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EUROPEAN COMMISSION'S ECOSYSTEMS THEORY OF HARM: CLEARED FOR TAKE-OFF?

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Summary

On 9 September 2026, the EU's General Court delivered its judgment in Booking Holdings' ("**Booking**") appeal of the European Commission's 2023 decision to block its proposed acquisition of Etraveli. The judgment, which upheld the Commission's decision, provides important guidance on the Commission's merger assessment framework, especially as regards the assessment of "non-horizontal" mergers where the parties are active in different but related markets.

The Commission's Decision

As we have written previously, in 2023, following an in-depth Phase 2 investigation, the European Commission blocked Booking's proposed acquisition of Etraveli. The basic premise of the Commission's decision was that Booking would have been able to strengthen its already dominant position in the supply of hotel online travel agency ("**OTA**") services by acquiring ETraveli, which supplies flight OTA services. The Commission found that the combination of the leading hotel and flight OTA platforms would expand Booking's travel services "ecosystem" making it more difficult for competitors to compete – in effect, Booking would be able to cross-sell hotel bookings to Etraveli's customers, thereby increasing an already dominant position in hotel OTA services.

The decision is often cited as the first merger prohibition founded in significant part on concerns relating to digital ecosystems. Such a theory is not expressly included in the Commission's current Non-Horizontal Merger Guidelines, which focus on more "traditional" theories of harm such as vertical foreclosure and conglomerate effects – i.e. where a dominant position in one market can be leveraged to enhance the merged company's position in an adjacent market. By contrast, in this case, the Commission effectively suggested that, post-transaction, Booking could "reverse" leverage Etraveli's position to entrench its existing dominance in hotel OTAs.

The Appeal

Booking appealed the decision to the EU's General Court. In part, it was alleged that the Commission had erred by departing without justification from its existing guidelines and the established framework for assessing anticompetitive foreclosure – in essence, a direct challenge to the theory of harm applied by the Commission when blocking the deal. The appeal was also grounded on an allegation that the Commission had not used the correct "counterfactual" (i.e. the situation absent the merger) to assess the effects of the merger and had, regardless of these alleged errors, erroneously found there to be a significant impediment to effective competition.

The General Court did not accept Booking's pleas in law. Notably, on Booking's first plea that the Commission had departed without justification from its guidelines and established frameworks, the Court found that the Commission's concerns could still be understood as a form of leveraging, namely that acquiring a leading flight booking platform would strengthen Booking's dominant position in hotel OTA services. While the specific mechanism identified by the Commission was not expressly described in the guidelines, the Court emphasised that the guidelines are not exhaustive and cannot be expected to address every way in which a merger may reinforce market power. As such, the Commission was entitled to rely on this so-called "reverse leveraging" theory to block the transaction, and the concept of foreclosure as outlined in the Commission's guidelines was broad enough to cover the perceived harm in this instance.

As part of its first plea, Booking had also argued that the Commission had incorrectly treated pro-competitive conduct as anticompetitive. The Court did not agree, noting that efficiencies arising from a merger are to be considered separately from the anticompetitive harm, and that the fact the potential harm arose from ordinary cross-selling rather than coercive tying or bundling did not preclude the potential for the conduct to have anticompetitive effects. Booking had argued that such cross-selling was simply an example of the merged company "competing on the merits". The Court though emphasised that the concept of competing on the merits is not relevant in the merger control context, where the assessment is of market structure and how businesses are likely to act with and without a merger.

While of less general application to future transactions, the Court also did not accept Booking's claims that the Commission had incorrectly assessed the counterfactual and that it had incorrectly found the transaction to be anticompetitive. Accordingly, the Commission's decision stands.

It remains to be seen whether Booking will appeal the decision to the EU Court of Justice, although it has already indicated it may do so. Should there be a further appeal, the General Court's decision may not be the final word on the correct approach to leveraging theories of harm.

What does this mean?

The General Court's decision has a relatively narrow focus on, and accepts the Commission's application of, the so-called "reverse leveraging" theory of harm adopted by the Commission in its decision. While this theory of harm relies on Booking's comprehensive travel "ecosystem", the

General Court’s decision still focuses to a large extent on a novel application of traditional leveraging and foreclosure theories of harm. That is, rather than expressly affirming a broader ecosystem theory, the judgment confirms that in at least some instances existing leveraging, foreclosure and dominance concepts may be flexible enough to apply to “ecosystems” without an entirely new theory of harm being required. Indeed, if the General Court’s decision could be seen to interpret the concept of leveraging broadly then one could question whether the Commission needs a separate ecosystem theory of harm in its toolbox.

All that said, as we have previously reported, the Commission has included entrenchment as a relevant theory of harm in its draft Merger Guidelines released earlier this year. This is, to some extent, a broader theory of harm reflective to a large degree of the realities of the digital economy. While the General Court's judgment does not expressly endorse this broader theory, the judgment is consistent with the Commission’s direction of thinking, and it is likely to take confidence from the judgment, particularly in light of historical challenges it has faced in conglomerate and leveraging cases. The explicit inclusion of entrenchment and ecosystem-based theories of harm in the new Merger Guidelines, once finalised, will also provide a clearer framework for such transactions, and will also likely give the Commission more leeway to apply broader theories when appropriate cases arise.

If you have any questions about the implications of this judgment, the Commission’s new Merger Guidelines or EU merger control more generally, please reach out to any of the listed authors.

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