E-commerce and EU competition law

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

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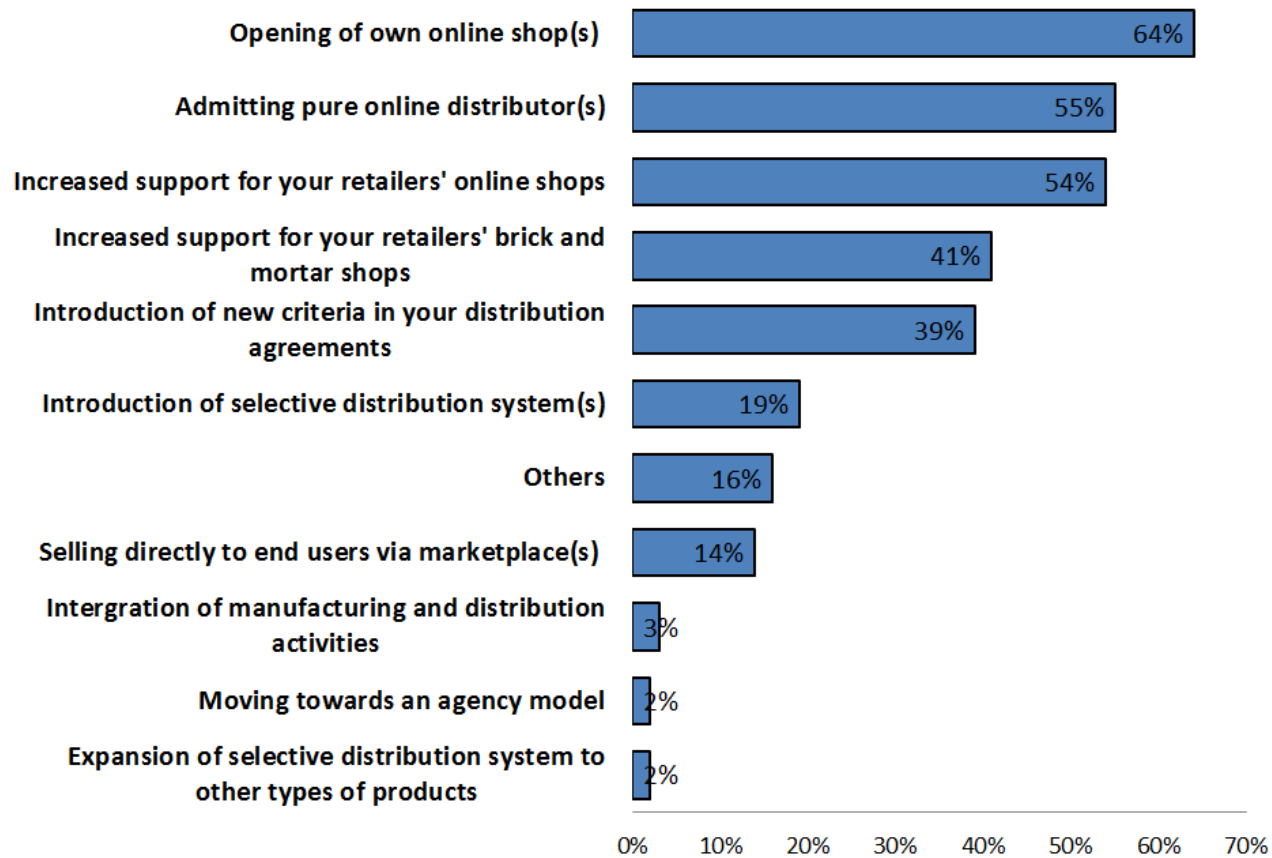
Key Findings of E-commerce Sector Inquiry

Final Report of E-Commerce sector inquiry : May 2017.

Key findings: More **price transparency** and **price competition**

=> Impact on distribution strategies

1. Increased presence of manufacturers at the retail level (own webshops)

2. Increased recourse to selective distribution

3. Vertical Restraints

   - Pricing restrictions
   - Territorial restrictions
   - Online sales restrictions

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Manufacturers' Strategies

Strategy	Percentage
Opening of own online shop(s)	64%
Admitting pure online distributor(s)	55%
Increased support for your retailers' online shops	54%
Increased support for your retailers' brick and mortar shops	41%
Introduction of new criteria in your distribution agreements	39%
Introduction of selective distribution system(s)	19%
Others	16%
Selling directly to end users via marketplace(s)	14%
Intergration of manufacturing and distribution activities	3%
Moving towards an agency model	2%
Expansion of selective distribution system to other types of products	2%

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

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Selective Distribution
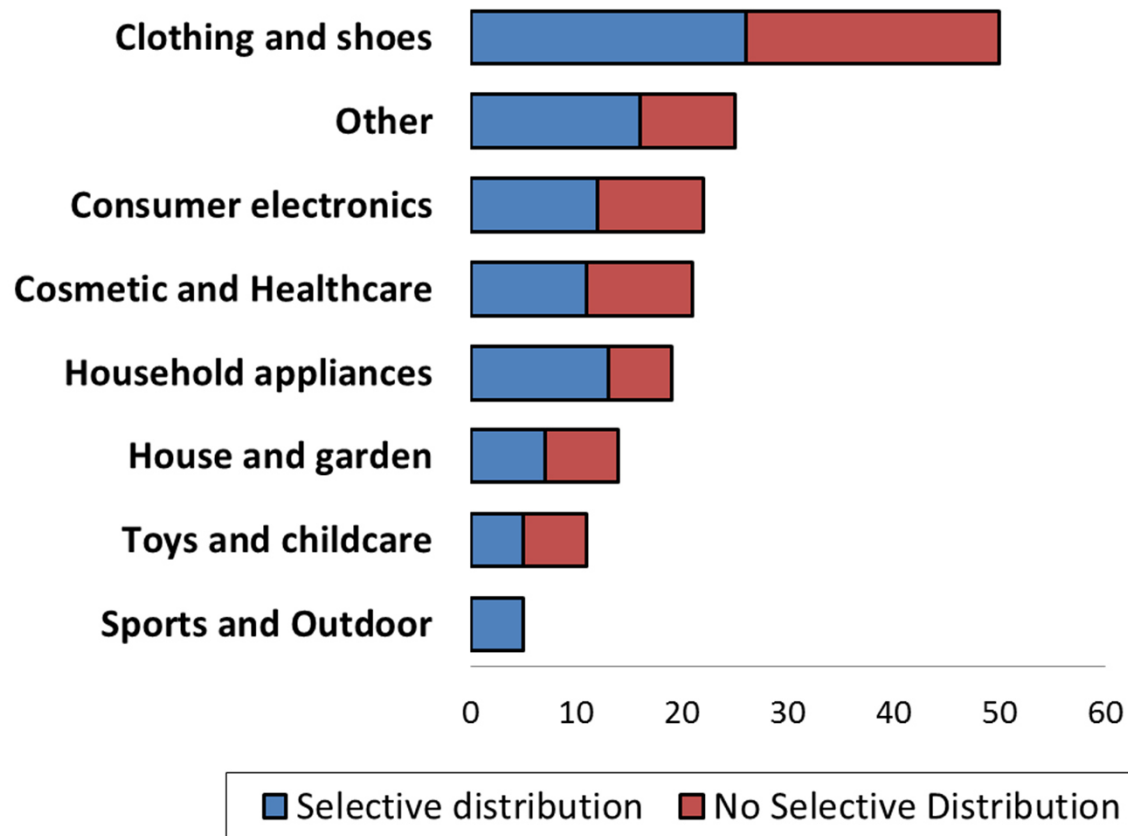
B. 29: Number of respondent manufacturers active in one product category only and sell via selective distribution

Selective Distribution / Coty judgment

No change of general approach :

❖ **Step 1 of assessment: METRO?**

- objective criteria of a qualitative nature

- uniform for all potential resellers

- applied in a non-discriminatory fashion

- **appropriate** to preserve quality / ensure proper use

- proportionate

⇒ If Metro criteria met, outside the scope of Article 101 TFEU

(both <30% and >30%)

❖ **Step 2 of assessment: ARTICLE 101?**

If Metro criteria not met, assessment 'by object' or 'by effect' if there is restriction of competition (falls within Article 101 TFEU)

Selective Distribution / Coty judgment

❖ **Step 3 of assessment: EXEMPTED? (VBER / 101(3))**

Selective distribution agreements are **exempted** from the prohibition under Article 101(1) TFEU, where market share of both the supplier and the buyer each do not exceed 30 %.

Exemption applies **regardless of the nature** of the product concerned: Criteria for hardcore not product-specific (*Coty, paragraphs 65 to 69*)

❖ **Hardcore restrictions** (*Article 4*) → vertical agreements containing the following restrictions are **presumed** to **restrict competition** and **excluded altogether** from the benefit of the VBER, irrespective of the market share of the undertakings concerned:

- o Resale price maintenance (*Article 4.a*)
- o Territorial and customer restrictions (*Article 4.b*)
- o Restrictions of active or passive sales to end users by members of a selective distribution system (*Article 4.c*)
- o Restrictions on cross-supplies within a selective distribution system (*Article 4.d*)
- o Restrictions on the supplier's ability to supply components to third parties (*Article 4.e*)
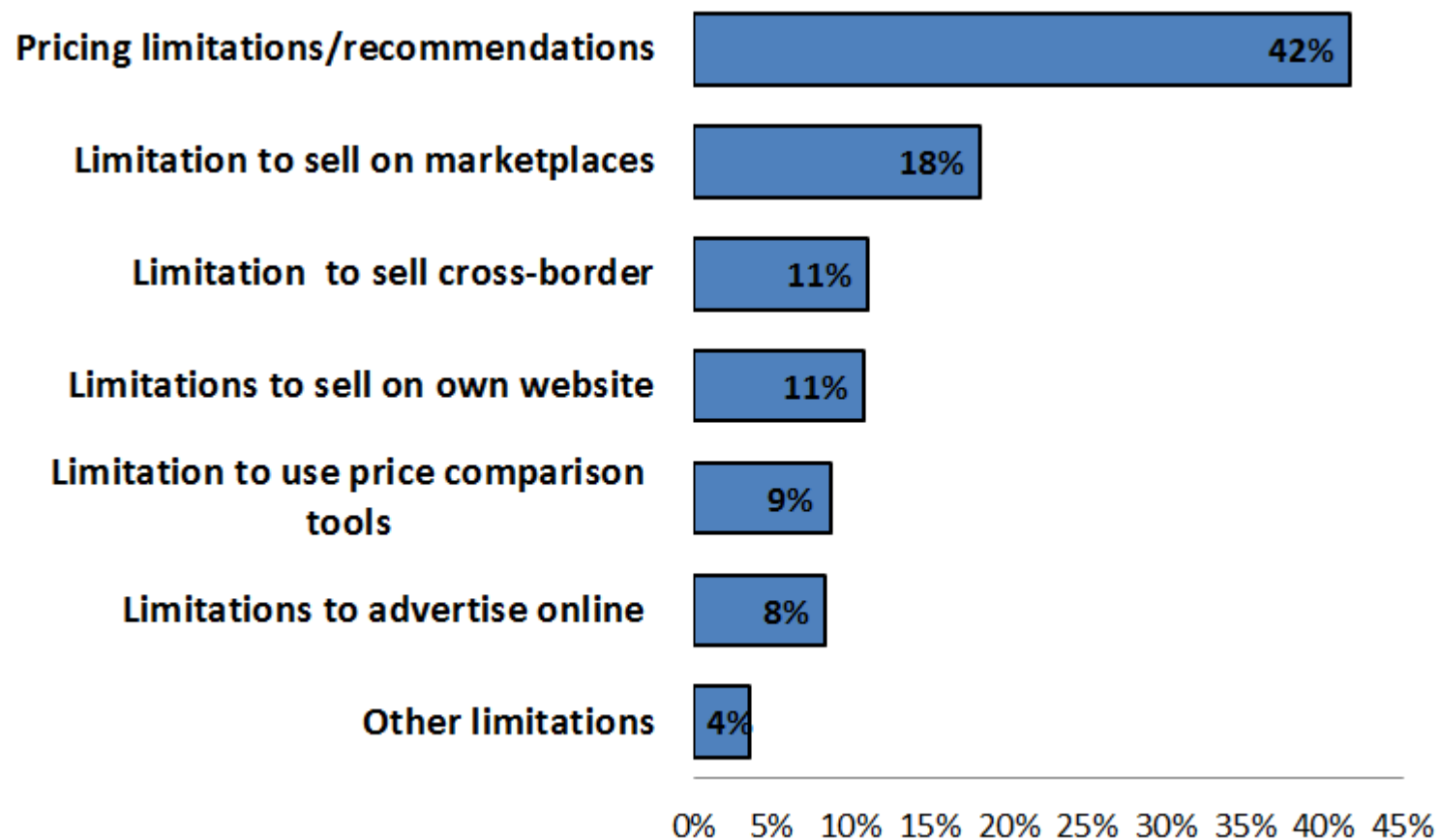
❖ **Platform bans?** *Coty, paragraphs 65 to 69*

Not hardcore restriction (if at all in breach of 101 TFEU):
- o Not possible to circumscribe platform consumers
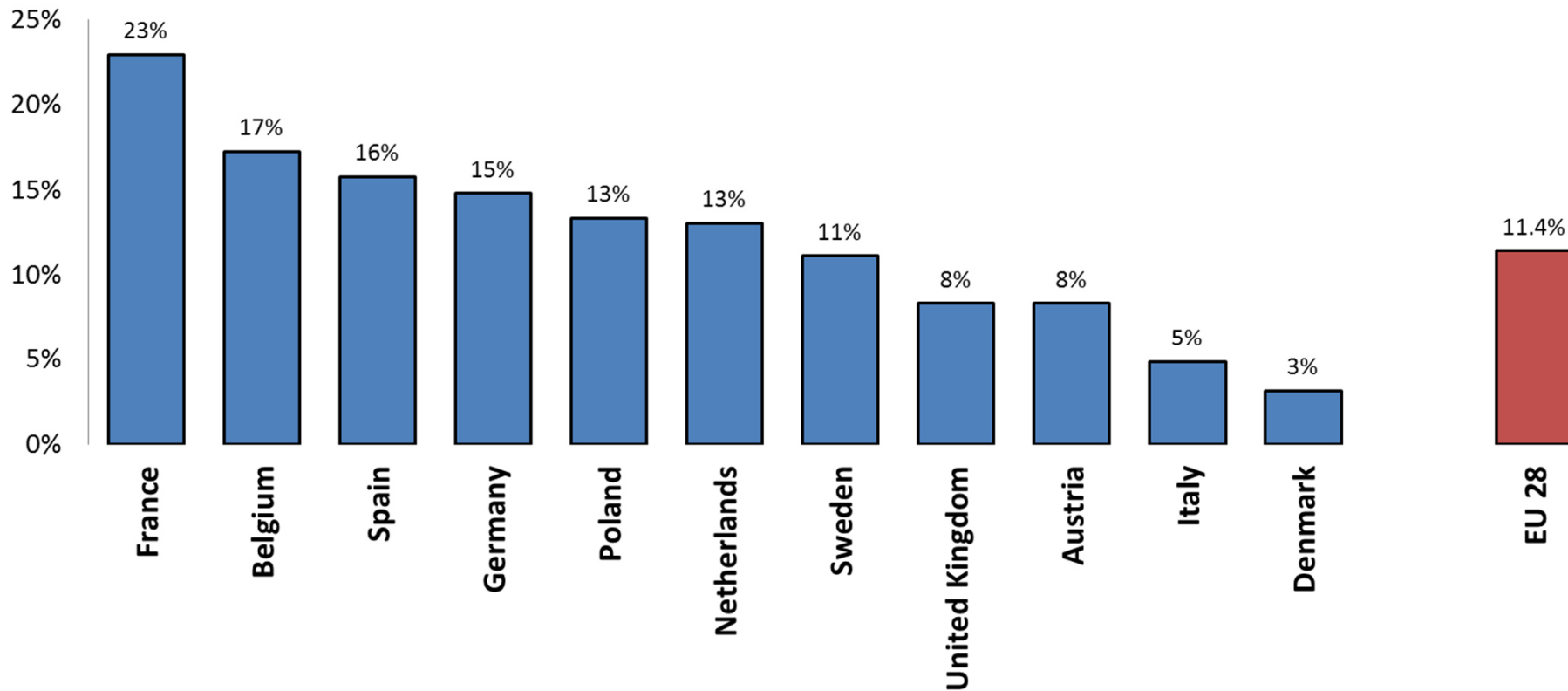- o Findability of online offer

=> Restricts only one specific form of internet sales

Contractual Restrictions

B. 35: Proportion of retailers having contractual restrictions, per type of restriction

Cross-Border Sales Restrictions

B. 53: Retailers that have contractual restrictions to sell cross-border in at least one product category, by Member State

Geo-blocking Regulation

❖ Traders shall not apply different general 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

❖ Provisions of agreements imposing on traders obligations in respect of passive sales to act in violation of the prohibitions in the Regulation shall be automatically void.

ENFORCEMENT VERTICALS 2017

- February 2017 (opening decisions)

  ➢ 4 resale price maintenance cases

  ➢ Hotel price discrimination

  ➢ Geo-blocking of video games

- May 2017 (commitment decision): Amazon e-books

- June 2017 (opening decision): Guess distribution

- June 2017 (opening decision): Distribution and licensing practices of licensed merchandise by Nike, Sanrio and Universal Studios

BACK TO PROTECTING SINGLE MARKET I.

Focus: limitations of cross-border / online sales

- Geo-blocking of video games

- Guess distribution

- Distribution and licensing practices of licensed merchandise by Nike, Sanrio and Universal Studios

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BACK TO PROTECTING SINGLE MARKET II.

Focus: discrimination based on nationality or country of residence of customer

- Hotel price discrimination

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