to the Motor Vehicle Block Exemption Regulation (MVBER).

As an integral stakeholder in the automotive value chain, our members are directly and indirectly in contractual relationships with OEMs and their dealership networks. As stated previously, the VBER and the VGL should allow for the possibility to refuse hardcore restrictions, like e.g. limitations on parallel trade and to prevent OEMs to restrict the commercial freedom of leasing and rental companies.

2. Specific issues

2.1 End user status

Art. 4 of the updated VBER maintains hardcore restrictions with regards to restrictions on sales by (selective) distribution networks to **end-users**. However, the concept of end-user has not been defined in Article 1 of the current or the updated VBER.

With regards to our industry, the recognition of leasing and rental companies' as end-users can currently be found in the 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 moto vehicle on behalf of a named consumer without being a member of the distribution network."*

Via the MVBER Supplementary Guidelines 'end users' benefit, amongst others, from protections against sales restrictions imposed by a supplier upon members of its selective distribution system. That valuable protection currently applies to vehicle leasing and rental companies, and intermediary companies that purchase vehicles on behalf of consumers.

It is important that the concept of 'end user' continues to be interpreted as it is set out in the MVBER Supplementary Guidelines to ensure that suppliers are not able to unduly restrict competition. Ultimately, this recognition provides clear benefits for consumers, including by promoting intra-brand competition 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.

- Clarification of 'end user' status in the VBER

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 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 general vertical agreements block exemption regime.
- Since 2010, the current MVBBER, 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 VBER.

It is counterintuitive that the meaning of 'end user' for the purposes of the VBER should only be set out in the MVBBER Supplementary Guidelines, and not in the VBER itself or only in the Vertical Guidelines.

There are several reasons why the MVBBER Supplementary Guidelines is not the appropriate location for this important provision:

- Most obviously, this position is a hangover from the content of the previous MVBBER (Regulation 1400/2002), and accompanying Explanatory Brochure. Given that new vehicle distribution now falls to be assessed under the VBER, it no longer makes sense for companies and their advisors to have to refer to the MVBBER Supplementary Guidelines, which chiefly focus on competition in aftermarkets.
- The current position raises the risk that the 'end user' interpretational provisions could inadvertently "slip through the cracks" if the sector-specific MVBBER is permitted to expire without renewal in future. While Leaseurope is strongly in favour of the existing protections under the MVBBER, 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 MVBBER are no longer deemed necessary by the EC. 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, contrary to consumers' best interests.
- Even if the EC remained alive to the issue identified in the previous paragraph, and proposed to relocate the 'end user' interpretational provisions to the VBER upon the future expiry of the MVBBER, procedural difficulties might arise due to the schedule of review of the respective retained block exemptions, with the MVBBER due to expire one year *after* the VBER. A situation could therefore arise where the European Commission is unable to recommend the inclusion of the 'end user' interpretational provisions in the VBER until the next periodic review. This would be highly damaging to legal certainty and business confidence in the motor vehicle rental and leasing sector.
- A period of uncertainty between the adoption of the VBER and the MVBBER 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.

Leaseurope submits that the most appropriate place for the 'end user' interpretational provisions is in the text of the VBER 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);
- (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);
- (c) be beneficial to ensure that the buyers of the goods, like leasing companies, have access to data that is generated by such good – see paragraph 2.2.3 below); and
- (d) enable the CMA to apply 'end user' status to leasing and intermediary companies in other sectors, thus bringing similar benefits to consumers as are currently enjoyed in the automotive sector.

The current review of the regulatory framework provides a good opportunity to correct this legislative inconsistency.

- **Definition**

In order to include a definition of 'end user' directly in the VBER, Leaseurope would propose to:

- Include a new definition under Article 1 as follows: *"end user" includes leasing companies and rental 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)*

The French definition should include both "*sociétés de crédit-bail*" as well as "*société de location*".

Moreover, it should be ensured not only that leasing companies and rental companies duly fall in the scope of end user; but also that the protection that is granted towards such end users also applies in circumstances where car manufacturers sell cars directly to them, notably through their own digital platforms (see further paragraph 2.2 below on dual distribution).

2.2 Dual distribution

As such dual distribution systems may be capable of increasing consumer choice and promoting competition. However, such systems may have a limiting effect on competition situations, especially if such goods used to be sold via large-scale independent distribution networks and such distribution networks are dismantled to take back pricing control.

OEMs are increasingly providing competing mobility services directly to end customers in competition with leasing and rental companies. They are seeking greater control over their distribution networks with a view to better controlling customers or even foreclosing those other mobility providers.

Leaseurope appreciates that this concern has been reflected by the European Commission by including a new paragraph 2(5) on the applicability of the VBER in case of dual distribution. Whilst the information exchange is one imminent topic (see further 2.2.1 below), Leaseurope notes that OEMs are more in general trying to control leasing companies' commercial behaviour either via (incorrect) claims to retain a certain level of the market or a customer group to itself (see further 2.2.2 below), or via hampering access to in-vehicle data (see further 2.2.3 below). Each of these three types of behaviour directly limits consumer choice.

Leaseurope has engaged Quantalyse to quantify potential harm if indeed independent leasing companies would be pushed out of the market. This study is available on request.

2.2.1 Information exchange

A concern for Leaseurope members is the increasingly common requirement imposed by motor vehicle manufacturers (either directly, or indirectly via requirements imposed on dealers) that rental and leasing companies must supply the motor vehicle manufacturer with the details of the rental / leasing company's customer, or the ultimate driver of the vehicle if different. In the experience of Leaseurope members, this frequently goes beyond the customer / driver's delivery address, and can include personal information such as telephone number, email address, or the corporate customer's company number or VAT number, without any apparent justification.

Given that motor vehicle manufacturers are increasingly engaging in dual distribution by setting up their own leasing operations to compete with those of independent leasing companies, providing the (personal) data of these customers may enable motor vehicle manufacturers to gain customers from independent leasing companies based on an illicit use of personal information when the leasing contract is due to expire. Even if there is a short-term and limited benefit to individual lessees who may receive individual offers from motor vehicle manufacturers, the overall impact will be anticompetitive, given that it 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. This can occur in several ways throughout the leasing customer lifecycle:

- (a) In-life: vehicles may prompt drivers to take them for repair or servicing via the manufacturer's channels only via in-vehicle alerts; manufacturers may seek to sell 'ancillary' services to the driver;
- (b) End-of-life: motor vehicle manufacturers may contact drivers directly with "special offers" to renew their vehicle, seeking to bypass the leasing company.

In order to address this concern, Leaseurope appreciates that the EC proposes to narrow the scope of the dual distribution exemption to clarify that where the parties' aggregate market share at retail level exceeds 10%, then information exchanges between them will not qualify for exemption under the safe harbour. Instead, such information exchanges must be assessed under the rules on horizontal agreements.

Leaseurope submits that consumers' interests would be even better protected by introducing a new hardcore restriction, or any other language, in the VBER providing that suppliers may not require 'end users' (which is to defined explicitly in the VBER, see para. 2.1. above) to disclose any data of the user of the goods supplied other than what is strictly necessary to enable the use of the goods.

This would be in line with the protection that leasing and rental companies have under the current MVBBER Supplementary Guidelines. As per paragraphs 51 and 52 of the MVBBER Supplementary Guidelines leasing companies may not be obliged to provide the OEM/ its supplier with copies of each leasing agreement as this could amount to an indirect restriction on sales. In order to ensure that leasing and rental companies maintain such protection, these paragraphs should be included in the renewed Vertical Guidelines. This proposal should capture measures imposed directly by motor vehicle manufacturers on leasing and rental companies, and also those imposed indirectly via buyer-distributors such as dealers.

In addition the renewed Vertical Guidelines should further clarify how such protection against disclosure should be interpreted. The key points which should be are:

- suppliers may not require their customer to disclose (personal) data of the ultimate users of the products or services for the purpose of determining the level of discount or bonus (see further para. 2.2.2 below);
- suppliers may only require their customers to disclose the (personal) data of the ultimate users of the products or services on a need to know basis when strictly necessary in order to enable the provision of those goods or services and such information should not be used for another purpose; and
- Where (personal) data of the ultimate users is provided to suppliers which operate a dual distribution model, that data should be subject to internal firewalls within the supplier, preventing it from being used by the supplier's marketing / customer acquisition teams.

Introducing clear guidance on these points would go some way to addressing the harms to competition arising from the ability of suppliers operating dual distribution models to win downstream customers from their direct counterparties.

2.2.2 Direct competition

In addition to the above-mentioned development of OEMs requiring leasing and rental companies to provide certain information, Leaseurope notes several other developments that limit independent leasing and rental companies' ability to compete.

Some examples include:

- OEMs are taking back control to whom the vehicles are sold by converting dealers into agents.
- Certain OEMs do not provide the same discounts for private individuals that leasing companies would 'normally' get for corporate customers. This leads to independent leasing companies being restricted from such sales to private customers. In general, to meet people mobility needs, private lease may be a more affordable option for many rather than buy a car. In addition, leasing companies can play a key role in providing green mobility. Therefore, competition between independent leasing companies and OEMs should not be hampered.

Leaseurope submits that any commercial behaviour of OEMs that limits sales of buyers or end users should be hardcore restricted under the VBER. This includes for example any restrictions on buyers or end users in the active or passive sales for leasing the purchased goods, whether this is a result from direct obligations on the buyer but also from indirect measures aimed at inducing the buyer not to sell to particular customers or territories, such as refusal or reduction of bonuses, or discounts or termination of supply.

In addition, Leaseurope submits that it should be clarified that it would be beneficial for the leasing and rental industry if it would be clarified in para. 31 (g) of the updated Vertical Guidelines that the agency exception may only be invoked if indeed dealers do not run any risks and do not make any market specific investments, for example in relation to investments in their premises (e.g. a showroom).

2.2.3 Access to in-vehicle data

In the Commission Evaluation Report¹, it is explicitly recommended that *some provisions may need to be updated, in particular to reflect the importance that access to data is likely to have as a factor of competition.*

Including the end user status of purchasers of goods (fleet owners) for subsequent lease or rental in the VBER could also be beneficial to ensure that such purchaser is actually able to have real-time access to in-vehicle data. Leaseurope submits that the VBER should introduce a new provision prohibiting suppliers/OEMs from denying, limiting, delaying or imposing on owners and/or end users unfair requirements for access to any data generated by their goods or services.

Fleet owners need to be able to retrieve all vehicle data which is captured in the vehicle as the owner of such vehicle. Next to VIN number, mileage (odometer) reading, days to next maintenance service, miles to next maintenance service, longitude & latitude, EV's battery status, g-forces etcetera.

Protecting the owner/end user by enabling direct access to such data enables them to, at least, compete at same level playing field as OEMs could. As an example, such access would allow fleet owners to seek to sell 'ancillary' services to the driver, instead of OEMs having preferred access. Also, it could ensure that fleet owners are able to prompt their drivers to take the vehicles for repair or servicing via the service channels that the fleet owner prefers and were the fleet owner gets the best pricing conditions, instead of being directed to the manufacturer's channels only. In terms of the availability of vehicle data that is required for repair and maintenance, Leaseurope will provide further input in the consultation procedure for the updated MVBER. However, it is important to underline that access to in-vehicle data is also a basic requirement to ensure a level playing field for leasing and rental companies as such.

¹ REPORT FROM THE COMMISSION Commission Evaluation Report on the operation of the Motor Vehicle Block Exemption Regulation (EU) No 461/2010.

About us

Leaseurope brings together 45 member associations representing the leasing, long term and/or short term automotive rental industries in the 32 European countries in which they are present. The scope of products covered by Leaseurope members' ranges from hire purchase and finance leases to operating leases of all asset categories (automotive, equipment, machinery, ICT and real estate). It also includes the short-term rental of cars, vans and trucks. Leaseurope represents around 1,700 leasing companies across Europe, with over 70,000 employees and represents approximately 91% of the European leasing market.

Leaseurope is entered into the European Transparency Register of Interest Representatives with ID n° 430010622057-05