

# Blurring the lines – a new era in EU merger control?

EU Competition Law Briefings

# Agenda



## **How Illumina/Grail and Towercast created a new regime for below-threshold mergers**

Kai Neuhaus



## **Case study: Proximus / EDPnet**

Romain Alderweireldt



## **The new ecosystem theory of harm in the Booking/eTraveli case**

Kirsten Baubkus-Gérard

# **How Illumina/Grail and Towercast created a new regime for below- threshold mergers**

Kai Neuhaus, CMS Brussels

# From the good old days...

Jurisdiction = filing = concentration + thresholds

## Concentration

- EU merger regulation
  - Acquisition of / change in control
  - Creation of full-function JV
- Member States
  - Acquisition of control, but also lesser degree of influence or minority shareholdings or (AT, DE...)
  - Creation of full-function, but sometimes also non-full-function JVs
  - Asset deals often own category

## Thresholds

- EU merger regulation
  - Turnover thresholds
- Member States
  - Turnover thresholds, but also...
    - Transaction value thresholds (AT, DE...)
    - Market share thresholds (ES, PT, SI...)
    - Threat for competition (IE, IT, HU, SE,...)

... to a brave new world

Jurisdiction  $\neq$  filing; jurisdiction = concentration + X

### Illumina/Grail – Art. 22 EUMR

- May a Member State, which has a national **merger-control** regime in place, refer a concentration to the Commission under Art. 22, if the concentration is **below EU thresholds and out of scope of national ex ante control**?

### Towercast – Art. 102 TFEU

- May a Member State, which has a national **merger-control** regime in place, refer a concentration to the Commission under Art. 22, if the concentration is **below EU thresholds and out of scope of national ex ante control**?

# llumina/Grail – Art. 22 EUMR

## Question

*May Member States, which have a national merger-control regime in place, request the referral of a concentration to the Commission under Art. 22 if the concentration is below EU thresholds and out of scope of national ex ante control?*

*May the Commission invite Member States to make such referral?*

Until 2021 Commission rejected all such Art. 22 referrals, but since 2021 Commission encourages such referrals, issued guidelines and FAQs and accepted referrals

## Art. 22 (1) EUMR

One or more Member States may request the Commission to examine **any concentration** as defined in Article 3 that does **not have a Community dimension** within the meaning of Article 1 but **affects trade between Member States** and **threatens to significantly affect competition within the territory of the Member State or States making the request.**

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

# Illumina/Grail – Art. 22 EUMR

## Background to the case

**Sep 2020:** Illumina signs Grail transaction; Grail no turnover, so thresholds not met

**Dec 2020:** COM receives complaint; COM contacts AT, DE, SE, SI (and UK)

**Feb 2021:** COM invites MS for referral under Art. 22

**Mar 2021:** FR requests referral; COM informs other MS of referral, BE, GR, IS, NL, NO join referral

**Apr 2021:** COM accepts referral and initiates merger control proceedings

**Apr 2021:** Illumina applies for annulment of invitation letter and decision to accept referral → [T-227/21](#)

**Aug 2021:** Illumina closes transaction with COM proceedings still pending

**Aug 2021:** COM initiates gun jumping proceedings

**Jul 2022:** General court dismisses action

**Sep 2022:** Illumina and Grail appeal → [C-611/22](#) and [C-625/22](#)

**Jul 2023:** COM fines EUR 432 million for gun-jumping

**Oct 2024:** COM orders unwinding of concentration

**Mar 2024:** AG Emiliou opines that Art. 22 not available

**Sep. 2024:** ECJ annuls T-227/21 and confirms that Art. 22 is not available for below-threshold concentrations

# Illumina/Grail – Art. 22 EUMR

## Main ruling of ECJ

*Referral requests under Art. 22 (1) or requests to join a referral under Art. 22 (2) can only be made by Member States*

- *Without an ex ante merger control regime (LU) or*
- *Where the concentration is subject to ex-ante control under national rules (mandatory notification or notifiable under national rules)*

## Reasoning of the ECJ

- Literal interpretation of Art. 22 allows for referral of below-threshold concentrations (¶123, 125)
- Historical, contextual, and teleological interpretation also appropriate (¶126 et seqq.)
  - Historical: "Dutch clause" tends to contradict that Art. 22 meant for below-threshold (¶146)
  - Contextual: Art. 22 not meant for below-threshold (¶177-184)
  - Teleological: Art. 22 not meant for below-threshold (¶192-219)



# Illumina/Grail – Art. 22 EUMR

## Essence of the ECJ's reasoning

- Art. 22 not corrective mechanism to remedy **deficiencies in the merger control system** but for **allocation of competences** between COM and NCAs (¶192, 200)
- Art. 22 has two main objectives (¶199):
  - "Dutch clause"
  - Extend "one-stop shop" principle (see recital 15)
- EUMR aims at balancing effective control with legal certainty; COM's interpretation liable to upset balance (¶205)
- COM's interpretation leads to informal notifications of each case to each NCA, thus inconsistent with objective of effectiveness (¶210)
- COM's interpretation of Art. 22 at odds with **principle of institutional balance**; if EUMR has enforcement gap, then EU (or national) legislator must act (¶215-217)

## Open questions

- Art. 22 available if NCA competent if only call-in right?
- Review as abuse of dominance (*Towercast*) as the new way?
- Non-turnover based thresholds legitimate (¶217)?

# Towercast – Art. 102 TFEU

## History Art. 102 TFEU vs merger control

ECJ Case 6/72 ("*Continental Can*"): Art. 102 can be applied to concentrations, but decision was made in 1973, i.e. before introduction of EUMR in 1990

When EUMR entered into force in 1990, Commission declared it would not apply Art. 102 on concentrations

Since then COM did not review concentrations under Art. 102 ex-post

### Question

*May Member States review a concentration under Art. 102 TFEU if that concentration (i) was below EUMR thresholds, (ii) below national thresholds and (iii) had not been referred to COM under Art. 22?*

## Background to Towercast case C-449/21

**Oct 2016:** TDF acquires Itas (3 to 2 merger), not notifiable and no Art. 22 referral; Towercast remaining rival

**Nov 2017:** Towercast files abuse complaint with French CA

**Jan 2020:** French CA dismisses complaint

**Mar 2020:** Towercast appeals to court of appeals

**Jul 2021:** Court stays proceedings and requests preliminary ruling → **C-449/21**

**Mar 2023:** ECJ rules that national CA is not precluded from reviewing concentration as abuse under Art. 102 TFEU

# Towercast – Art. 102 TFEU

## Article 21 (1) EUMR

This Regulation alone shall apply to concentrations as defined in Article 3, and **Council Regulation (EC) No 1/2003 [...] shall not apply**, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.

## Recital 7 EUMR

Articles [101] and [102], while applicable ... to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty.

## ECJ in Towercast C-449/21

Art. 21 (1) EUMR intended to govern scope of EUMR in relation to other secondary EU competition legislation (¶33) but mute concerning primary law such as Art. 102 (¶34)

Art. 21 (1) EUMR only applies to concentrations subject to EUMR (i.e. including thresholds) (¶41), for all other concentrations national procedural rules apply (¶48, 50)

Art. 102 TFEU is primary law, EUMR only secondary legislation and secondary legislation cannot rule out applicability of primary law (¶42, 47)

Art. 102 TFEU has direct effect and is not conditional on the prior adoption of a procedural regulation (¶44, 51)

# Towercast – Art. 102 TFEU

## Summary of Towercast-doctrine

- Conditions for ex-post review under Art. 102 TFEU
  - Acquirer is dominant before concentration
  - Concentration has no community dimension
  - Concentration below thresholds for mandatory national ex-ante control (?)
  - No Art. 22 referral
- Abuse ≠ SIEC (strengthening of dominance not sufficient to establish abuse)
- Abuse only if as a result of concentration only undertakings whose behaviour depends on the dominant undertaking would remain in the market (¶52, ref. to *Continental Can* ¶26)

## Open questions

- Reasoning of ECJ would, in principle, not exclude Art. 102 ex-post review in cases where national ex-ante merger control occurred
  - Review by COM?
  - Review by same NCA?
  - Review by other NCA?
- NCA's even obliged to apply Art. 102 (*Art. 4(3) TEU*)?
- Civil law damage claims based on Towercast?
- Reasoning of ECJ appears to limit Towercast-doctrine to horizontal mergers (¶52) → vertical, conglomerate?
- How about acquisition of minority shareholdings?

# Case study: Proximus / EDPnet

Romain Alderweireldt

# The first application of Towercast by a national authority...

## Proximus takeover of Edpnet suspended by Belgian antitrust watchdog

21 Jun 2023 | 19:22 GMT | Insight ⓘ

By [Natalie McNelis](#) and [Matthew Newmann](#)

Evidence that Proximus may have committed an abuse of its dominant position when it took over its broadband rival Edpnet is strong enough to merit interim measures suspending the deal, the Belgian competition authority decided today, MLex has learned. It's the first pursuit of a non-notifiable deal on the basis of abuse-of-dominance rules after a judgment in March by the EU's top court over Towercast that confirmed the availability of that legal avenue.



# Spotlight on the Belgian Competition Authority!



A great deal of attention and questions...

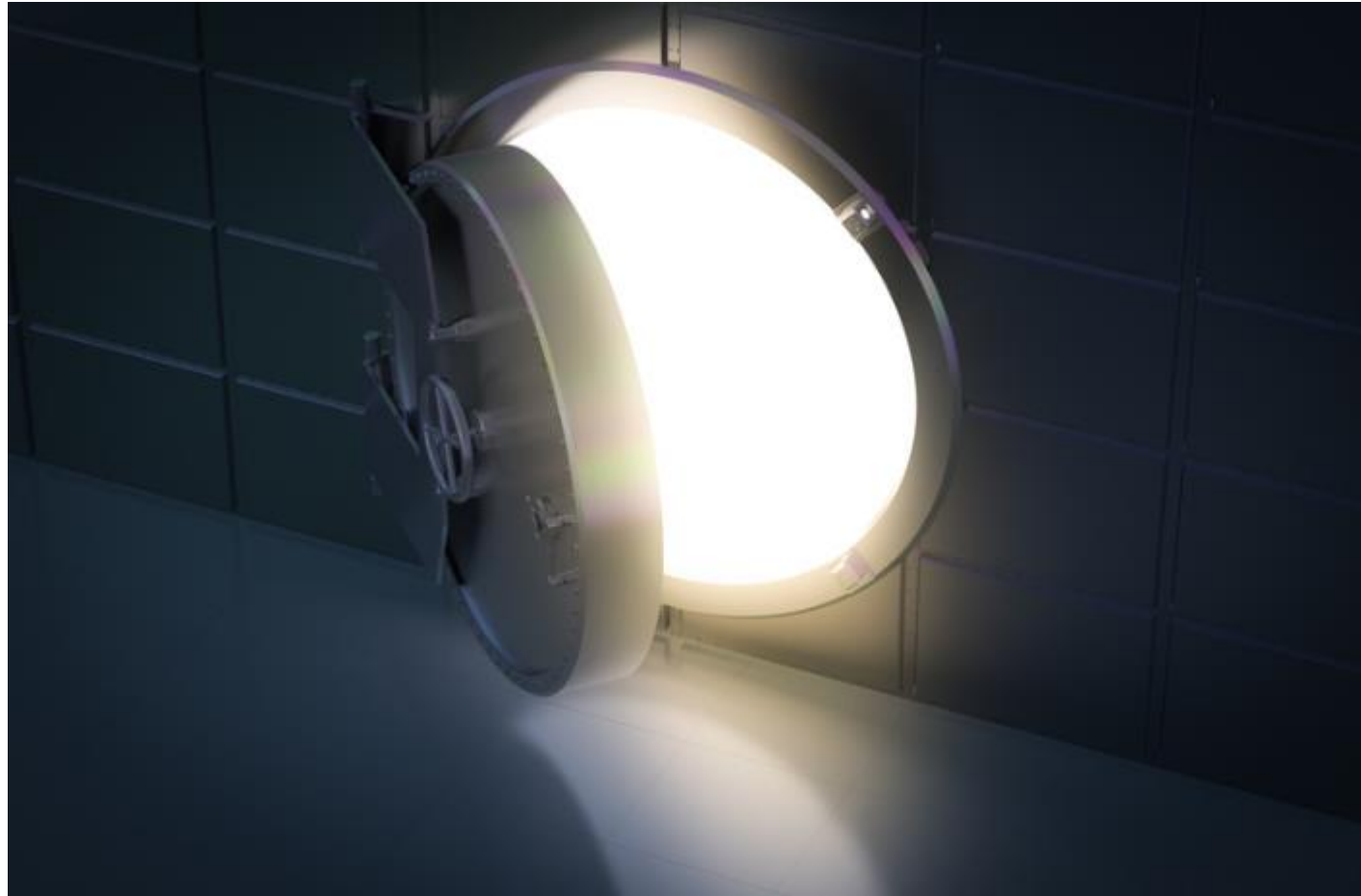




Ex-post, Towercast in EDPnet evokes mainly... a crowbar!



# A crowbar that opened the Proximus vault



# Five Requests For Information (RFI) over the summer 2023

Annexe 2 à la demande de renseignements

CONC-RPR-23/0001

Affaire Proximus/Edpnet

Date limite de réponse : 17 août 2023

8. Veuillez fournir tous les documents reprenant le mot-clé « Edpnet » ou tout autre nom donné à Edpnet ou au projet de reprise des actifs d'Edpnet au sein du groupe Proximus , préparés, échangés, reçus ou émis entre le 1<sup>er</sup> juillet 2022 et le 28 juin 2023, dont disposent l'ensemble du personnel de référence visé à la question 3.

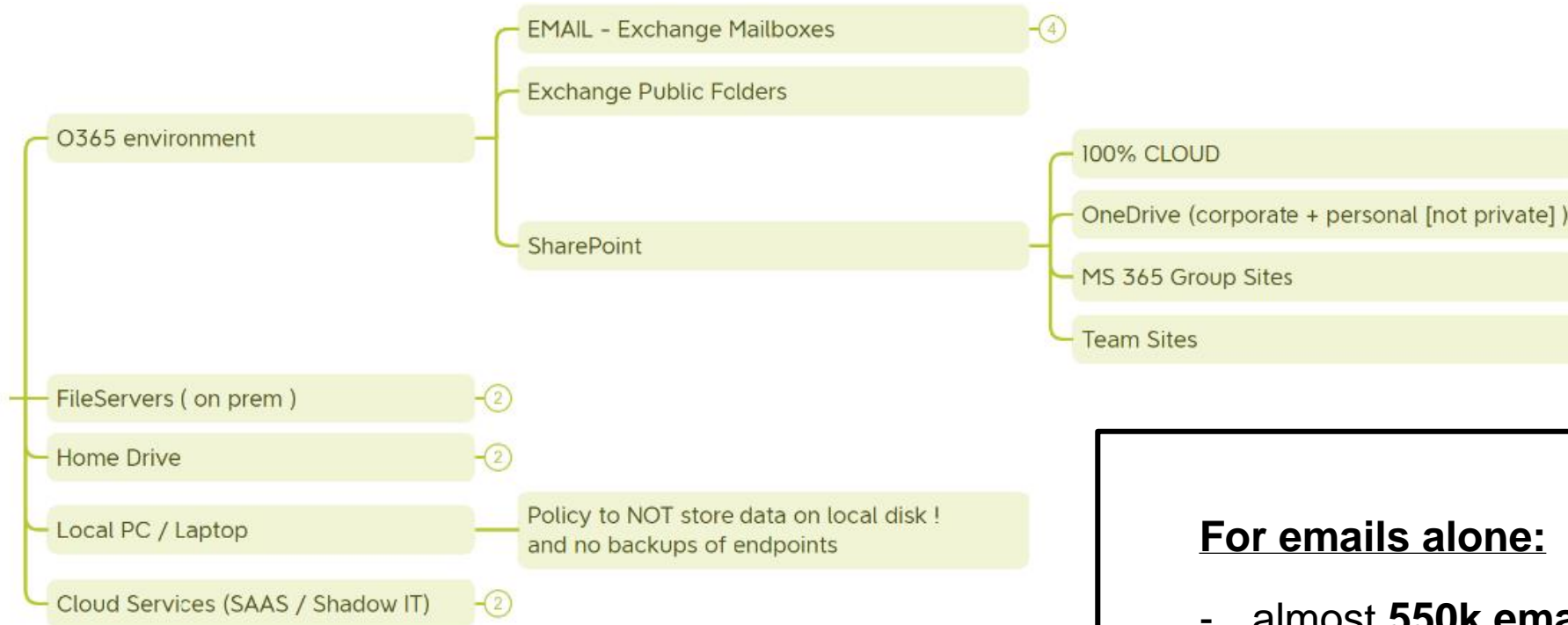
Ces documents incluent mais ne sont pas limités à l'ensemble des analyses, mémorandums, rapports, examens, évaluations, présentations, courriels, messages, sous quelque forme que ce soit (documents électroniques ou papier), produits en interne ou par des tiers (tels que des consultants externes ou des institutions financières ou d'investissement).

8. Please provide **all documents containing the keyword 'Edpnet'** or any other name given to Edpnet or the proposed takeover of Edpnet's assets within the Proximus group, prepared, exchanged, issued between 1 July 2022 and 28 June 2023, available to **all reference personnel** referred to in referred to in question 3.

These documents include but are not limited to all analyses, memoranda, reports, assessments, presentations, e-mails, messages, **in any form whatsoever (electronic or paper)**, produced internally or by third parties (such as external consultants or financial or investment institutions).

**Invention of the self-performed dawn raid!!!**

# Data inside Proximus tenant



## **For emails alone:**

- almost **550k emails**
- in more than **14k mailboxes**
- for a volume of **1 Terabyte !**

# Data outside Proximus tenant

edpnet - request for information (duplicate)

English (United States)

\* Required

Means of communication

2. Did you use **any other channels apart from the company's official means of communication** such as your professional mailbox or Teams, to communicate and exchange messages about the edpnet file?

No, I have not used other channels

Yes, I have used other channels

3. What other channels where they? \*

Private email

SMS

WhatsApp

Messenger

Telegram

Signal

Viber

Skype

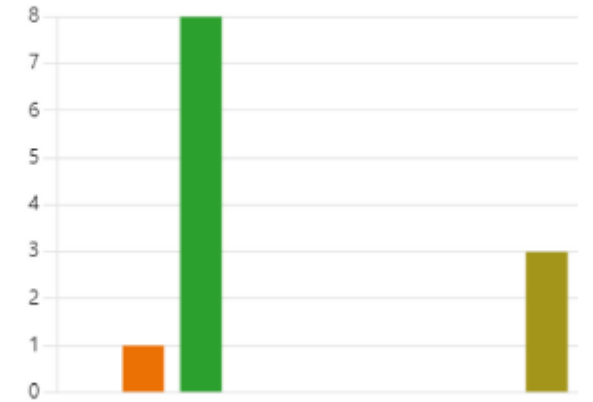
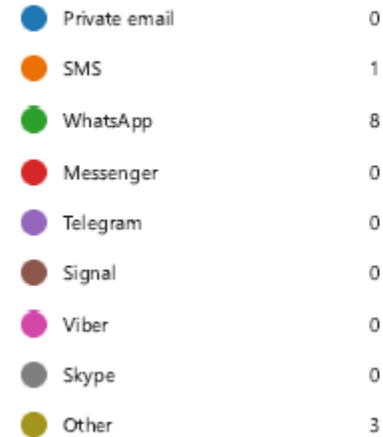
Other

Back Next

Page 2 of 4

Never give out your password. [Report abuse](#)

### 3. What other channels where they?



Survey to be conducted in a few days (during the summer) among 200 employees (including C-Level: CEO, CFO)

# Legal privilege

- son destinataire.

Les documents qui constitueraient une correspondance couverte par le *legal privilege* doivent être listés dans un document distinct.

Documents that constitute correspondence covered by legal privilege must be listed in a separate document.



# Complexity, exposure...and insolvency!



# Cost-benefit-risk analysis -> white flag





# Divestiture of EDPnet



Home > About us

## Press Release nr 51 - 2023

Publication date 11/06/2023

*Proximus/EDPnet (Towercast case law): the Belgian Competition Authority terminates proceedings following the divestiture of EDPnet to Citymesh*

Download(s)

 [20231106\\_Press\\_release\\_51\\_BCA.pdf](#)



## PRESS RELEASE

N° 51/2023  
6 November 2023

### **Proximus/EDPnet (Towercast case law): the Belgian Competition Authority terminates proceedings following the divestiture of EDPnet to Citymesh**

The Belgian Competition Authority (“Authority”) has today been informed of the conclusion and **completion of an agreement pursuant to which Proximus has divested EDPnet Belgium to Citymesh**. Further to this agreement, the Authority has decided to terminate its abuse of dominance proceedings opened in March 2023 with respect to the takeover of EDPnet’s assets by Proximus.

On this occasion, Prosecutor General Damien Gerard stated as follows: “*The divestiture of EDPnet to Citymesh will preserve and strengthen competition in the Belgian telecommunications sector, by guaranteeing the continuity and competitiveness of EDPnet and facilitating the emergence of a new operator, to the benefit of Belgian consumers and businesses. This result was made possible by the decisive action of the Authority, the full cooperation of the Telecommunications regulator BIPT and the collaboration of the companies involved.*”

<https://www.belgiancompetition.be/en/about-us/actualities/press-release-nr-51-2023>

# Takeaways

- A potential crowbar



- Close attention to data management and ready to process huge volumes of data



- Clarifications to come that the EDPnet case does not provide



# **Booking/eTraveli: the new "ecosystem" theory of harm**

Kirsten Baubkus-Gérard

# Facts of the case

## Booking.com / Etraveli group

- B and E operate Online Travel Agencies ("OTA") with **largely complementary services**: B is primarily active in hotel and E in flight OTA services.
- **B is dominant in the hotel OTA market** in the EEA (60-70% market share) and faces little meaningful competition (Expedia only 10-20% market share) and acts independently from competitors.
- B benefits from (i) **growing network effects** as ever more consumers and hotels use its services; (ii) **customer inertia**; (iii) its **brand strength**; (iv) its **unmatchable advertising spend**.
- All these factors result in **high barriers to entry/expansion** for rivals in the hotel OTA market.
- **E is one of the Top 4 providers in the flight OTA market** (10-20% market share) and the most competitive in terms of prices.
- B's **rationale for the acquisition** was to launch a new seamless service - "The Connected Trip" - to **cross-sell between different travel verticals ("one-stop-shop")**.

# Booking's travel ecosystem

- B offers a wide portfolio of OTA services ("accommodation, flights, car rentals etc.")
- Hotel OTA market is the largest and most profitable segment of the OTA market.
- Flights represent an important customer acquisition channel for hotel OTAs ("flights are the starting point of a trip").



# How does the COM assess the case?

- COM assessed whether the proposed transaction would further strengthen B's dominant position in the EEA-wide hotel OTA market.
- However, **COM toolbox does not fit:**
  - Horizontal Merger Guidelines (HMG) apply to horizontal mergers.
  - Foreclosure theory of harm (ToH) provided under the Non-Horizontal Merger Guidelines (NHMG) does not apply, since there is no leveraging from B's dominant position from the hotel OTA market to the flight OTA market. A "reverse leveraging" is not expressly covered by the NHMG.



# COM combines Guidelines

- COM considered that the Transaction has horizontal and conglomerate effects and therefore combined considerations from both Guidelines:
- "...both the Horizontal and non-Horizontal merger guidelines foresee that a significant impediment of competition may be the result of the creation or strengthening of a dominant position which can arise from a structural change in the market that decreases the ability for competitors to enter or expand in the market and more generally to compete." (para. 192)



## ...and puts forward an "ecosystem" theory of harm

- The **Transaction would have allowed B to strengthen its position on the hotel OTA market** where it is already dominant and this **even though the Target is active in a different market**, the flight OTA market (para 193+194)
- The transaction would
  - allow B to **acquire a customer acquisition channel**. This channel would allow B to gain a significant amount of additional traffic for its OTA hotel offering and as a result increase the sales of its hotel OTA services.
  - allow B to **expand its existing ecosystem** which **reinforces network effects**, and, **increases barriers to entry/expansion** on the hotel market which will reduce the competitive constraints on B and likely enabling B to increase costs for hotels using its platform, and likely also for end-customers.
- The effects of the Transaction would manifest themselves in the market absent any specific conduct by B.



# ...and departs from the traditional foreclosure theory of harm

- B would leverage its ability to acquire customers in the neighboring flight OTA market to strengthen its dominant position in the hotel OTA market ("**reverse leveraging**"). (para. 202)
- COM considers that
  - Non-Horizontal Merger Guidelines (NHMG) do not exclude "reverse leveraging" ToH.
  - COM may depart from the NHMG to address new concerns that have risen more recently with the development of online ecosystems.
  - NHMG do not require that foreclosure is established (e.g. rival's exit of the market). Sufficient to show that the rivals' ability to access to or expand in the market is hampered.
- The Transaction will **enable B to increase barriers to entry and expansion** (in particular via network effects) **on the hotel market**, thus limiting access of potential and actual rival hotel OTA's to customers and, hence, their ability to compete in the hotel OTA market. (para. 206)

# COM prohibits transaction

- COM rejected the Parties' efficiency claims as not substantiated.
- COM rejected behavioral remedies proposed by the Parties as insufficient and difficult to monitor.
- COM prohibited the Transaction on 25 September 2023 (after it had been unconditionally cleared by the CMA in phase 1).

PRESS RELEASE | 25 September 2023 | Brussels | 7 min read

## Mergers: Commission prohibits proposed acquisition of eTraveli by Booking



# Decision is currently under review by the General Court



Luxembourg

Case  
T-1139/23

# Questions raised by the decision

- Does the COM's theory of harm mischaracterizes pro-competitive benefits as anti-competitive effects ("efficiency offence" ToH)?
- Are Google/Amazon/Facebook/Apple and other gatekeepers still allowed to acquire complementary assets? What are the limiting criteria?
- Are dominant firms beyond the digital space also concerned by the ecosystem ToH?



Thank you!