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HOW DOES EU COMPETITION LAW AFFECT DISTRIBUTION BUSINESS?
(OVERVIEW OF NON-PRICING VERTICAL RESTRAINTS)

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Key Policy Differences

EU Competition Law

Two Legal Objectives:

- Maximize consumer welfare
- Facilitate single integrated market across EU

Analytical Framework:

- Effects-based approach/hardcore restrictions
- Absolute restrictive arrangements sealing off parts of EU market subject to close scrutiny

Consequence:

- Less flexibility for suppliers

US Antitrust Law

Sole Legal Objective:

- Maximize consumer welfare (lower prices, higher quality and product output etc.)

Analytical Framework:

- Rule of Reason (at federal level)

Consequence:

- More flexibility for suppliers

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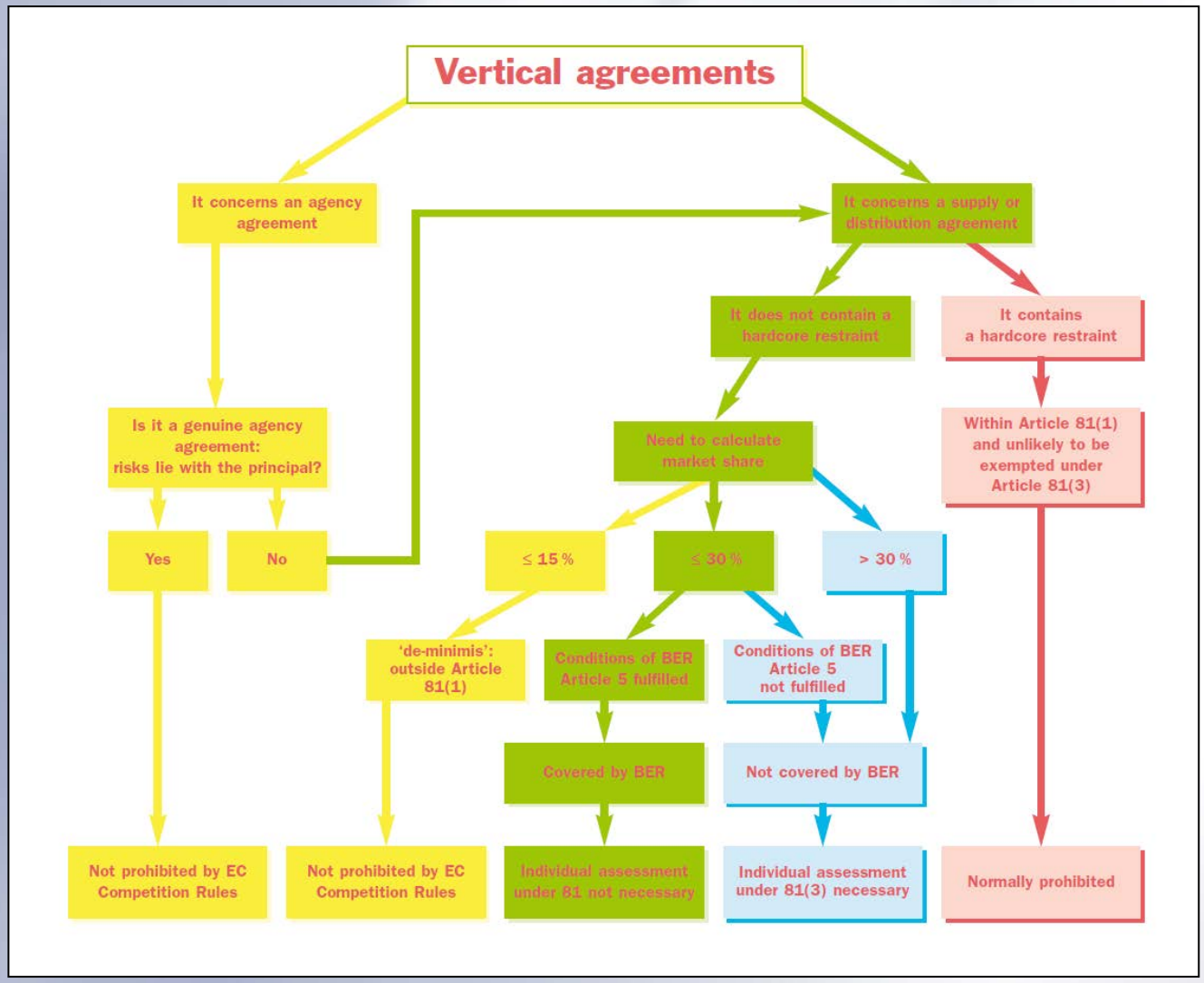
EU Law Analysis of Supply and Distribution Agreements



Flowchart used from Competition Policy in Europe: The Competition Rules for Supply and Distribution Agreements, 2002.

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Territorial and Customer Restrictions

Airtight restrictions run afoul of EU competition rules

- Reduction of intra-brand competition and risk of market partitioning (see, recently Case C-403/08 FA Premiere League)
- Protection against free-riding

Straightjacket approach continues

- Only <u>four</u> exemptions to the general prohibition:
  - restriction of active sales into exclusive territory or exclusive customer group
  - restriction of sales to end users by wholesalers
  - restriction of sales by authorized distributors to “unauthorized” distributors
  - restriction on sale of components by buyers to competing manufacturers
- Objective justification – limited application
- Focus on indirect obligations

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Territorial and Customer Restrictions in Selective Distribution Systems

Two Hardcore Restrictions

- Restriction of active or passive sales to end users by retailers
  - Exception- protection of exclusive distribution system operated elsewhere
- Restriction of cross-supplies between authorized distributors
  - Exception – no active sales by wholesalers to appointed retailers in other wholesalers' territories to overcome free-riding
- Absent hardcore restrictions, high risk of market partitioning due to permitted ban on sales to "unauthorized" distributors

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Non-Compete Obligations

Single Branding

- Any direct or indirect obligation causing buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods and services

Quantity Forcing

- Any direct or indirect obligation on the buyer to purchase from the supplier more than 80% of the buyer's total purchases

Excluded Restrictions

- Non-compete for indefinite duration or over 5 years
- Post-term non-compete
- Boycott in selective distribution systems

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Online Distribution

General Considerations

- One of main areas of review of competition rules on vertical restraints
- Subject to soft law only (Vertical Guidelines)
- On-line sales are, as a rule, form of passive sales
  - Differences between active and passive selling
  - Objective justification of online passive sales restriction is difficult (see, recently Case C-439/09 Pierre Fabre)
- Location clause not available (website is not showroom)

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Online Distribution (cont.)

Hardcore Restrictions (Passive Sales)

- Automatic re-routing of customers (GeoIP routing)
- Automatic termination of transaction on the basis of customer location
- Limiting proportion of online sales to offline sales
- Dual pricing, incl. variable fees to support offline sales

Exemptions in Selective Distribution Systems

- Quality standards (need to be equivalent to offline sales)
- Brick-and-mortar shops first (no “pure players”)

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Thank you for your attention.

In case of any questions, please contact us at:

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