

Flight of fantasy? The European Commission's *Booking/Etraveli* prohibition

The European Commission's recent decision prohibiting Booking's acquisition of Etraveli signals an important change in the assessment of conglomerate mergers in the EU.¹ The decision sets aside the well-established economic framework of the non-horizontal merger guidelines ("NHMG") and focuses instead on a theory of harm based on "ecosystem" concerns.

The justification for this shift in analytical framework appears questionable. The core economic logic underpinning the Commission's ecosystem concerns appears to be a question of foreclosure that would be suitable for analysis under the NHMG. By rejecting these guidelines the Commission seems to have set itself a materially less rigorous benchmark for assessing non-horizontal competition concerns. In doing so, the decision risks a return to "efficiency offence" concerns.

In combination with other recent non-horizontal merger assessments, such as *Broadcom/VMware* and *Amazon/iRobot*, the *Booking/Etraveli* decision suggests a policy shift in Brussels towards greater scepticism for non-horizontal mergers. Given the transaction was cleared at Phase I by the UK CMA, which examined the same theories of harm, it may also signal an important policy divergence between the Commission and other regulators. Pending the outcome of the ongoing General Court appeal, the *Booking/Etraveli* decision will have important ramifications for non-horizontal mergers in the EU, particularly those involving firms that are leaders in at least one of their markets.

Conglomerate mergers: the route well-travelled

Booking and Etraveli operate as online travel agents ("OTAs"). Booking is focused on accommodation services, operating a platform that connects hotels with consumers requiring hotel rooms. Etraveli provides a similar flight OTA service connecting airlines with consumers requiring flights.

The transaction combined the complementary services of accommodation OTA and flight OTA, and thus fell squarely within the category of non-horizontal mergers.² The two parties sell services to partially overlapping customer bases: some (but not all) accommodation consumers will also purchase flights for a given trip; and some (but not all) flight consumers will also purchase accommodation. There would thus be scope for the merged entity to sell both of these services to some consumers. Indeed, this was part of the rationale for the transaction: Booking hoped to offer customers a "Connected Trip", whereby consumers could purchase both flights and accommodation from the merged entity.³ This cross-selling would benefit Booking to the extent that it might make additional sales, and would benefit customers through a more seamless product experience.

These potential consumer benefits are consistent with the economic principle that non-horizontal mergers tend to generate pro-competitive efficiencies. This is recognised in the NHMG, which refer to the "substantial scope for efficiencies" in such deals.⁴

The NHMG also recognise the potential for conglomerate transactions to lessen competition. The guidelines focus on the risk of anticompetitive foreclosure, where a merger hampers rivals' market access to such an extent that their ability to compete is impaired, leading to a loss of consumer welfare.⁵ The guidelines provide a three-part analytical framework for assessing such risks, based on analysis of a merging firm's *ability* and *incentive* to foreclose rivals, and the *effect* of such foreclosure. This final step of assessing effect serves to distinguish pro-competitive transactions that might increase competitive pressure on rivals from those that diminish rivals' ability to compete to an extent that lessens competition and thus consumer welfare.⁶

1. Case M.10615 - Booking Holdings / Etraveli Group, provisional decision, published 10 June 2024. RBB advised Booking during the EU and CMA merger review processes, and is advising on the ongoing General Court appeal.

2. While the focus of assessment was conglomerate effects, the transaction also gave rise to a vertical link between Booking's upstream meta search service, KAYAK, and Etraveli's flight OTA business. This vertical relationship was not a material cause for concern in any jurisdiction.

3. In practice, Booking was already able to offer a Connected Trip service via a commercial affiliate agreement with Etraveli (see discussion of counterfactual below). The intention was to improve this service via the merger and encourage investment in the relationship by both parties.

4. NHMG, paragraph 13.

5. NHMG, paragraph 18.

6. The guidelines recognise that "a significant reduction of sales prospects" for rivals is not "in and of itself a problem" without an impairment to rivals' ability or incentive to compete. NHMG, paragraph 111.

The NHMGs were introduced in 2008, during the reform of European merger enforcement that followed a number of high-profile Court reversals. Notable amongst these were *General Electric/Honeywell* and *Tetra Laval/Sidel*, where the Courts criticised the Commission for an absence of cogent economic assessment and emphasised the need for theories of harm through foreclosure to be supported by convincing evidence. Since their introduction the NHMGs have provided an analytical framework within which the Commission and merging parties can assess and evaluate theories of harm in conglomerate mergers. But in its *Booking/Etraveli* decision the Commission specifically rejected the application of the NHMG, and instead focused on a novel theory of “ecosystem” harm.

Ecosystem harm: flying blind?

Booking is the leading accommodation OTA in Europe, albeit competing against dozens of rivals; while Etraveli has a moderate market position in flight OTA amongst a number of similarly sized rivals. The NHMGs might then suggest a foreclosure theory of harm whereby the merged entity could seek to leverage its position in accommodation OTA into the flight OTA segment. This was quickly eliminated as a cause for concern however, based on a simple market feature: the parties’ data showed that consumers typically make flight and accommodation purchases at different points in time, with the flight purchase typically being made around two weeks before the accommodation purchase.⁷ As such, the merged entity would not have the ability to use its accommodation offer to influence consumers’ flight purchase decision – by the time most consumers visit an accommodation OTA their flight purchase decision has already been made.

The Commission instead considered a theory of harm running in the opposite direction, whereby the merged entity could use its (relatively modest) position in flight OTA to strengthen its position in accommodation OTA. In pursuing this theory the Commission held that it was not necessary to apply the NHMG foreclosure framework, but rather that it should consider more generally whether the transaction would strengthen a dominant position per article 2(3) of the EUMR.⁸

Having departed from the NHMG, the Commission posited an “ecosystem” theory of harm, supported by a claim of important network effects. In order to fully assess the theory of harm, and its relationship to foreclosure analysis as set out in the NHMG, it is helpful to explore these two concepts.

The decision is not clear on what distinguishes an ecosystem theory of harm from conglomerate merger assessment more generally.⁹ The argument made is that the merger would allow Booking to develop a travel ecosystem that would “leverage its brand strength and existing customer inertia” in order to attract customers earlier in the travel booking process, before they might consider rival accommodation OTAs.¹⁰ This would, in the Commission’s view, increase barriers to entry and expansion and thereby “hamper rival hotel OTAs’ ability to compete on the merits”.¹¹

While there is a conceptual logic to this argument, it is entirely consistent with the assessment of foreclosure as set out in the NHMG. If a merger allows a firm to offer consumers a multi-product package, single-product rivals might be less able to compete for customer demand, to the extent that they are unable to offer a similar package. Depending on its magnitude, this effect could potentially lead to a lessening of competition, as set out in the NHMG.¹² But this is not a novel concept, and introducing the word “ecosystem” to describe it does not justify abandoning the NHMG’s analytical framework. Moreover, as discussed further below, the market facts suggest there was no credible concern of an anti-competitive foreclosure effect arising from Booking offering accommodation/flight packages.

7. Decision, footnote 248.

8. Decision, paragraphs 188 et seq.

9. Decision footnote 229 explains that the ecosystem concept refers to “Booking’s wide range offer of services that cover multiple facets of the travel experience”. This definition would cover any standard conglomerate deal where a merging firm sells multiple products that are consumed by common customers.

10. Decision, paragraph 740. See also paragraphs 736 et seq.

11. Decision, paragraph 741.

12. See, for instance, the discussion of rivals’ ability to compete with a merged entity by offering similar multi-product packages at NHMG paragraph 103.

Similarly, the decision's reference to network effects does not capture new concepts outside the NHMG that merit a change in enforcement policy. Network effects are specifically noted by the NHMG as a factor to be considered in the assessment of ability to foreclose in conglomerate mergers.¹³ The decision provides no substantive discussion of how network effects might lead to a merger-specific lessening of competition, simply a general assertion that network effects "create a high barrier to entry and expansion to new entrants and smaller OTAs".¹⁴ In fact, as discussed in the next section, the facts of the case indicated that the transaction was unlikely to have an impact that could hinder rivals via network effects.

Checking out: theory versus facts

The merger regulation refers to the prohibition of concentrations that would "*significantly impede effective competition*" (emphasis added). This requires an assessment of evidence on how and to what extent a merger might affect the operation of the markets in question. The parties highlighted a number of important market features that suggest any impact of cross-selling accommodation to Etraveli flight customers would be minimal.

- First, there is little overlap between the two parties' customer bases, which inherently limits the opportunity for cross-selling. The most important reason for this is that OTAs play only a minor role in the flight sector: 80%-90% of air travellers book directly with airlines, rather than using an OTA.¹⁵ Combined with the fact that not all accommodation consumers travel by air, and that Etraveli holds only a moderate share of the European flight OTA market, this means that only a very small proportion of consumers requiring accommodation have had any contact with Etraveli that could provide an opportunity for cross-selling. It follows that the vast majority of accommodation OTA consumers would be unaffected by any post-transaction cross-selling, and so would remain available as sales opportunities for rival accommodation OTAs.
- Second, evidence on consumer preferences and behaviour demonstrated a strong preference for mixing and matching flight and accommodation providers, rather than purchasing the two services from a single provider. This is consistent with the nature of the products: travel is an infrequent and high value purchase, giving consumers a strong incentive to search for the best available deals. As noted above, flights and accommodation are typically purchased at different points in time, limiting the risk of consumers defaulting to purchasing accommodation offered immediately after a flight choice; consumers instead generally start a new search when they consider their accommodation choices some time after booking a flight. This process is supported by a wide range of specialist online travel search engines (such as Google Hotels and Kayak), which reduce consumer search costs and facilitate multi-homing. Indeed, a key development of the travel industry over the last thirty years has been a shift away from package holidays as online services have allowed consumers to pursue mix and match travel bookings.
- Third, a number of firms already offer a combination of flights and accommodation OTA, either via commercial agreements or through in-house services, and these offers have had limited impact on the market.¹⁶ Expedia, for instance, has offered a combination of flights and accommodation OTA services for twenty years, during which time it was overtaken by Booking as the largest accommodation OTA in Europe. This demonstrates that the merged entity would not gain an irreplicable advantage over rivals in being able to offer a connected trip, and that such offers have had a limited impact on the accommodation OTA sector.

It is notable that the above factors, regarding a limited pool of common customers, separation of purchase decisions, customers' multi-homing behaviour, and counter-strategies available to rivals, are all features identified in the NHMG as reducing the ability of a merging firm to lessen competition through foreclosure.¹⁷

13. NHMG, paragraph 101; see also the footnote to this paragraph, which specifically refers to the scope for network effects to arise in the case of platforms bringing together buyers and sellers.

14. Decision, paragraph 251.

15. Decision, paragraph 269. This reflects the scale and brand recognition of airlines, which are able to support the infrastructure and marketing to facilitate large scale direct sales. Hotels, by contrast, tend to be less well placed to make direct sales to consumers, meaning OTA usage is higher in accommodation.

16. Indeed, Booking itself has offered flights since 2019 under a commercial affiliate agreement with Etraveli. The Parties argued that this ongoing long-term agreement, which already allowed Booking to pursue much of the cross-selling at issue in the Commission's theory of harm, represented the relevant counterfactual, and reduced the potential impact of the transaction. The Commission instead adopted a "zero flights counterfactual", assuming that absent the transaction the agreement would cease to operate. Not only is this approach highly speculative, the assumption that Booking would terminate the flights agreement also appears to contradict the core theory of harm, which is based on the idea that flights are a significant route to market for accommodation OTAs.

17. NHMG, paragraphs 98 to 100.

The parties undertook detailed modelling to quantify the impact of these market features, building upon pre-acquisition internal analyses and using a combination of internal and market data. This exercise indicated that cross-selling to flights customers would indeed have a minimal impact upon the accommodation OTA segment: incremental accommodation sales for the merged entity were estimated to represent a fraction of one percent in additional market share for Booking.¹⁸ The Commission largely accepted this modelling exercise, but altered a number of parameters, most notably the counterfactual (as discussed at note 16), assuming away the existing commercial affiliate agreement between the merging parties. This led it to an estimated accommodation OTA share increment of between one and three percent.¹⁹

While the parties disputed the Commission's adjustments, which significantly inflated the increment in relative terms, even on its calculations the estimated impact of the transaction remained minimal. An accommodation market share increment of one to three percentage points (or much lower on the prevailing counterfactual) does not obviously meet the standard of representing a *significant* impediment to effective competition.

Remarkably, the decision goes further, and suggests that *any non-zero increase* in accommodation sales arising from cross-selling would constitute a competition concern.²⁰ That is, a single additional hotel stay for Booking, within a market worth more than €30 billion per annum, could on the Commission's view be a sufficient change in market structure to justify regulatory intervention. Does this idea of attracting any non-zero volume of additional sales, by offering customers a better service, now represent the intervention threshold for non-horizontal deals assessed under "ecosystem" concerns?

Connecting the dots

Booking/Etraveli appears to signal an important departure from the effects-based assessment of non-horizontal mergers that has developed over the past two decades. It also suggests a divergence in approach between the Commission and the CMA, which considered the same theory as the Commission but ruled out competition concerns based on the market facts.²¹

The decision relies on a novel theory of harm with a poorly defined conceptual underpinning and remarkably low intervention threshold. Indeed, it may even suggest a lower intervention threshold for non-horizontal mergers than for horizontal mergers, contrary to clear economic logic that non-horizontal mergers tend to generate efficiencies and do not eliminate direct competitive constraints between firms.

What is particularly concerning is that the source of the claimed harm, the ability to offer consumers a one-stop-shop for flights and accommodation, is itself a consumer benefit. In focusing upon the possibility that this offer could raise barriers to entry or expansion for rivals by attracting additional customers the decision risks prioritising competitors over competition, and re-introducing the "efficiency offence" concept.²² There is a clear policy danger in prohibiting transactions that improve services for consumers, even if that places greater pressure on rivals.

This is not to say that non-horizontal transactions could never raise competition concerns through cross-selling mechanisms of the sort investigated in *Booking/Etraveli*. If there were sufficient demand for a combined product, and rivals were unable to respond via counter-strategies, then markets could tip towards a merged entity to an extent that harms competition and consumer welfare in the long run. But such concerns are already well captured by the analytical framework of the NHMG; and application of that framework to the *Booking/Etraveli* deal would have clearly indicated that the market facts of the case were inconsistent with such concerns.

Given the low intervention threshold set in *Booking/Etraveli*, "ecosystem" concerns of this sort could apply to a wide range of non-horizontal mergers involving firms which are leaders in at least one of their markets. The outcome of the ongoing General Court appeal could therefore represent a landmark judgment for European merger control.

18. "Booking memo on Etraveli veto foreshadows scathing EU court appeal", MLex, 22 September 2023.

19. *Ibid.*

20. "...it is undisputed by the Notifying Party that the Transaction would allow Booking to grow, and that the counterfactual would only result in a higher or lower increment, but an increment that would in any event be positive, thus increasing Booking's market share on the hotel OTA market", Decision, paragraphs 1007. See also paragraph 1077.

21. There has been some suggestion that the UK clearance decision reflected a different factual position from that seen in the EU. In terms of the key factual elements of the industry, regarding customer overlaps, consumer preferences and consumer multi-homing and search behaviour, we did not identify any material difference between the situation in the UK and EU. Even to the extent that the facts did differ between the two jurisdictions, the CMA's clearance decision would still conflict with the Commission's endorsement of a non-zero increment threshold for intervention.

22. The efficiency offence argument refers to a concern that regulators may use merger-specific cost savings or product improvements as a reason to prohibit mergers in order to protect competitors. This was one objection to the Commission's prohibition of General Electric/Honeywell in 2001.