Judgment of the General Court in Case T-1139/23 | Booking Holdings v Commission

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The General Court upholds the prohibition of Booking's acquisition of Etraveli Group

The Commission found, correctly, that the acquisition of Etraveli Group, Europe's leading online flight booking operator, would have strengthened Booking's already dominant position on the market for online travel agencies in the hotel sector

Booking, a major player in the market for online travel agencies in the hotel sector, had planned to acquire sole control of Etraveli Group, a specialist in online flight bookings, in order to add a flight offering to its platform. The Commission, however, declared that transaction incompatible with the internal market, [1] finding that it would strengthen Booking's dominant position on the market for online travel agencies in the hotel sector, by increasing barriers to entry and expansion, which would limit access by existing and potential rivals, and to potential hotel customers. Booking challenged that decision before the General Court.

By its judgment delivered today, the General Court dismisses the action and therefore upholds the Commission's prohibition of the acquisition of Etraveli Group by Booking.

Before the General Court, Booking maintained, inter alia, that the Commission had departed from its guidelines applicable to non-horizontal mergers, that it had relied on an incorrect counterfactual scenario and that it had failed to demonstrate a significant impediment to effective competition.

The General Court rejects those arguments.

As regards the Commission's alleged departure from its own guidelines on non-horizontal mergers, the General Court considers that those guidelines do not prevent the Commission from taking into account new forms of competition concerns, such as those which may arise in digital markets. In that regard, the General Court observes that the theory of harm adopted by the Commission was based largely on leveraging, typical of non-horizontal mergers, resulting from the fact that the merged entity would use its dominant position on one market as leverage to strengthen its position on another market. Those guidelines do not preclude a theory of harm from being based on 'reverse' leveraging, by which a non-dominant position, in the present case on the market for online travel agencies in the flights sector, is used to strengthen an already dominant position, in the present case, on the market for online travel agencies in the hotel sector. Indeed, when those guidelines were adopted in 2008, the Commission did not already have experience of such concerns. Moreover, if the Commission could rely solely on leveraging which would result in the strengthening of a non-dominant position, but not rely on leveraging if that would lead to the strengthening of an already dominant position, the effectiveness of merger control would risk being undermined.

In addition, the General Court held that the Commission also did not misinterpret those guidelines by classifying as anticompetitive a form of 'competition on the merits', namely, an increase in Booking's ability to cross-sell hotel rooms to flight customers by offering them the convenience of a one-stop shop. Indeed, the concept of competition on the merits, developed in the case-law relating to Articles 101 and 102 TFEU, does not play a similar role in the context of merger control, inasmuch as the implementation of a concentration cannot be regarded as a form of competition on the merits and must be assessed in terms of its effects on the structure of competition, regardless of the nature of the merged entity's subsequent conduct.

As regards the Commission’s analysis of whether there was a significant impediment to effective competition, the General Court first of all rejects Booking’s argument that the Commission applied an incorrect legal standard by relying solely on qualitative elements in order to conclude that there was such an impediment, even though the transaction would result in a minimal increment in its market share in the hotel sector. Indeed, in the light of the principle of the unfettered evaluation of evidence, the Commission may take as a basis qualitative elements, whether or not they are supported by quantitative elements, provided that the evidence adduced is sufficiently cogent and consistent, that it contains all the relevant evidence which must be taken into consideration, and that it is capable of substantiating the conclusions drawn from it.

The General Court then holds that the evidence provided by the Commission supports the conclusion that Booking’s dominant position on the market for online travel agencies in the hotel sector would be strengthened, in that the transaction forms part of its ‘connected trip’ strategy, that is to say, offering a range of travel services, of which flights are an essential part, with the aim of acquiring customers and making them more loyal. It would thereby enable Booking to optimise and grow its flight business in the fastest and most efficient way by acquiring its preferred flight solution, which would result in growth in its hotel business as a result of cross-selling of hotel rooms to flight customers.

However, since the finding of a strengthening of a dominant position does not automatically lead to the conclusion that there is a significant impediment to effective competition, the General Court then reviews the evidence relied on by the Commission in the decision for the purposes of substantiating whether that impediment resulting from the transaction was significant.

In that context, the General Court finds (i) that the Commission’s calculations of the increment in Booking’s share of the market for online travel agencies in the hotel sector post-transaction are vitiated by a number of errors, with the result that that increment could be limited to a few tenths of a per cent, and (ii) that it has not been established that the growth which Booking could achieve, post-transaction, would lead hotels to transfer an additional part of their hotel room inventory to its platform or to terminate their commercial relationship with other online travel agencies, or that such growth would enable Booking to increase the commissions received from hotels.

It observes, however, that the Commission relied on the fact that the transaction would make Booking’s dominant position on the market for online travel agencies market in the hotel sector less contestable. However, the EC Merger Regulation allows the Commission to rely on a theory of harm which is not founded on the assumption of a significant reduction in the current level of competition, but rather on the assumption of a consolidation and perpetuation of the already low level of competition.

In that regard, the General Court observes that the contested decision sets out two circumstances demonstrating that the strengthening of Booking’s dominant position on the market for online travel agencies in the hotel sector is likely significantly to impede effective competition.

First, as that market is characterised by strong network effects and a significant gap between the dominant market leader and its main competitors, even a relatively small increase, in quantitative terms, in the dominant undertaking’s market share would be capable of strengthening the existing network effects.

Second, the increment in Booking’s market share would be achieved through growth in one of the few channels for acquiring hotel customers which Booking does not yet dominate, namely flights, thereby creating a travel ecosystem which would be difficult for other online travel agencies to replicate, since Booking would become the market leader in both the hotel and flight sectors. That growth would, moreover, affect a number of online travel agencies which play a sufficiently important role in the competitive process in the hotel sector for the impact on their competitiveness to have a negative impact on the dynamics of competition.

Having completed that overall assessment, the General Court concludes that the merger would give rise to a significant impediment to effective competition.

Finally, the General Court upholds the Commission's assessment that the efficiencies which, according to Booking, would result from the transaction, were not sufficient to offset its expected negative effects.

NOTE: An action for annulment seeks the annulment of acts of the institutions, bodies, office and agencies of the European Union that are contrary to EU law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

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[1] Decision C(2023) 6376 final of 25 September 2023 declaring a concentration to be incompatible with the internal market and the functioning of the Agreement on the European Economic Area (Case M.10615 Booking Holdings / eTraveli Group).