
Entrenchment of a dominant position

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Entrenchment according to the draft Guidelines

What do the draft guidelines say?

Entrenchment of a dominant position within a “**core market**” occurs when a merger “*structurally creates or reinforces existing barriers to entry or expansion*”, thereby **reducing contestability** in that market.

➤ **Dynamic** anti-competitive effect: deters the prospect of future entry, expansion or innovation by current or potential competitors

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DRAFT COMMUNICATION FROM THE COMMISSION

Guidelines on the assessment of mergers under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

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What do the draft guidelines say?

Three factors must be present for a SIEC:

- Merging party is **dominant** in core market or in “ecosystem” of closely related markets;
- Acquired “assets” are “**related**” to that core market (common customer pool or otherwise commercially or technically related); and
- The assets are “**important**” to compete on the core market (unique, scarce, or strategic), and their control restricts rivals’ ability and incentive to enter or expand.

Entrenchment more likely under pre -existing **market dynamics** that “reinforce or protect” the market position (**network effects, economies of scale / scope** , etc.).

Tying / bundling can also play a role: create or extend the ecosystem and leverage the market dynamics, making it difficult for *single-product* rivals to “gain foothold” in core market(s).

Is it really new? Or just conglomerate foreclosure?

Same building blocks as classic conglomerate foreclosure:

- separate but complementary markets, with common set of customers
- foreclosure = restricting entry / expansion
- greater effect under scale economies and network externalities (para 10 1, NHMGs)
- “dynamic implications” (para 10 1, NHMGs)
- even entrenchment and reverse leveraging (para 10 8, NHMGs: “*protecting market power in the tying goods market*”)

But conglomerate foreclosure already appears separately in draft Guidelines!

So how is “entrenchment” different?

- Requires dominance – but could still be dealt with under conglomerate foreclosure
- “Ecosystems” are prominent – but just another way to describe *complementarity* and, in any case, not a requirement

- The conduct and the harm
- Assessment is backward-looking and structural (not effects-based)
- Low (or *de facto* no) intervention threshold
- Efficiency offence?
- Broad scope
- Policy considerations

No core “conduct” as such (unlike most TOHs)

- Is the *acquisition itself* the conduct?

No *explicit* mention of “consumers” or “consumer harm”:

- In NHMG, harm was “anti-competitive foreclosure” (para 18)
i.e., tying / bundling → foreclosure → price increases
- In entrenchment, the harm is a **reduction in “contestability”**
(deters future entry, expansion or innovation by actual or potential competitors).

Assessment backward-looking and structural

Assessment is **backward-looking**, largely **structural** and almost **formalistic** i.e.,

- *Is the firm dominant?*
- *Are the target's assets “related”?*
- *Are the assets “important”?*
- *Are there network effects or other exacerbating market dynamics?*

Effects analysis is absent

Low (or *de facto* no) intervention threshold

Any (conglomerate) merger involving a dominant firm means entrenchment

“Any”, because the other criteria are broad and likely to apply in most cases:

- E.g., a “plausible connection” between asset and core market seemingly enough
- In any case, target’s assets are almost always “related” to acquirer’s existing business and “important”

Intervention threshold in a conglomerate merger is lower than horizontals (and no safe harbour!)

Is it an efficiency offence?

Conglomerate mergers “ **substantial scope for efficiencies** ” (NHMG, para 13)

- **Demand side:** decrease in search and transaction costs, one -stop shopping, better compatibility and quality assurance
- **Supply side:** Cournot effect (internalise complementarities → lower prices), economies of scope, production and sales optimisation

However, the entrenchment theory **completely ignores** that a dominant firm buying a complementary asset may lead to product improvements, process innovation, etc.

- Is it an efficiency offence?
- Usual retort from authorities: efficiencies accrue in the short-run, and harm is in the future (dynamic)? But then need to do a balancing exercise

- **Not just digital:** draft Guidelines also cite airline and chemicals mergers
- **Multiple assets in scope:** data, IP, customer acquisition channels, infrastructure, talent, compute capacity ¹
- **Multiple (exacerbating) market dynamics:** network effects, economies of scale, economies of scope, customer inertia, high switching costs, lack of portability
- **Connection between core market and other market:** commonality between customer bases or otherwise commercially related or technically related (so not just technical interoperability!)

1. https://competition-policy.ec.europa.eu/document/download/cdfd5036_-d597-40e6-93ca-a712bc751653_en?filename=Topic_E_Digitalisation.pdf

- Encourage dominant firms to innovate “in-house” and for start-ups to grow into challengers / disruptors
 - May end up leading to **less not more innovation**.
- Over-weighting the pre-merger position raises the likelihood of over-enforcement.
 - Including efficiency- and innovation-driven deals, precisely the transactions merger control should not discourage.
 - Framework for dealing with mergers of dominant firms already exists!
- the low intervention threshold doesn't really square up with the growth and competitiveness agenda.

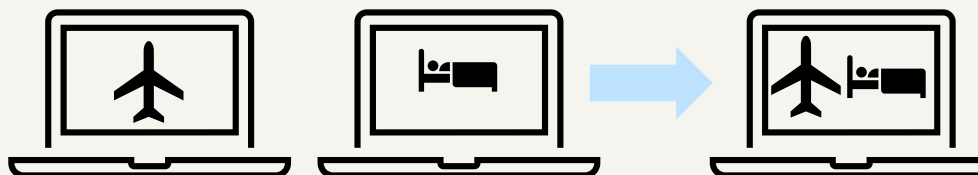
Booking / eTraveli

Merger of two travel companies.

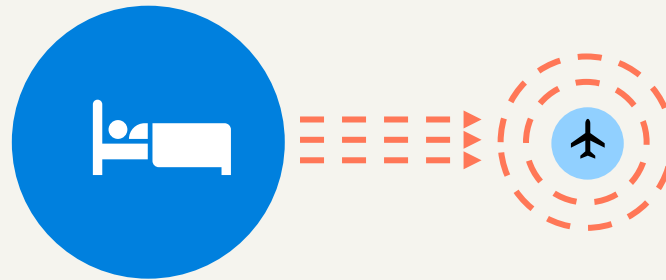
- Booking: leading accommodation OTA (hotels).
- eTraveli: one of numerous moderately sized flight OTAs.

Bring together flights and accommodation as “**Connected Trip**”.

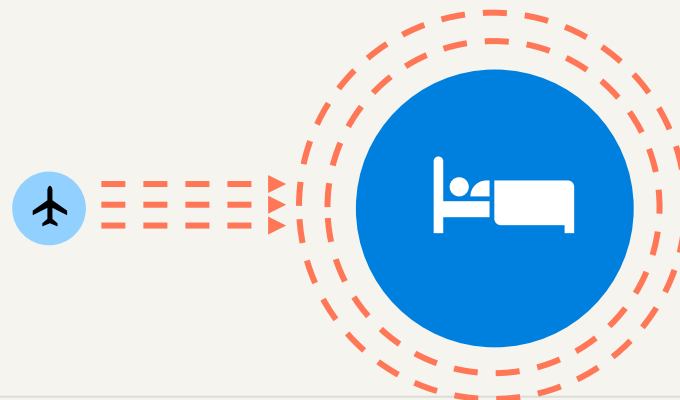
Obvious efficiency: more convenient for travellers - but “Connected Trip” provided basis for prohibition.



Traditional conglomerate ToH: leveraging product where market power is stronger (accommodation) for gains in product where market power is weaker (flights).

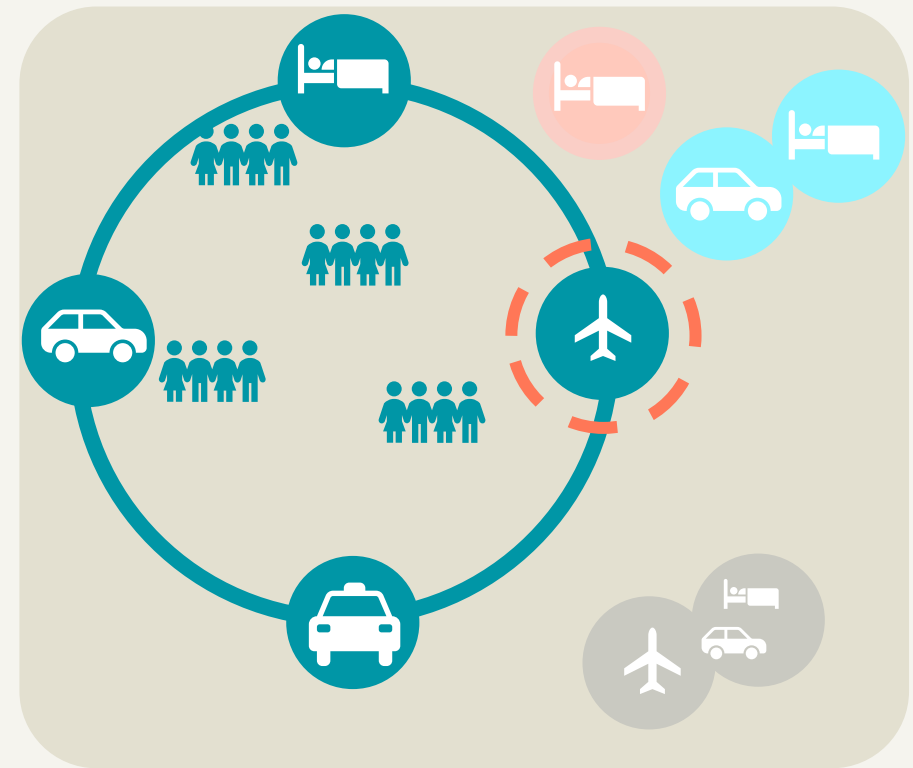
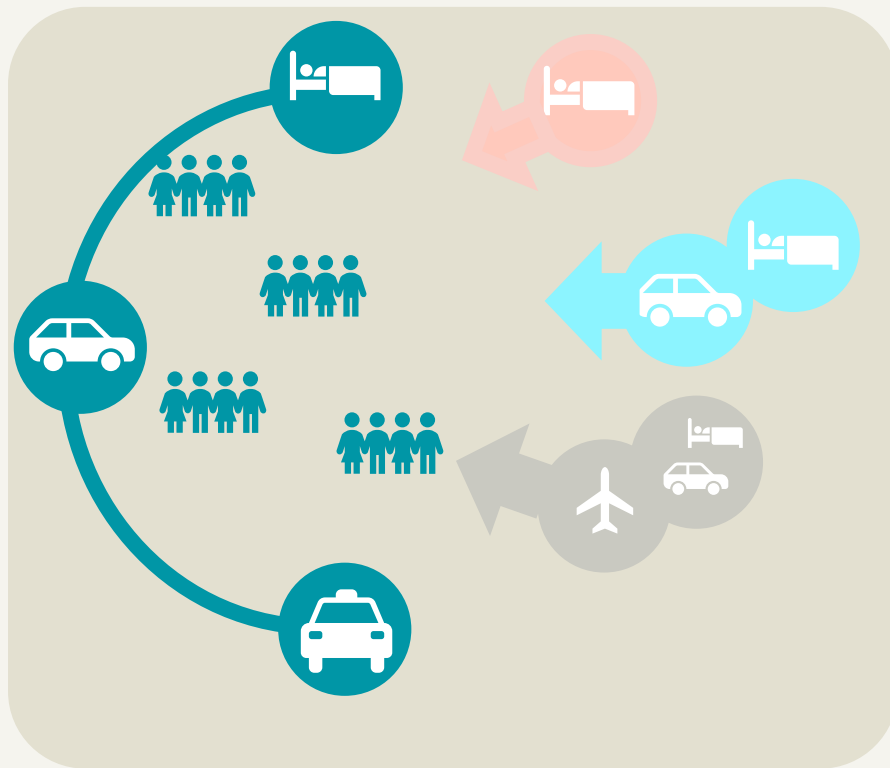


Story is swapped in ecosystem TOH: flights help strengthen accommodation.



Ecosystem issues: exclusionary

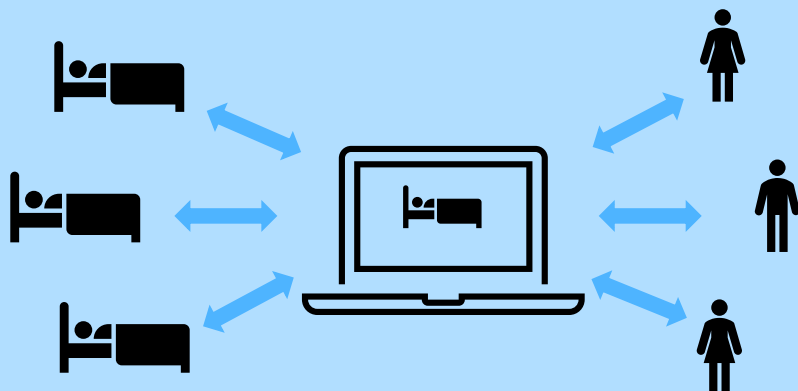
Exclusionary concern: single-product rivals cannot access demand



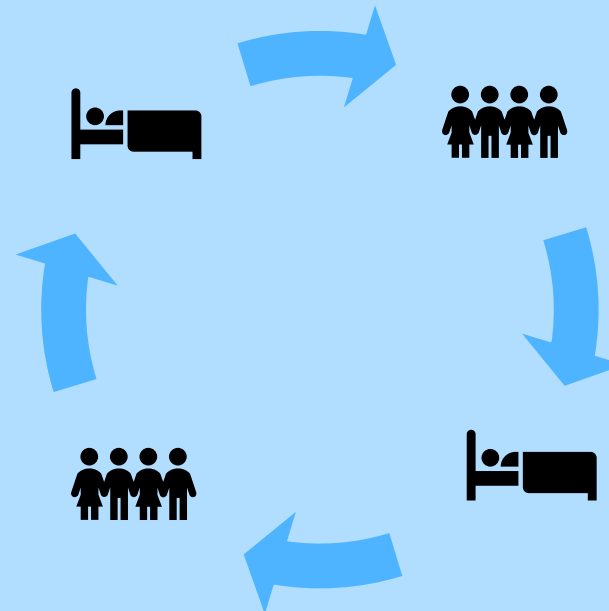
Two-sided network effects : more consumers lead to more hotels which attract more consumers etc.

Network effects found to **reinforce** rival foreclosure effect via barriers to expansion/entry

Hotel OTAs face two -sided market
(customers and hotels)



Positive feedback loop between increased
customers and increased hotel listings



Minimal impact on accommodation OTA: Parties' analysis $< 0.5\%$, EC analysis $< 5\%$

- Flight OTA **minor part** of flight demand
- Consumer multi -homing preferences and purchasing patterns
- Rivals **already offer** connected trips



Commission: **any** non-zero increment constitutes SIEC

- Was this an “ecosystem” with technical links / interoperability and lock-in / barriers to switching?
 - No. Customers mix and match and multi-home.
 - But it doesn’t matter: guidelines keep it broad (“plausible connection”)
- Extremely low threshold of intervention: “a few tenths of a percent” (recital 301)?
 - But the merger test is “significant impediment to effective competition” (SIEC)!
- Efficiency offence:
 - Connected trip would benefit consumers (one-stop-shop, etc.)
 - No longer economic basis for presumption of efficiencies in complementary product mergers? (Cournot effect? economies of scope?)
- Was the “asset” (flight customer acquisition channel) important to compete on the core market? Was it unique, scarce, or strategically important?

Concluding remarks

- Unclear why can't be dealt with under conglomerate foreclosure concerns
- No assessment of effects: assessment is structural/ formalistic and backward-looking, focusing on the “presence” of factors (dominance, market features, relationship between core market and target's assets)
- Low (or *de facto* no) intervention threshold or safe harbours (e.g., consider tiny increment in Booking/eTraveli)
- Seems to be conglomerate foreclosure *repackaged* with a significantly lower (or no?) threshold for intervention and extremely broad scope
 - Somewhat worrying: gives the EC significant amount of discretion

RBB