

**Webinar on Competition law and policy approaches towards digital platforms and ecosystems in cooperation with the BRICS Competition Law and Policy Centre and the Brazilian Administrative Council for Economic Defense (CADE)**

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**Ecosystem Theories of Harm in EU Merger Enforcement**

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# **Ecosystem Theories of Harm in EU Merger Enforcement**

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# Ecosystem theory: a snapshot

- The concept of 'ecosystem' originating in economics and business management literature → being translated in the legal sphere.
- Ecosystems are comprised of multiple independent actors
- 'Joint value creation' creates strong interdependencies between the ecosystem members, **but** ecosystem members are also independent actors → incentives to maximise their respective value capture → competition between actors within the same 'module' or in nascent modules → 'co-mpetition' (Petit and Teece 2020)
- The value of the ecosystem > sum of the values of the different parts.
- Members of the ecosystem rely not only on the price mechanism to coordinate economic activity but use prices together with bilateral contracts, negotiations and platforms.

For a recent account see Lianos, Eler, Kleinschmitt, 'Towards a Legal Theory of Digital Ecosystems' (2024) available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4849340](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4849340)

# Competition Law – Limits

- Can NPT account for a multi-dimensional concept of economic power?
  - Competition law assess power in a ‘relevant market’ and focuses on **price dimension** of competition and **specific types of business conduct**
  - But power can be exercised at an ‘**ecosystemic**’ level – leverages its power from bottlenecks to other more competitive spaces
    - ‘Strategic market status’
    - ‘Conglomerate market power’
    - ‘Intermediation power’
    - ‘Gatekeeper’
  - The concept of ecosystem in competition law=underdeveloped ([Lianos et al 2024](#))
  - See however European Commission, [Revised Market Definition Notice](#): section on digital ecosystems.

# Google Android – GC:

- The GC examined the intensity of inter-ecosystem competition between Apple and Google
- ‘Ecosystem’ distinct from ‘relevant market’
- *‘a digital ecosystem brings together several categories of supplier, customer and causes them to interact within a platform, the products or services which form part of the relevant markets that make up that ecosystem may overlap or be connected to each other on the basis of their horizontal or vertical complementarity. Taken together, the relevant markets may also have a global dimension in the light of the system that brings its components together and of any competitive constraints within that system or from other systems’* (para. 116).

# Ecosystem Theories of Harm in EU Merger Enforcement

- **Booking/eTraveli decision (2023):** the EC published a [press release](#) announcing its decision to block Booking Holding's acquisition of the Swedish firm eTraveli.
- Decision not yet published, but believed to be the **first merger** prohibition on the grounds of an '**ecosystem theory of harm**' in the digital space.
- The EC's press release suggests that the EC considered whether competitive harm arising from acquisitions of **complementary services** in digital markets may not be confined to explicit illegitimate conduct, such as anticompetitive bundling or tying. In some cases, the EC may find competitive harm in the simple **aggregation by acquisition** of a new service or product to a platform's digital portfolio. This will happen if the addition of the acquired product to the ecosystem is found to raise **entry barriers** in one or more markets within the ecosystem.

# EC's findings

- Booking is dominant in the hotel OTA services market and benefits from indirect network effects.
- The acquisition of eTraveli would have granted Booking's hotel OTA 'a main customer acquisition channel' because flight OTAs 'generate a significant amount of traffic' for hotel OTAs, and eTraveli is a 'best in class' flight OTA.
- The transaction would have expanded Booking's '**travel services ecosystem**' that 'revolves around' hotel OTA services and 'made it more difficult for competitors to contest Booking's position in the hotel OTA market.'

## Cont.

- The numerous **cross-selling opportunities** that exist between flight and hotel OTAs are noted, which would have been helped by a ‘customer inertia’ leading customers who used Booking’s flight OTA services **to stay on the Booking platform** for their purchase of hotel OTA services.
- The increased user traffic to Booking’s hotel OTA services offering would have ‘**reinforced network effects and increased barriers to entry and expansion**’ in the hotel OTA market, strengthening Booking’s bargaining power with hotels and resulting in ‘**higher costs** for hotels and possibly consumers.’



# Suggested remedies

- The remedies proposed by Booking involved showing customers on its flight OTA checkout page a choice screen for hotel offers from competing hotel OTAs → to alleviate consumer inertia.

The EC found these remedies insufficient:

- (i) The ranking of offers was ‘not sufficiently transparent and non-discriminatory,’
- (ii) it would only affect cross-selling opportunities via the flight checkout page, which ‘represent a small share of cross-sale opportunities’
- (iii) the commitments would be difficult to monitor.

# A novel theory of harm?

- The nature of the EC's concern relating to the growth of Booking's 'travel services ecosystem' appears novel
- Represent a clear shift from more traditional non-horizontal concerns of input foreclosure or leveraging of dominance across well-defined markets.
- Novel conditions and mechanisms for competitive harm **or** an adaptation of the traditional theories of harm in EU's non-horizontal merger guidelines?

Decision	ToH
<i>Google/Fitbit</i> (EC, 2020)	Standard foreclosure of other businesses from Fitbit's data plus data combination to extract more rents from consumers in areas such as health insurance and employment. Cleared with access remedies plus 'data siloing' remedy.
<i>Meta/Giphy</i> (UK CMA, 2022)	Inclusion of Giphy's GIF business into Meta's 'ecosystem' could have been used together with Meta's other assets to disadvantage rivals.
<i>Microsoft/Activision</i> (UK CMA, 2023)	As a result of controlling a list of assets (cloud, Windows operating system, first and third-party games as well as 'important' content), Microsoft would be 'uniquely advantaged' at a critical time of pivoting towards new cloud gaming technologies. Mentions 'ecosystem'.
<i>Amazon/iRobot</i>	Abandoned - Could raise 'ecosystem' ToH

Thank you for your attention!

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