



The Coty Judgment C-230/16

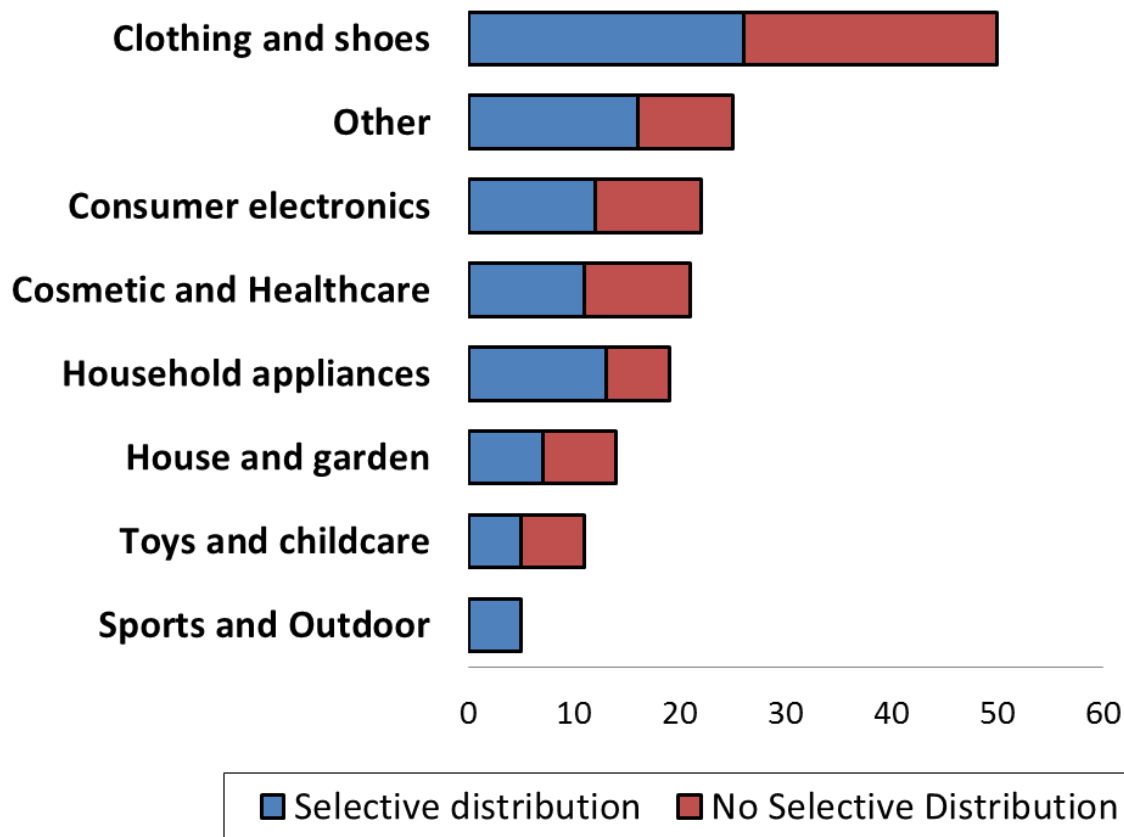
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Facts

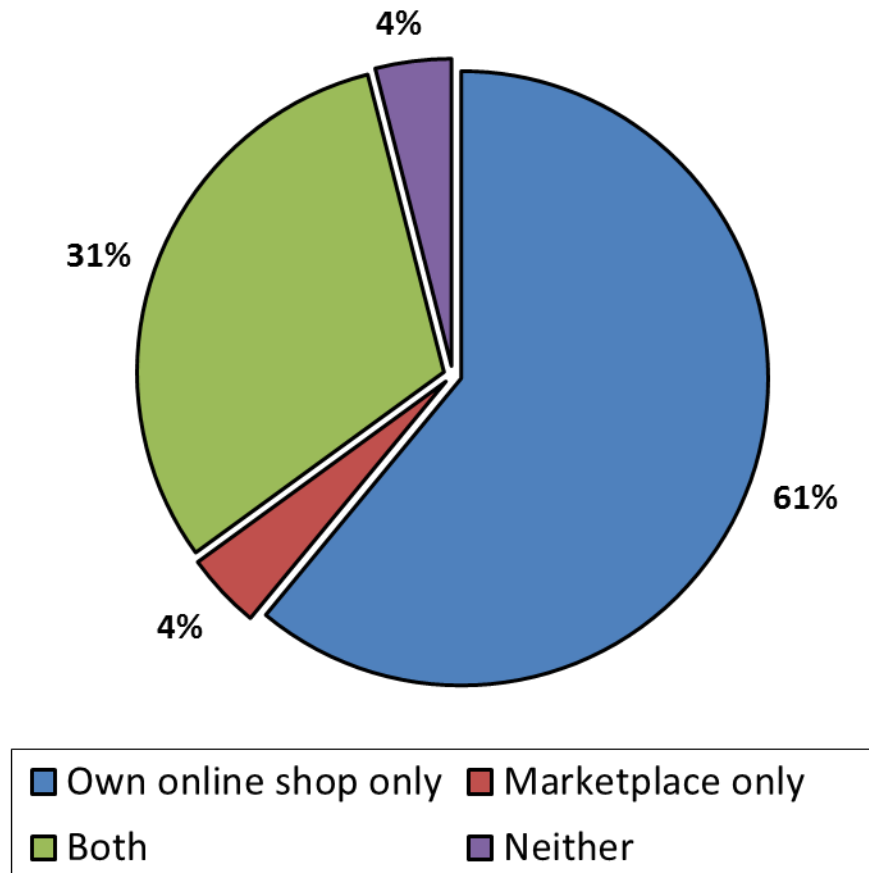
- ❖ Selective distribution contract for luxury cosmetics in Germany
 - "The authorised retailer is entitled to offer and sell the products on the internet, provided, however, that that internet sales activity is conducted through an 'electronic shop window' of the authorised store and the luxury character 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 (Context)



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

Relevance of Marketplaces



B. 54: Proportion of retailers using different sales channels for selling online

Relevance of Marketplaces

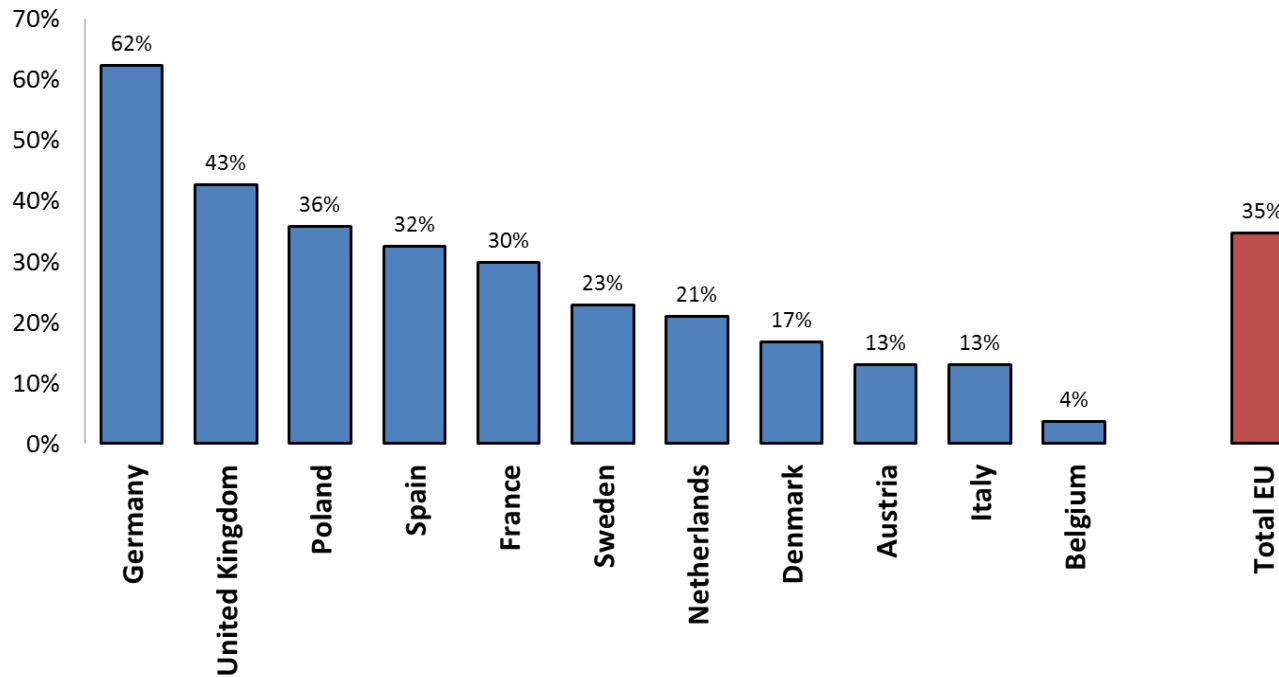


Figure B. 59: Proportion of retailers in each Member State that use marketplaces

Relevance of Marketplaces

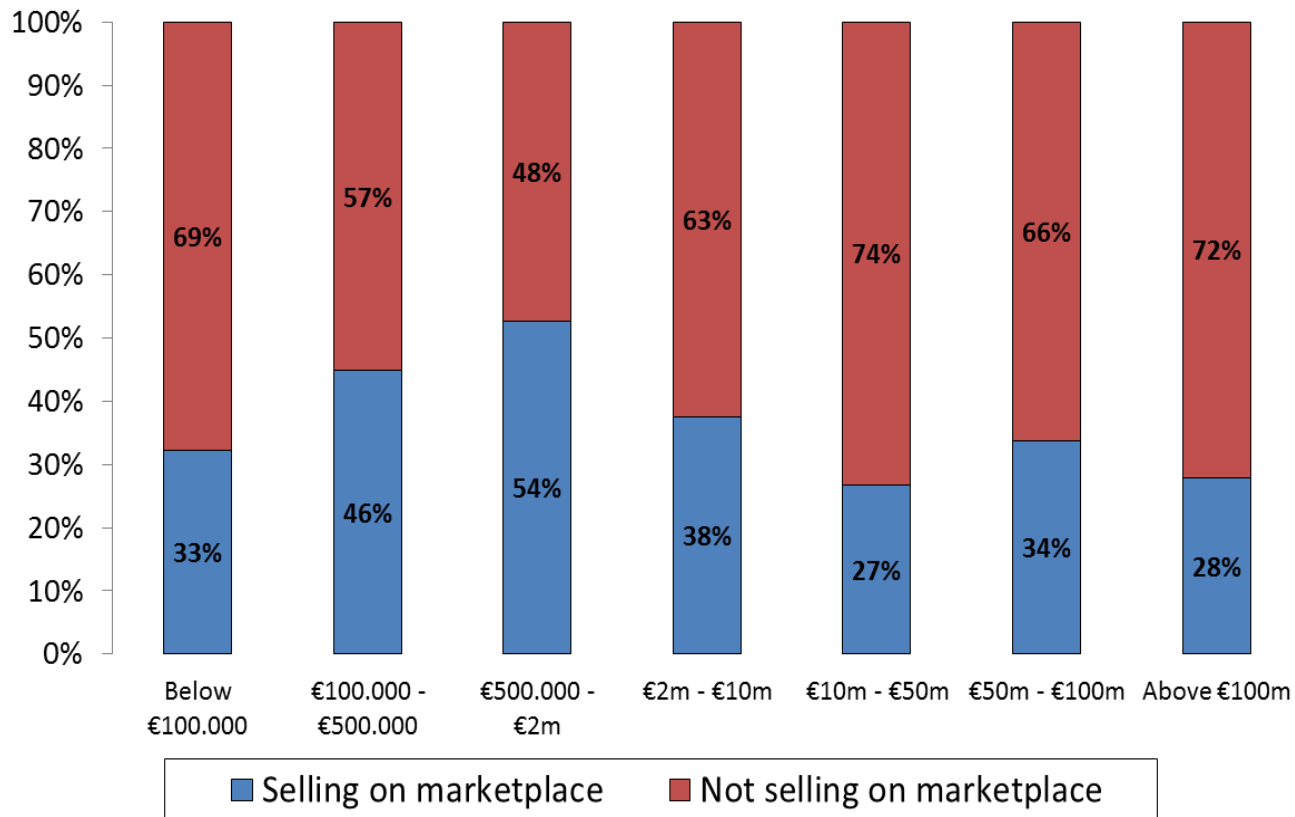


Figure B. 55: Proportion of retailers in each turnover category that sell on marketplaces

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*).

Coty Judgment (marketplace bans under Article 101)

- ❖ 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

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)

Conclusions

- ❖ Legal certainty as marketplace bans are exempted by the VBER
- ❖ Competitive relevance of marketplaces differs per Member State and product
- ❖ VBER withdrawal possible, if problematic
- ❖ Outside VBER, case by case analysis necessary