



# **Selective distribution after Coty and the interplay of the geo-blocking regulation with competition law**

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*The views expressed are purely personal and do not necessarily represent an official position of the European Commission.*

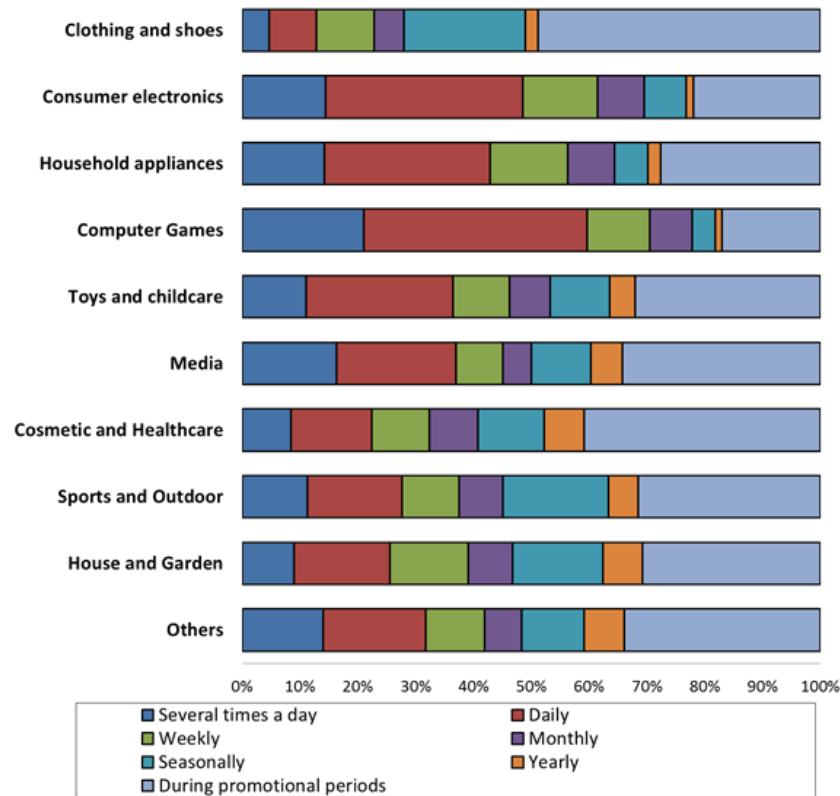
# Key findings of e-commerce sector inquiry (context)

- ❖ More **price transparency** and **price competition**
- ❖ **More price monitoring / pricing software**
- ❖ **Impact on distribution strategies**
- ❖ Increased **recourse to selective distribution systems**
- ❖ **Vertical restraints**
  - Pricing restrictions
  - Territorial restrictions
  - Online sales restrictions



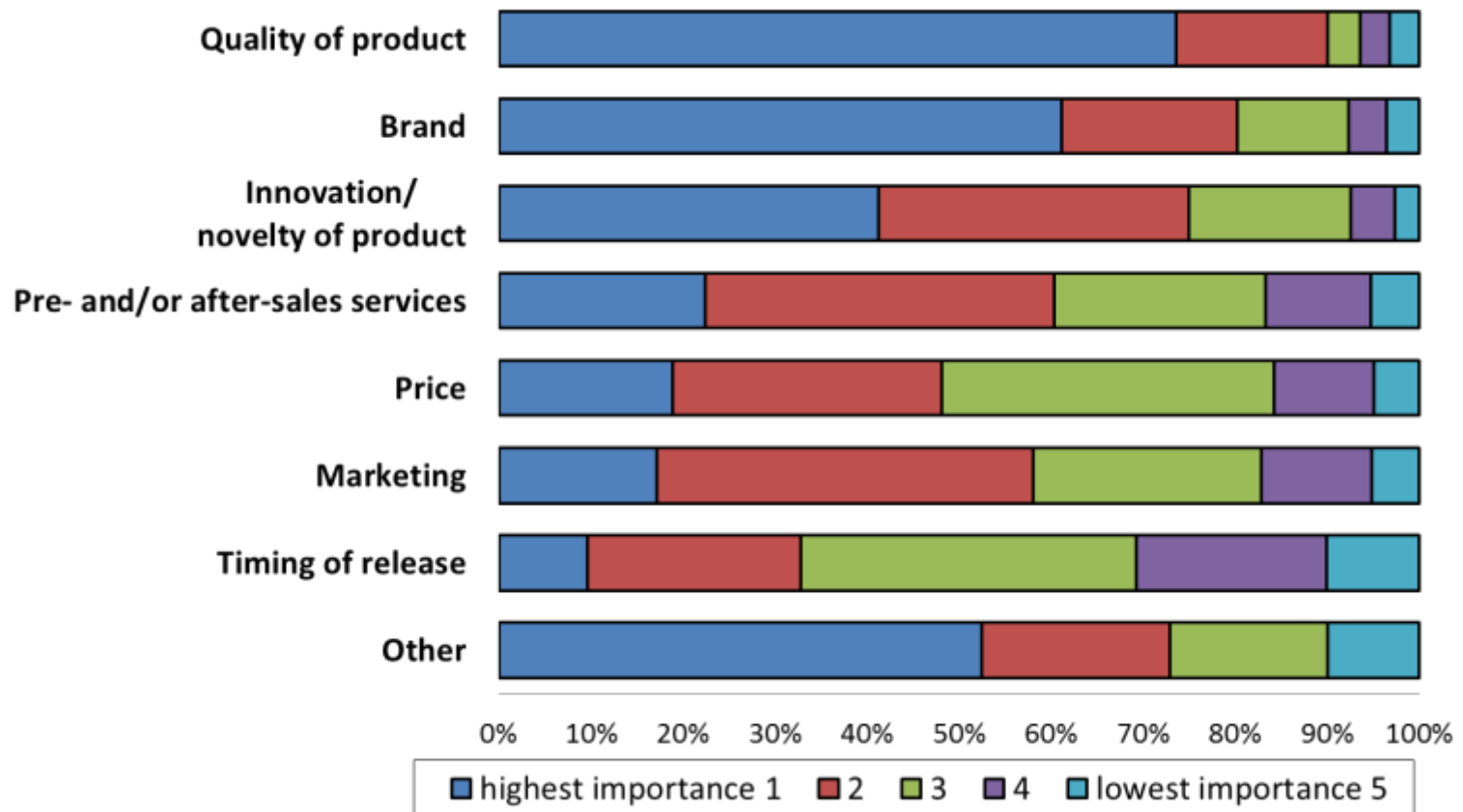
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# Online prices: Increased price competition



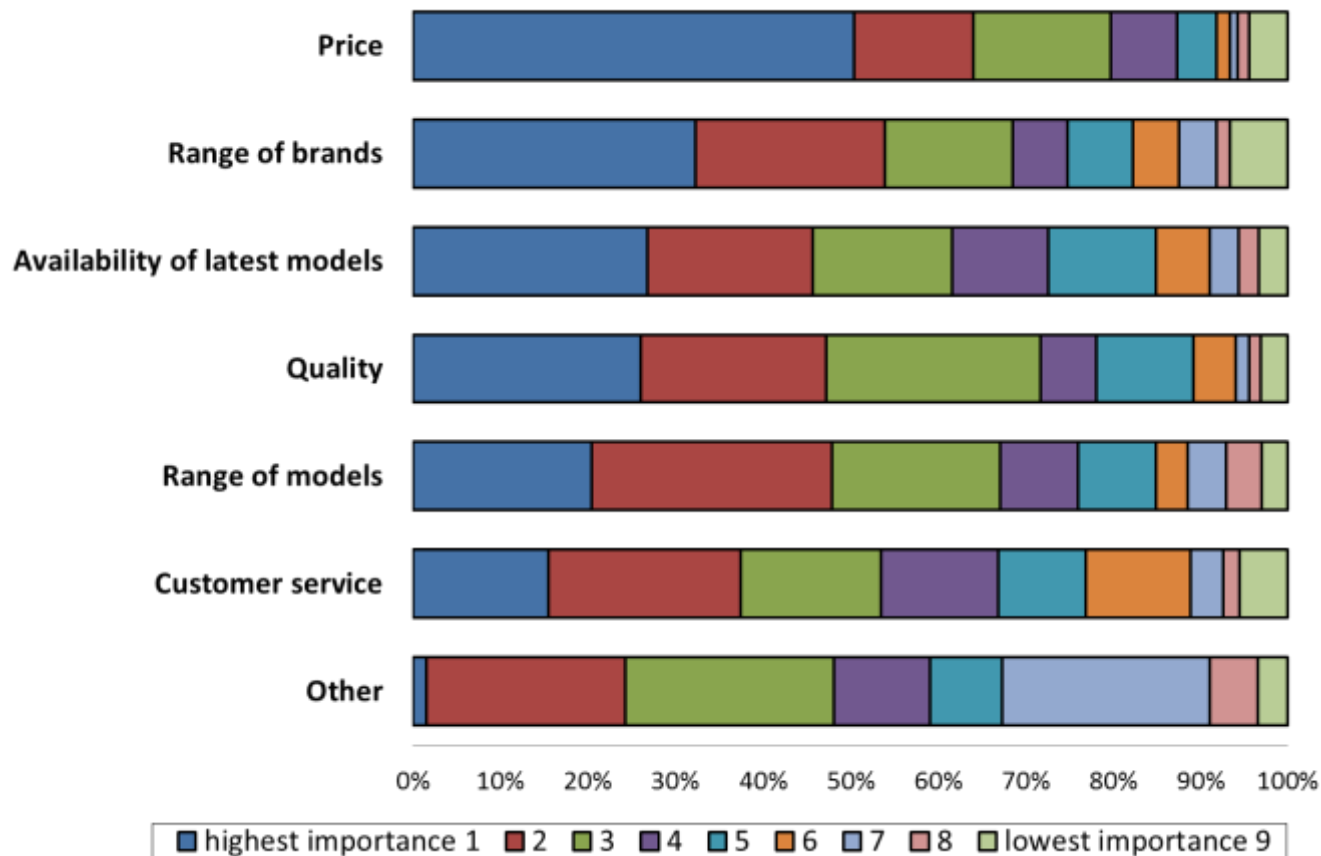
B.19: Frequency of modifying online prices based on the responses of retailers

# Manufacturers – drivers



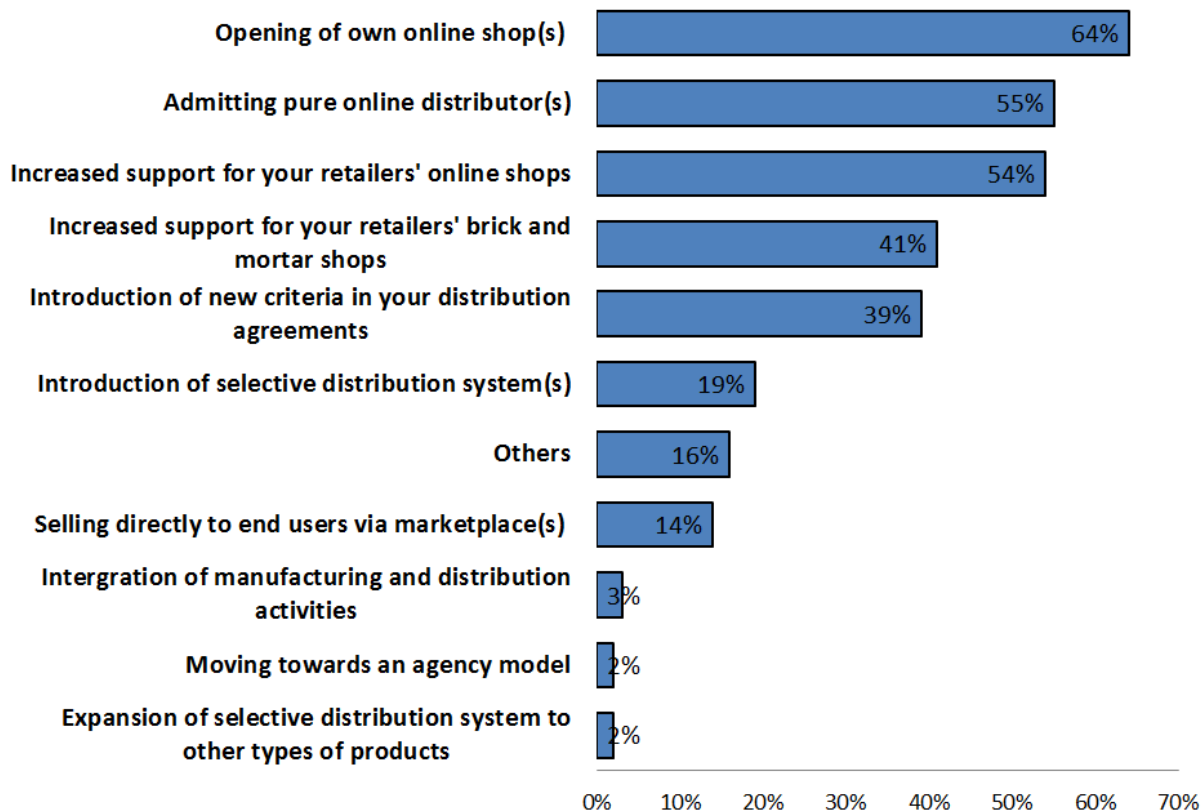
B. 13: Rating the parameters of competition by manufacturers

# Pure Online Players – drivers



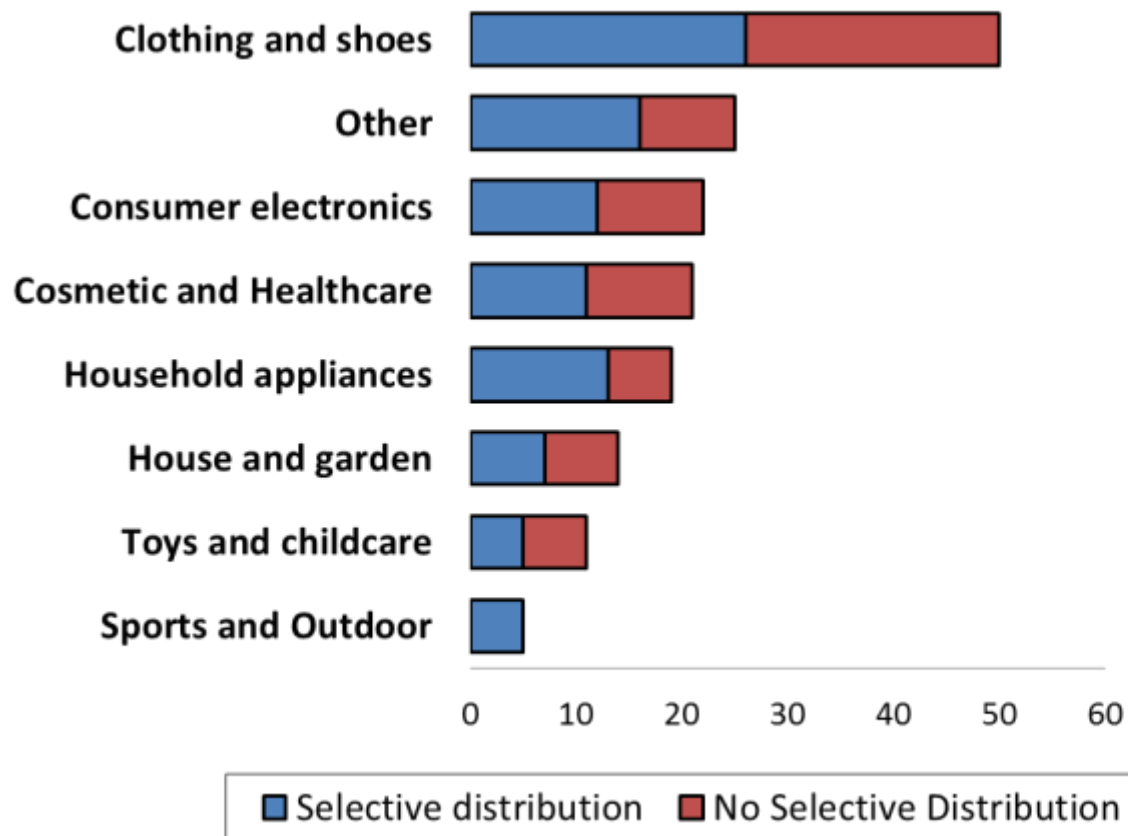
B. 15: Rating the parameters of competition by pure online players

# Manufacturers' strategies



**B.23: Measures taken by manufacturers in the last 10 years to react to the growth of e-commerce**

# Selective distribution



**B. 29: Number of respondent manufacturers active in one product category only and selling via selective distribution**

# Price and non price competition

How to:

- ❖ address free-riding
- ❖ maintain or establish certain brand image
- ❖ ensure high level of distribution quality

Possible measures?

- ❖ RPM: hardcore restriction – efficiencies unlikely
- ❖ Price differentiation possible – not dual pricing
- ❖ Selective distribution typically block exempted, unless hardcore restrictions present
- ❖ Selective distribution increases competition on parameters other than price (brand image/quality of sales services)



## Coty judgment C-230/16 (Facts)

- Selective distribution contract for luxury cosmetics in Germany
  - "The authorised retailer is entitled to offer and sell the products on the internet, provided, however, that that internet sales activity is conducted through an 'electronic shop window' of the authorised store and the luxury character of the products is preserved."
  - The contract expressly prohibits the use of a different business name as well as the recognisable engagement of a third-party undertaking which is not an authorised retailer of Coty.

# Selective Distribution (case law)

- ❖ Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, such as the maintenance of a specialist trade capable of providing services as regards **high-quality and high-technology products**, constitute an element of competition which is in conformity with Article 101(1) TFEU (*Case 107/82, AEG-Telefunken, paragraph 33*).
- ❖ Selective distribution is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down **uniformly** for all potential resellers and **not** applied in a **discriminatory** fashion, that the **characteristics of the product** in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down **do not go beyond what is necessary** (*Case 26/76, Metro, paragraph 20*).

# Selective Distribution (case law)

- ❖ "The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU" (*C-439/09, Pierre Fabre, paragraph 46*).
- ❖ "Agreements constituting a selective distribution system [...] necessarily affect competition in the common market [...] Such agreements are to be considered, in the absence of objective justification, as 'restrictions by object'." (*Pierre Fabre, paragraph 39*).

# Coty Judgment (selective distribution)

- ❖ A selective distribution system designed, primarily, to preserve the luxury image, is compatible with Article 101(1) TFEU on condition that the Metro criteria are met (*C-230/16, Coty, paragraph 29*).
- ❖ Pierre Fabre solely concerned the goods at issue and the contractual clause in question. It did not concern the selective distribution system in its entirety (*Coty, paragraphs 32 and 34*).
  - In line with previous case law (*Copad, Leclerc*)
  - Removes uncertainty caused by para. 46 of *Pierre Fabre*-judgment on luxury image
  - Selective distribution also possible for other product categories (e.g. for "high-quality" and "technical" products, *AEG*)

# Coty judgment (marketplace bans under Article 101 (1) TFEU)

- The Metro criteria apply to a specific contractual clause designed to preserve the luxury image (*Coty, paragraph 40*).
- Marketplace ban is appropriate (*Coty, paragraphs 42-51*):
  - Goods will be exclusively associated with the authorised distributors
  - No contractual link with marketplace to ensure quality conditions
  - Liable to harm the luxury image
- Marketplace ban is proportionate (*Coty, paragraphs 52-57*):
  - No absolute internet sales prohibition
  - Pre-defined quality conditions are not as effective



# Coty Judgment (marketplace bans and VBER)

## Article 4 VBER

The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

... (b) the restriction of the territory into which, or of the customers to whom, a buyer party to the agreement...

... (c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade...

# Coty Judgment (marketplace bans and VBER)

65 "... in contrast to the clause referred to in the case that gave rise to the judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649), the clause at issue in the present case does not prohibit the use of the internet as a means of marketing the contract goods.....

66 .... it does not appear possible to circumscribe, within the group of online purchasers, third-party platform customers.

67 ... selective distribution contract .... allows, under certain conditions, authorised distributors to advertise via the internet on third-party platforms and to use online search engines, with the result that...customers are usually able to find the online offer of authorised distributors by using such engines."

**Reasoning not limited to luxury goods and equally applicable to other product categories**

# Internet sales restrictions and VBER

- ❖ **Not all contractual provisions** that (negatively) affect internet sales are "hardcore" restrictions (Article 4 VBER: "object of market partitioning", "to whom and where to sell")
- ❖ **Absolute internet sales bans** (*Pierre Fabre*)
  - Hardcore restriction under Article 4 b) and 4 c) VBER
- ❖ **Marketplace bans** (*Coty, paragraphs 65-68*)
  - No *de facto* prohibition of internet sales
  - Only restricts specific kind of internet sale, advertising for own website remains possible
  - No customer group restriction (Article 4 b) VBER)
  - No passive sales restriction (Article 4 c) VBER)





# The Regulation on unjustified geo-blocking (2018/302)

- Context: Digital Single Market Strategy
- Applicable **as of 3 December 2018**
- Part of an e-commerce package together with proposal on cross-border parcel delivery services and a proposal to strengthen enforcement of consumers' rights
- Aim: Better access for consumers to online goods and services across Europe by preventing discrimination of customers by retailers
- Legal basis: Art. 114 of TFEU

# The main elements of the Regulation

- Banning denial to access websites
- Justification requirement in case of blocking access
- Requirement of customer's consent for rerouting
- Banning discrimination during payment
- Equal treatment obligation in certain situations without obliging companies to deliver goods cross-border



# Interplay Competition law / Regulation

## Complements competition law by catching unilateral situations

Traders shall not apply different conditions of access to their goods or services, for reasons related to the nationality, place of residence or place of establishment for:

- Sale of goods without physical delivery
- Sale of electronically supplied services
- Sale of services provided in a specific physical location

## The Regulation prevails in case of passive sales restrictions

*Article 6: "Provisions of agreements imposing obligations on traders, in respect of passive sales within the meaning of Regulation (EU) No 330/2010, to act in violation of the prohibitions laid down in Articles 3, 4 and 5 of this Regulation shall be automatically void."*

- Reference to passive sales concept in VBER
- Increased importance of definition of passive sales (currently in Vertical Guidelines)