



# EU competition law and supply and distribution agreements

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4<sup>th</sup> Anti-Monopoly Law Competition Week

9-12 October 2012, Xi'an, Shaanxi Province

\*"The views expressed are those of the speaker and do not necessarily reflect those of DG Competition or the European Commission"



## **Articles 101 and 102 TFEU**

- Treaty on the Functioning of the European Union, former EC Treaty
- Article 101: addresses agreements between firms which are independent from each other
- Article 102: addresses conduct of dominant firms, i.e. in general the conduct of one particular firm

## Article 101 TFEU

- Article 101(1) prohibits agreements that have as their object or effect to restrict or distort competition
- Article 101(3) declares the prohibition inapplicable if the agreement and its restrictions are indispensable to create efficiencies which benefit consumers, without eliminating competition

## Article 101 TFEU

- Article 101 thus implies an effects based approach: overall outcome for competition and consumers determines assessment
- Distinction between agreements that have as their object to restrict competition and agreements that have as their effect to restrict competition

## Object or hardcore restrictions

- Agreements that have as their object to restrict competition are considered serious restrictions of competition (for instance price fixing cartel agreements)
- In case of such “hardcore” restrictions there is a presumption of negative effects under Article 101(1) + presumption it is unlikely that the conditions of Art 101(3) are fulfilled
- This does not exclude individual exemption in case of convincing evidence of likely efficiencies, but unlikely in particular in case of cartel agreements + high risk of fines
- Hardcore approach = the order of bringing forward evidence and showing effects is reversed
  - first likely efficiencies need to be shown by the defendant
  - before the likely negative effects are shown by the authority/plaintiff

## Restrictions by effect

Most agreements that fall within Article 101(1) are considered to be in the “agreements that have as their effect to restrict competition” category. This means:

- (a) Authority/plaintiff must show likely negative effects under Article 101(1)
- (b) Defendant must show likely efficiencies under Article 101(3) once likely negative effects are established (“consumer welfare test”)
- (c) “Safe harbour” created by so-called Block Exemption Regulations (BERs) for many types of agreements below certain market share thresholds => net positive balance presumed  
Exception: hardcore restrictions
- (d) Guidelines (GLs) help to interpret these BERs and provide guidance on a case by case assessment of negative and positive effects where the BERs do not apply (above the market share thresholds)



# EU Competition Rules for Supply and Distribution Agreements

- In 2010 Commission adopted Vertical Restraints Block Exemption Regulation (VRBER) and Vertical Restraints Guidelines (VRGL)
- Applicable since 1 June 2010
- Rules can be found at:  
<http://ec.europa.eu/competition/antitrust/legislation/vertical.html>

## Background: the 2010 review

- Positive past experience with the 1999 BER/GL:
  - Strong support in public consultation to keep framework of 1999 which introduced effects-based approach
  - Principle of market share threshold well accepted
  - Since the 2004 decentralisation most enforcement done by NCAs and courts; BER/GL ensure consistent application
- Objective of review: to update/improve 1999 BER and GL
- Result of review: high degree of continuity with new VRBER 330/2010 and new VRGL

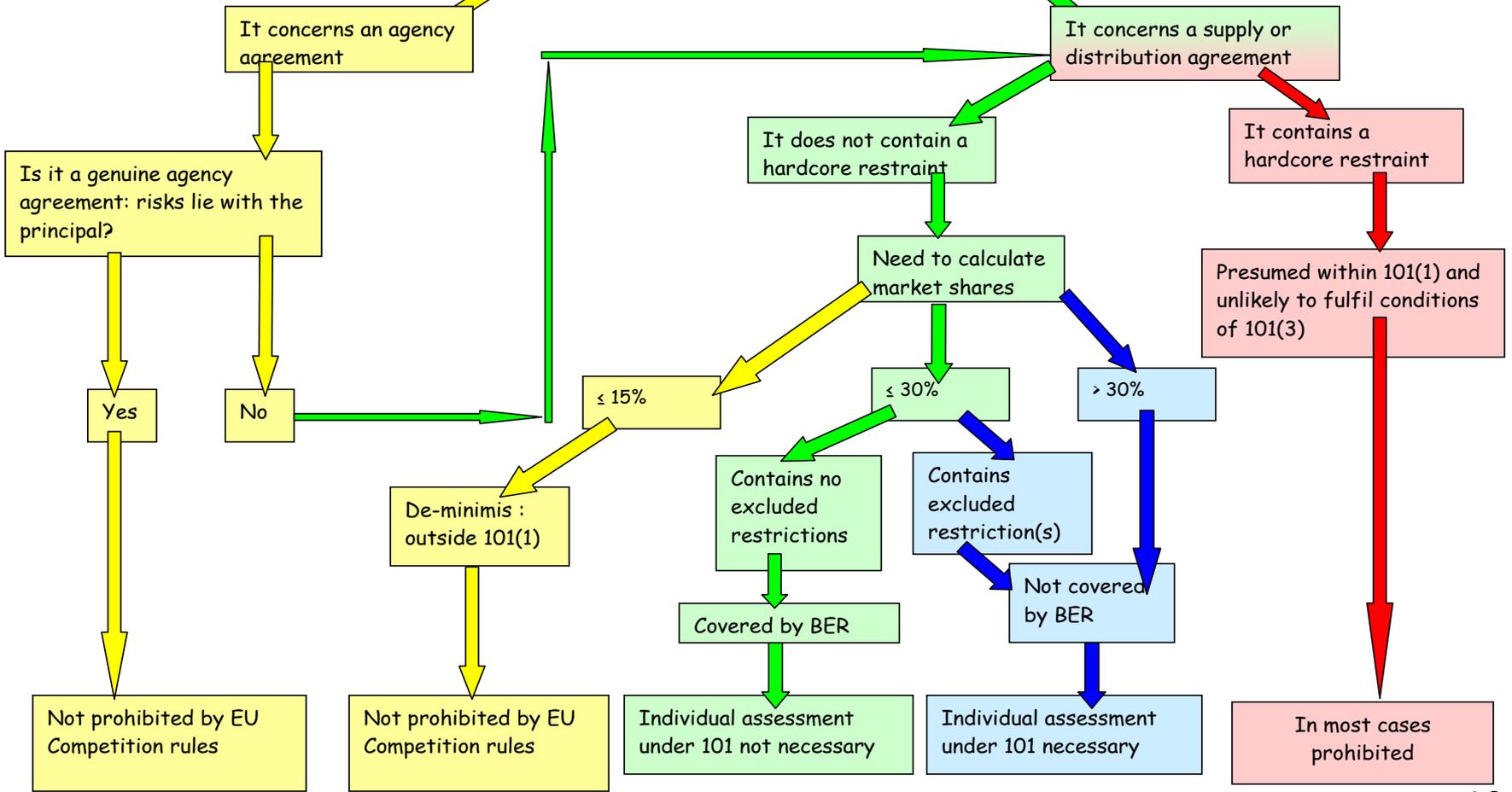
## The basic features of the VRBER/GL

- Apply to vertical agreements concerning the sale and purchase of goods and services for all sectors
- Do not apply to vertical agreements between competitors except dual distribution at the retail level
- A wide block exemption with
  - a limited hardcore list (article 4 VRBER)
  - a limited list of excluded restrictions (article 5 VRBER)
  - Safer harbour below 30% market share threshold (article 3 TTBER)
- No presumption of illegality above the market share threshold



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# VERTICAL AGREEMENTS



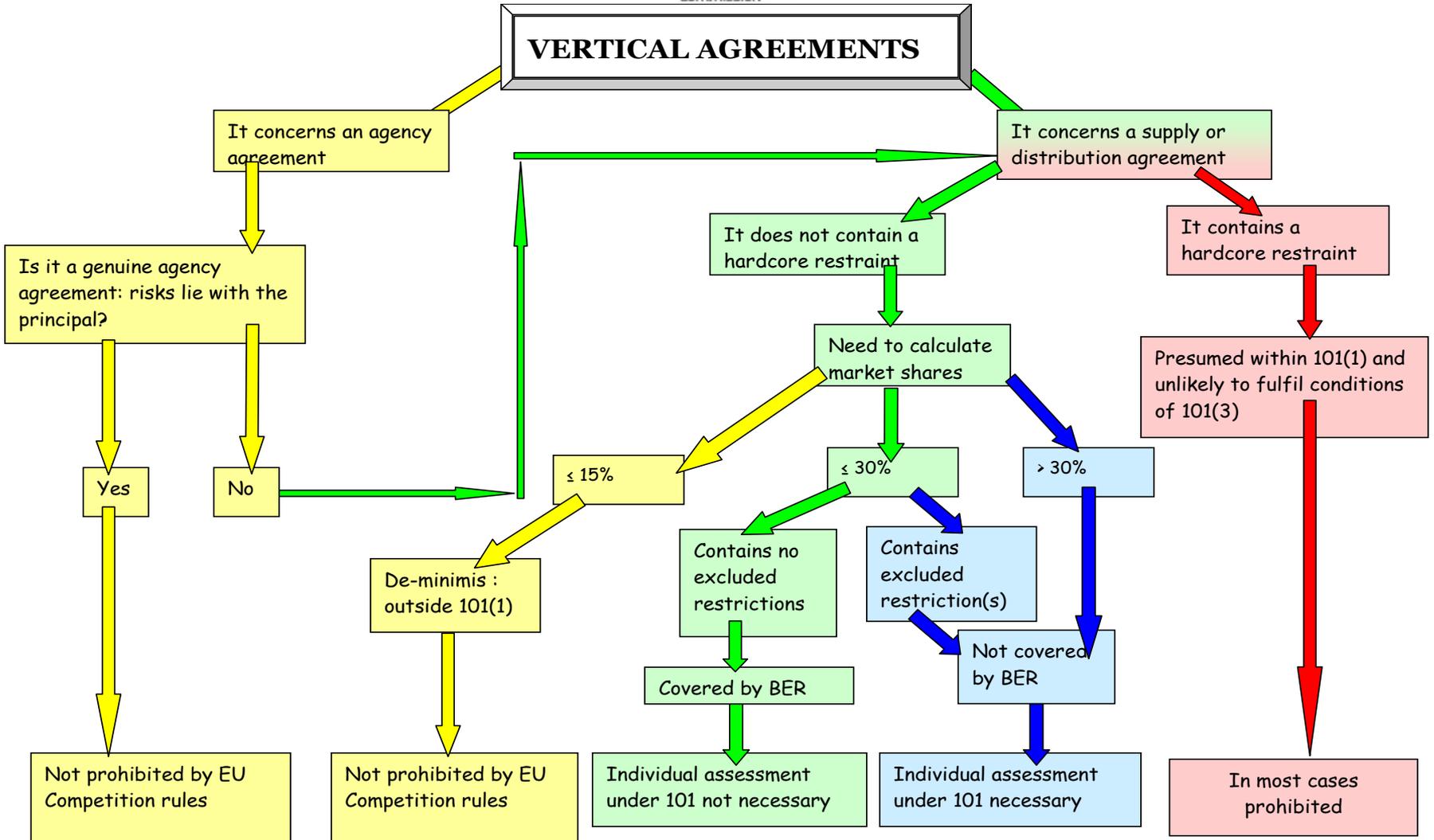
## Agency agreements

- VRGL § 12-21: For the purposes of applying Article 101(1) the agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, contract specific risks directly related to the contracts concluded and/or negotiated on behalf of the principal, risks related to market-specific investments for that field of activity, and risks related to other activities required by the principal to be undertaken in the same product market.
- Genuine agency agreement: obligations on the agent in relation to the concluded/negotiated contracts fall outside Art 101(1)
- Be aware: provisions concerning the relationship between agent and principal may still fall within Article 101(1)
- Be aware: if not genuine agency certain obligations may be hardcore restrictions



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## Hardcore restrictions

- Art. 4 BER: serious restrictions of competition which exclude the benefit of the block exemption for the whole agreement
- RPM: agreeing fixed or minimum resale price is a hardcore restriction, but not if recommended or maximum resale price
- Sale restrictions: concern is market partitioning: in principle buyer/distributor should be free to resell where and to whom it wants:
  - Passive sale restrictions are hardcore (main exception selective distribution)
  - Active sale restrictions are hardcore except to protect areas where there is exclusive distribution

## Resale Price Maintenance

- VRGL section VI.2.10 describes the numerous possible negative effects of RPM, but also some potential positive effects
- Hardcore approach motivated not only by seriousness of possible negative effects, but also by doubts about effectiveness and indispensability of RPM to obtain efficiencies
- Approach supported by case experience of Commission and NCAs and by (scarce) empirical data

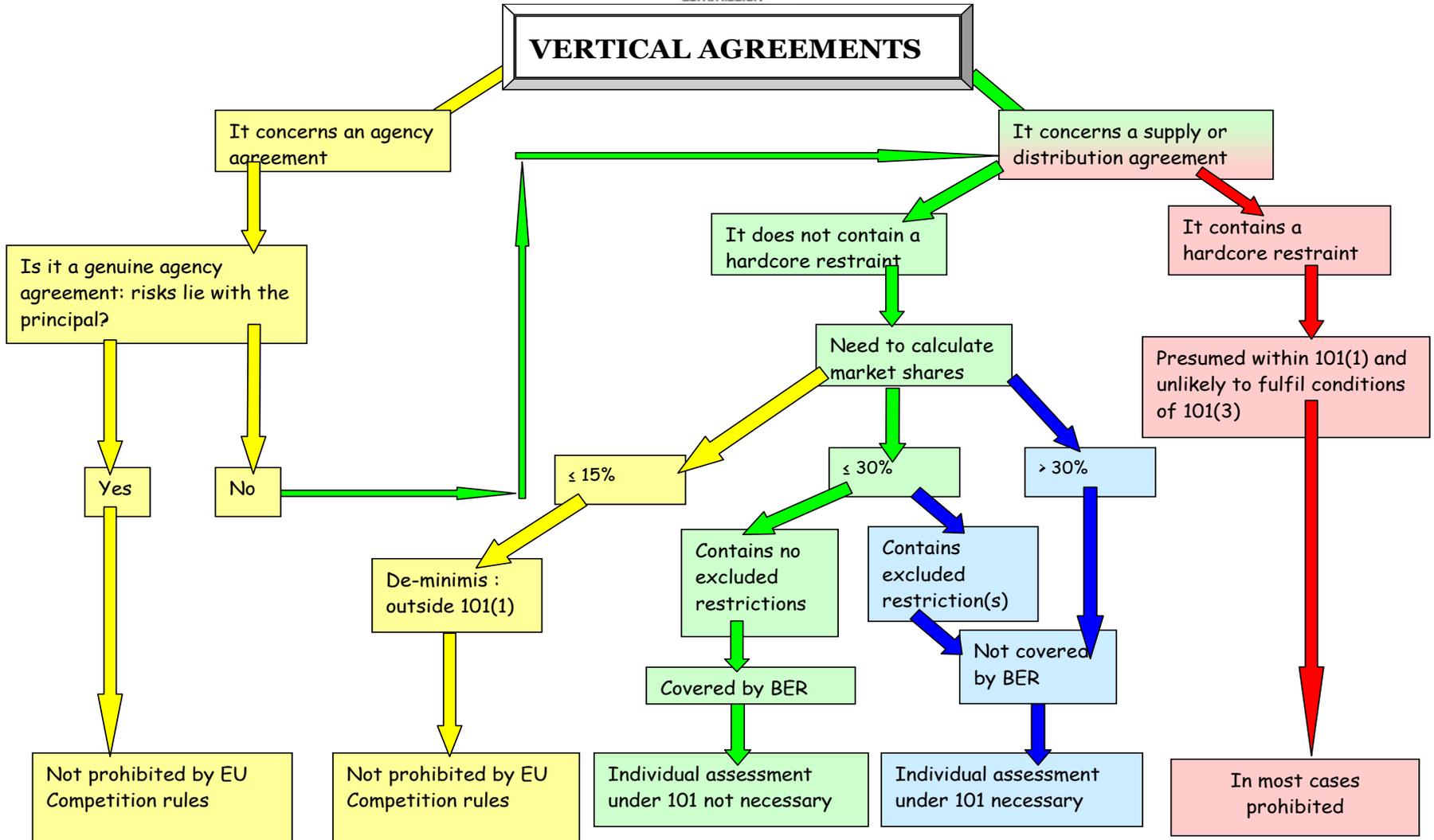
## Hardcore Online Sale Restrictions

- General rules on (re)sale restrictions apply to offline and online sales
- On the one hand, distributors should be free to have a website and engage in internet sales to allow consumers to benefit from the internet
- On the other hand, suppliers should be free to choose distributors/distribution format and prevent possible free riding
- VRGL clarify how the distinction between active and passive sales applies to online sales (only relevant for exclusive distribution) and what are considered passive sales restrictions



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## The safe harbour

Market share of both supplier and buyer does not exceed 15%: case is de minimis: De minimis Notice states that Article 101(1) does not apply: no appreciable effect on competition

- Commission Notice: legally it only binds Commission
- Notice does not apply in case a hardcore restriction is contained in the agreement
- In case of cumulative effect: de minimis market share threshold is 5%

## The safe harbour

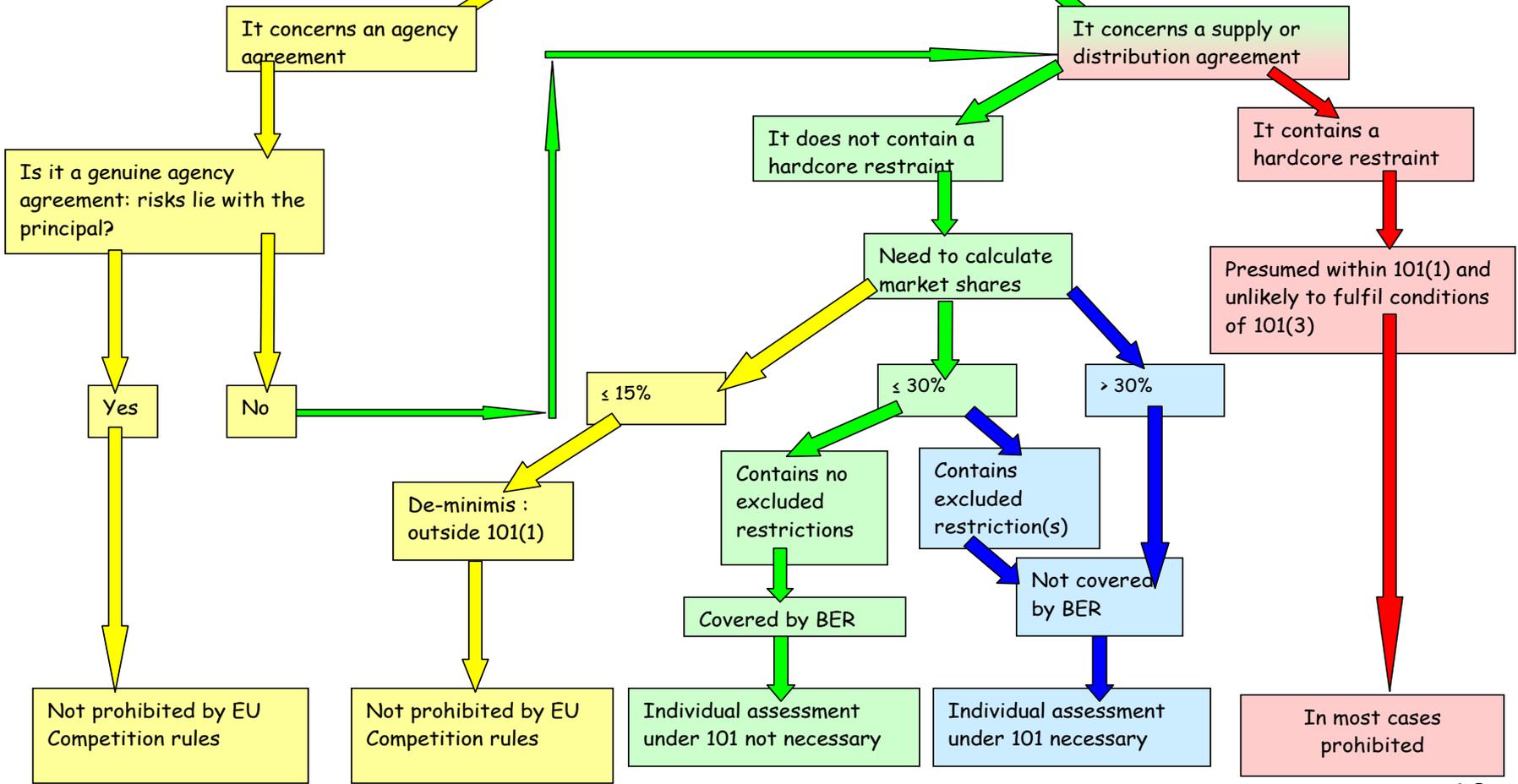
Benefit of BER safe harbour depends on both the supplier's and buyer's market share not  $> 30\%$

- Not only suppliers, but also distributors may have market power (e.g. supermarkets) => coverage by the BER should also depend on buyer's market share
- For supplier: share on the market where supplier sells contract products to the buyer
- For buyer: share on the market where buyer purchases the contract products from the supplier
- If in safe harbour: only withdrawal of BER possible for the future by Commission or NCA



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## Excluded restrictions

- No negative presumption: only obligation excluded from safe harbour, rest of agreement can benefit from BER
- Non-compete obligations exceeding 5 years (risk of cumulative foreclosure effect), except if buyer operates from premises/land owned/leased by supplier
- Post term non-compete obligations except if the obligation is indispensable to protect know how transferred by the supplier to the buyer, does not exceed 1 year and is limited to the location where the buyer was operating during the contract
- Obligations on members of a selective distribution system not to sell the brands of particular competing suppliers (to avoid cumulative boycott)

## Example of non-compete obligations

- Interbrew case of 2003: commitments of Interbrew to shorten and open-up its beer supply agreements with pubs in Belgium
- Issue: foreclosure of other brewers, leading to less choice and higher prices for customers
- Relevant factors: market position of Interbrew, position of competitors, entry barriers, possibilities of pubs to switch, duration and type of agreements

# Thank you

