

CEMA – European Agricultural Machinery Industry Association

CEMA feedback to the EU Commission's draft regulation on The Vertical Block Exemption Regulation expiring on 31 May 2022

EU Transparency Register: [489575310490-58](#)

Brussels, 17 September 2021

As the European agricultural machinery industry association, CEMA represents over 7,000 manufacturers, both large multinational companies and European small and medium-sized enterprises ("SMEs"), through 11 national member associations. CEMA members produce more than 450 different machine types and generate an aggregated turnover of more than EUR 40 billion (2016). 150,000 people are directly employed in the sector, with a further 125,000 people working in distribution and maintenance.

CEMA welcomes the renewal of Regulation (EU) No 330/2010 of 20 April 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. These last ten years regulation 330/2010 provided the European Agricultural machinery industry legal certainty and a robust framework to invest in its distribution systems in a context of structural market contraction.

CEMA notices that the fundamental principles of the Vertical Block Exemption Regulation are maintained, meaning the right for our industry to grant an exclusive territory to a dealer or to select him/her based on chosen criteria. This is critical to preserve assets being invested by our industry in its distribution system.

However, CEMA has substantial concerns regarding how **dual distribution, active and passive sales** and **the online economy** will be regulated in the future.

1) Dual Distribution

Undoubtedly the online platform economy in the distribution of goods is becoming a structuring trend in our industry. While very limited at this time, this trend is characterized by some manufacturers using the new e-commerce technologies available to directly sell small quantities of products to their clients. This trend has clearly been supported by the COVID 19 crisis, which led to some supply disruptions, at the dealer level, in various EU member states. The use of this additional distribution channel makes, de facto, some manufacturers falling under the definition of dual distribution and potentially leads to the loss of the safe harbour clause under the VBER. This, even in cases by which dual distribution by the supplier is conducted only in an insignificant part of the distribution.

A generic example will help to understand what the issue is about.

Example: A supplier with a strong brand has an established distribution system but tries to acquire via online sales of specific products (e.g.: parts or machines) additional customers, who are not yet connected to a local dealer or a distributor. While it might be the supplier's intention to use the online platform for a very small and specific portfolio only, this supplier

would not be covered anymore by the safe harbour granted by the VBER in case the market share would exceed 10% for these products.

As the market would not be determined for each series/type of machines but esp. in our industry include a big range of products (e.g.: tractors very different in power and size) the market share of 10% could be reached even if only one special product (with a low “market share” in its category) belonging to the same product market would be offered online.

This is also relevant for parts since the calculation of their aggregated market share almost automatically reaches 10 % for branded parts (being usually considered one product market). This is even true if only a small collection of parts would be sold via dual distribution (e.g.: 100 out of 200.000) in order to draw the customers’ attention to the brand.

In addition, a manufacturer selling a certain type of specialized agricultural equipment (constituting a separate product market) could immediately have a market share exceeding 10% for he’s among the very few to be able to produce such a specialty equipment. And theoretically, he would lose the benefit of the safe harbour for a couple of spare parts sold online. This example characterizes our industry very well with 7,000 manufacturers selling limited amounts of units for a big range of products, very different from power categories, sizes, design and applications.

In this respect, CEMA is concerned by **Article 2 of the new regulation and its provision 5** which is shifting the acceptable market share to 30%, however, only subject to the assessment of any information exchange under the rules applicable to horizontal agreements. This does not seem to be manageable in practice as it is not clear how the exchange of strategic information between supplier and distributor could be avoided for a specific product – potentially being only one out of a big range of products belonging to the same product market - in an established distribution system

This demonstrates that our industry would be deprived of the opportunity to develop additional online sales channels and associated investments to the established distribution system and acquire customers of competing brands without the risk to leave the safe harbour of the VBER. As a paradox it would hamper competition, investments and progress.

2) Active and Passive Sales

CEMA welcomes the drafted regulation and the more detailed wording regarding the definition of active and passive sales. It certainly improves the situation for the consumer goods business but will have very limited positive effect on the agricultural machinery industry.

Due to rapidly developing technologies and growing complexity of new machines agricultural equipment industry dealers must continuously invest into technical expertise, tools, facilities etc. These heavy investments can only be amortized if the industry dealers can rely on a fair protection of their territory. Meanwhile, the last decade has shown that even an exclusive distribution system could hardly efficiently protect dealers against active sales. While a single customer buying few machines from different dealers, from the same brand, located in different territories has very little impact on the distribution’s viability, sales to resellers or fleet customers from other territories could substantially damage the business of the appointed dealer in any given exclusive territory. Furthermore, when a litigation occurs the unsolicited request is the

standard allegation from the contested parties and the contrary can usually not be proved. Here again a generic example could help to understand where the challenge resides.

Example: An unauthorized reseller from another territory approaches a dealer and receives a delivery of several machines. After having resold the machines the reseller comes back and a continuous business relationship develops. The relationship between the selling dealer and the reseller cannot be proved to be a subsidiary or outlet of the selling dealer by the manufacturer or dealer. This disrupts the dealer's economy in the territory to which the equipment has been sold as he will only be involved in not very profitable warranty services.

The definitions of active and passive sales are not helpful here and furthermore, any kind of interference by the dealers or the supplier would be a risk under competition law which means that no measures are available against this type of "active" sales.

As we understand, the traditional definitions of active and passive sales are not covering this case and the EU Commission might consider it.

3) Online Economy/Online Intermediation Services

While the goal of the proposed new VBER regulation to restrict the big players of the online platform economy is acknowledged it might cause legal risks for our industry. This is especially due to several references for definitions to other EU regulations.

Example Distributors are more and more also selling online or intending to sell online (esp. parts and smaller machines). As building up online sales websites is quite complex and consumes resources and expenditure of each distributor a supplier might wish to support the distributors and provide a platform for their online sales. This is also due to the supplier's interest in the quality of the online brand identity and aligning the strategic brand management. The platform would give each distributor the basis for his online sales (probably for free). The supplier would only provide the product catalogues and the distributor locator and takes care of the brand consistency.

Under the proposed VBER regulation, it is unclear if a supplier offering the service described above would make him be qualified a provider of online intermediation services. This is a crucial question to address in case of a hybrid function where the supplier is engaged in a dual distribution and again even for a very small product portfolio or services. For this reason, CEMA requests more clarification in the regulation in order to be clear about a potential hybrid situation and therewith probably losing the safe harbour of the VBER.