



# ACM's strategy and enforcement priorities: Platforms & MFN clauses

*The art of balancing the pros and cons case by case*

Bart Noé

EUCTP Competition week, October 20 2015 Shanghai

# Legal Framework

- Article 101.1 TFEU applicable?
  - MFN clause by definition restricts competition between producer and platform.
  - But, producer sets the price: genuine agency contract? If so contract may escape Article 101.1 TFEU
  - What If RPM was used instead?
- Article 101.3 TFEU:
  - Lower search & comparison costs for consumers
  - Increased competition between producers
  - Preventing freeriding realistic efficiency defence
- NOT a hard-core restriction

# Relevant factors for retail MFN clauses:

- Product market
  - The distribution of services and digital goods might differ from that of other goods (in which case brick & mortar stores might be important)
- Wide or narrow MFN
  - Does the MFN apply only to the producers own sales channels or to other platforms as well?
- Consumer behavior
  - Do consumers generally use only one platform (single homing) or do they compare offers on multiple platforms (multi-homing). In the first case even a narrow MFN might be harmful; in the latter the efficiency defense against free riding might be plausible (in the absence of market power and foreclosure)
  - Other, non price, means to bind consumers (services, or coupons e.g.). This could offer more possibilities for market entry (compare OFT/CMA original remedy of allowing discounts for closed user groups)
- Producer behavior
  - If producers use only a few platforms, platforms must compete to bind as many producers as possible: Therefor, the possibility to increase commissions is limited

# Other cases involving retail platforms

1. UK: Moto vehicle insurance
2. Amazon retail platform (UK & Germany)
3. Many Online hotel booking cases
4. Amazon E-books (EC)
5. Indirectly: Asics (Germany)

# Conclusions

1. Platforms play central role in internet economy and generally benefit consumers
2. Two sided markets: network effects might allow platforms to gain markets share very quickly
3. However, the possibilities of free riding on their investments in the online world are much bigger as well.
4. Legal framework allows Competition Authorities to weigh pro's and cons.
5. Retail MFN clauses will have different net effects depending on case specific circumstances. No “one size fits all solution”

Authority for  
Consumers & Markets



**Thank you for your attention!**

