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A precedent for the platform age: The *Booking/eTraveli* judgment and its implications for digital M&A

Overview

On 9 September 2026, the General Court delivered its judgment in *Case T-1139/23, Booking Holdings v Commission*, dismissing Booking's challenge to the European Commission's September 2023 decision prohibiting its proposed acquisition of eTraveli Group, a European-based flight online travel agency (OTA). The Court supported the Commission's key findings, including an endorsement of its then-novel "ecosystem" theory of harm and its interpretation of what constitutes a "significant impediment to effective competition" (or SIEC), the legal test for assessing whether mergers are harmful to competition. The judgment also confirmed the circumstances in which the Commission is able to depart from its own guidelines.

The judgment will come as a relief to the Commission, which had already incorporated a section on the ecosystem theory of harm (now termed "entrenchment") in its new draft merger guidelines, set to be finalised later this year (the Draft Guidelines). Booking has not yet confirmed whether it intends to appeal the ruling to the Court of Justice, but for now the General Court's judgment gives the green light to the Commission's approach, with important implications for other mergers subject to the Commission's review, particularly in the digital sector.

Case background

In 2022, Booking sought to acquire eTraveli Group, a flight OTA. The Commission reviewed the transaction following an Article 4(5) referral by the parties. The Commission found that the transaction would significantly impede effective competition by enabling Booking to strengthen its dominant position in hotel OTAs through acquiring a key customer acquisition channel, reinforcing network effects, and creating a travel ecosystem that rivals would struggle to replicate.

Booking appealed on several grounds, each of which was dismissed:

- **EC applied the incorrect legal test:** Given this case is a conglomerate merger between complementary assets (which are generally viewed as pro-competitive),

  Booking argued that the Commission erred when it departed from the 2008 Non-Horizontal Merger Guidelines by relying on a novel "reverse leveraging" theory (using a non-dominant position in the flight OTA market to strengthen an already dominant position in the hotel OTA market) without properly demonstrating anti-competitive foreclosure, as required by its own guidelines. The Court rejected this, holding that the guidelines were not an exhaustive codification, noting that digital markets give rise to concerns "not sufficiently taken into account" when the 2008 guidelines were adopted.

- **EC applied an erroneous counterfactual:** Booking contended that the Commission erred in failing to account for an existing commercial agreement between Booking and eTraveli, which allowed Booking to display flight inventory from eTraveli, as the appropriate counterfactual. The Commission instead relied on a counterfactual that did not give credit for the full terms of that agreement which meant it overstated the estimated increment to Booking's hotel OTA position arising from the transaction. The Court ultimately held that this point was not determinative; under the ecosystem theory of harm developed by the Commission, the precise scale of the quantitative impact of the transaction on Booking's hotel OTA market share had "no bearing on the outcome" of the appeal (see below).

- **Insufficient proof of SIEC:** Booking challenged the Commission's theory of harm and the legal standard applied, arguing that a marginal market share increment could not demonstrate a "significant" impediment to competition and could not sustain an adverse finding. The Court disagreed. Where a market is characterised by strong network effects, high barriers to entry, and a dominant undertaking far ahead of its competitors, the

Commission may rely on a theory of harm that alleges the concentration could merely *sustain* an already low level of competition, "to the benefit of the parties to the concentration and to the detriment of existing and potential competitors and consumers." Under these market conditions, no market share increment is necessary to establish competitive harm. Instead, if the "low level of competition" that already exists is "consolidated and perpetuated" by the concentration, the significant impediment to competition can arise.

- **Rejection of efficiencies:** Booking argued that the Commission erred in rejecting pro-competitive efficiencies, including lower flight prices and the creation of a consumer-friendly one-stop shop. The Court upheld the rejection, in part – and most notably – because efficiencies flowing to one set of consumers (flight consumers) could not offset potential harm to another set of consumers (hotel consumers), unless those groups were "substantially the same."

An SIEC "does not necessarily follow from a significant reduction … of the competitive pressure on the parties to the concentration, but from the low level of competition … becoming consolidated and perpetuated."

5 Key Takeaways

1. The merger guidelines are non-exhaustive

The Court confirmed that the Commission's existing merger guidelines do not prevent it from developing and relying upon new forms of competitive concern. The Court observed that the Non-Horizontal Merger Guidelines "lay down a general framework" for the assessment of non-horizontal mergers "without thereby limiting the Commission in the exercise of its discretion…." This gives the Commission latitude to advance bespoke theories of harm tailored to the characteristics of a specific sector or market structure. The Draft Guidelines also expressly contemplate this flexibility. Businesses that operate in digital ecosystems, two-sided markets, or otherwise unique market structures should be prepared to consider potential theories of harm that extend beyond those identified in the merger guidelines.

2. Direction of leverage unimportant – reducing market contestability matters

The Court endorsed the concept of "reverse" leveraging: the use of a non-dominant position in one market to strengthen an already dominant position in another. This is a notable departure from the more familiar leveraging scenario, discussed in the 2008 Non-Horizontal Merger Guidelines, where dominance in market A is used to acquire or strengthen a position in market B. The Court reasoned that reverse leveraging could have the same potential impact on competition, namely the strengthening of the merged entity's position to the detriment of its competitors, and the direction of the leveraging effect is immaterial. Accordingly, it would be "contradictory" to allow the Commission to rely on leveraging only where it would strengthen a non-dominant position, and not where it would strengthen an already dominant position. The Draft Guidelines reflect this position through the theory of "entrenchment of a dominant position," which contemplates that a merger may give rise to competitive harm where the acquisition of assets in a related market structurally reinforces existing barriers to entry and expansion, thereby reducing market contestability. Specifically, the Draft Guidelines define entrenchment as arising where at least one merging firm is dominant, the acquired assets are related to the core market, and those assets are important for effective competition; including, for example, where they constitute an important customer acquisition channel (citing *Booking/eTraveli* as a precedent). For dominant firms, this finding significantly broadens the range of acquisitions that may attract scrutiny, materially increasing the risk profile of M&A in adjacent or complementary markets.

3. Dominance is necessary but insufficient; the Commission must also show significance

The Court confirmed that the strengthening of a dominant position does not automatically give rise to a significant impediment to effective competition. Notwithstanding significant errors in the Commission's quantitative assessment of the transaction's effects on Booking's hotel OTA market share, the Court accepted that the Commission had shown two ways in which the transaction's impact on Booking's hotel OTA market position should also be regarded as being capable of significantly impeding effective competition. First, that even a small quantitative increase in market share can reinforce existing network effects, particularly when there is a significant gap between the dominant undertaking and its rivals. Second, that the acquisition would allow Booking to create a travel "ecosystem" that competitors would find difficult to replicate, particularly by capturing one of the few remaining independent channels for hotel customer acquisition.

Notably, this theory of harm does not rely on a significant reduction in *existing* competition; rather the Court considers it enough that a transaction sustains an already low level of competition. In effect, any reduction in the contestability of a dominant position – however minimal – can form the basis of a theory of harm.

Establishing any reduction in the contestability of a dominant position, particularly without a requirement to show a change from the current competitive levels in the market, is a notably low threshold. Although the Commission must then establish that the transaction could perpetuate the status quo in order to demonstrate that the transaction represents a "significant" impediment to competition, this may offer limited reassurance when the Commission can rely on market characteristics and internal documents alone to establish this significance.

4. **Qualitative evidence alone can be sufficient evidence to establish harm**

The Court accepted that the transaction may only have added "a few tenths of a per cent" to Booking's hotel OTA market share. Yet the Court upheld the Commission's prohibition based predominantly on *qualitative* evidence. The Court reiterated that the Commission must adduce evidence that is "cogent and consistent," contains all relevant considerations, and is "capable of substantiating the conclusions drawn from it." But this need not be quantitative. The Commission has already sought to enshrine this position in the Draft Guidelines which state that there is "no hierarchy between non-technical (or qualitative) and technical (or quantitative) evidence," and that the Commission may rely on a single item of documentary evidence provided that its probative value is undoubted. This lowers the practical threshold for intervention in cases involving dominant firms and increases the importance of internal documents as evidence. Board papers, investor presentations and internal emails are fertile grounds for the Commission, even when quantitative evidence provides little support for intervention.

5. **Cross-market efficiencies cannot offset harm unless the consumer groups are "substantially the same"**

The Court upheld the Commission's assessment that the efficiencies which Booking claimed would result from the transaction were not sufficient to offset its expected negative effects. In particular, the Court found that the expected harm arose in the hotel OTA market, affecting hotels and hotel customers, whereas the claimed efficiencies arose in the flight OTA market, principally benefiting flight customers. The Court held that such cross-market benefits could not offset the identified harm because the group of consumers who would benefit from the efficiencies (flight customers) and the group who would be harmed (hotel customers and hotels) were not shown to be "substantially the same." The Court was clear that a mere "commonality" between end-users of the two services was insufficient to satisfy this threshold. The Draft Guidelines are aligned in this respect.

Conclusion

The judgment gives the Commission greater latitude to challenge deals involving 'dominant' firms operating in markets characterised by network effects and allegedly high barriers to entry and expansion. Under those circumstances, a transaction that consolidates and perpetuates the existing competitive conditions, even with only a minimal market share increment, may be deemed to significantly impede effective competition. The Court also reinforced that the Commission's guidelines are just that – and it is free to depart from them where warranted.

For businesses operating in the digital sector in particular, acquisitions in adjacent or complementary markets now carry greater risk. The practical implication is that prospective deals need to be analysed carefully and holistically in advance, beyond the application of the recognised theories of harm laid out in the Commission's guidance or precedents.

Finally, the judgment underscores the critical importance of internal documents and analyses as sources of evidence, and the need to ensure that these are prepared in a coherent way that is consistent from the outset with the pro-competitive rationale underpinning the merger.

Contacts

Alex Bulfin
Partner
T: +44 (0)207 090 3454
E: Alex.Bulfin@slaughterandmay.com

Kerry O'Connell
Partner
T: +32 (0)2 737 9412
E: Kerry.OConnell@Slaughterandmay.com

Jacopo Pelucchi
Senior Counsel
T: +32 (0)2 737 9403
E: Jacopo.Pelucchi@slaughterandmay.com

London	Brussels	Hong Kong	Beijing
T +44 (0)20 7600 1200	T +32 (0)2 737 94 00	T +852 2521 0551	T +86 10 5965 0600
F +44 (0)20 7090 5000	F +32 (0)2 737 94 01	F +852 2845 2125	F +86 10 5965 0650