ALERTER
A New Theory of Harm?
Case T-1139/23
Booking Holdings v Commission

Jack Castle

In Case T-1139/23, *Booking Holdings v Commission* (the "Judgment') the General Court found it was open to the EU Commission to base a theory of harm on "reverse leveraging" – where a non-dominant position on one market strengthens a dominant position in another. This has implications for mergers and potential implications for litigation, including class actions, in digital ecosystems.

BACKGROUND

Booking Holdings Inc ("**Booking**") is an online travel agent ("**OTA**") focusing on hotels. It sought a merger with an OTA that sells flights, eTraveli Group AB.

The merger was blocked by the EU Commission (European Commission Decision C(2023) 6376 final of 25 September 2023, the "**Commission Decision**") on the basis that it would cause significant impediment to effective competition in the hotel OTAs market; a market where Booking was already dominant.

The Commission's analysis was this: when people book holidays, they generally book flights first. Booking flights also requires more, and more accurate, information than booking hotels. Selling flights therefore would give Booking an advantage in: (i) being able to keep the whole customer journey within its ecosystem; (ii) enable cross-selling of hotels after flights are booked; (iii) increase customer retention (Judgment, §§26–33). As such, Booking would be able to leverage being able to offer flights to acquire more customers for its hotels business, where it already dominated the other customer acquisition channels (Judgment, §§39–55).

So although neither eTraveli nor the merged entity would be dominant in flight OTAs, the Commission decided the merger would solidify Booking's dominance in hotel OTAs. That is, the Commission's theory of harm centred on "reverse leveraging": activity on a market where an entity is not dominant can cause anticompetitive effects (in this case foreclosure) in a market where the entity is dominant. This analysis is not contained in the 2008 Non-Horizontal Merger Guidelines (the "**2008 Guidelines**") and appears to be entirely novel.[1]

Booking challenged the Commission Decision, including on the basis of the Commission's theory of harm being contrary to its own guidelines.

RESULT

On 9 September 2026 the General Court dismissed the challenge, and concluded that it was open to the Commission to base its theory of harm on reverse leveraging. The Court simply said that "*leveraging is a generic term in relation to the impact which a practice identified on one market may have on another market*", and "[a]*s such, it would be contradictory to allow the Commission to rely on leveraging only where that leveraging would strengthen a non-dominant position, and not where it would strengthen an already dominant position*" (Judgment at §§88; 89).

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1 The Commission's New Draft Merger Guidelines (published 30 April 2026) do make reference to the Booking/eTraveli Commission Decision. Of particular note is its citation as support for barriers to entry and expansion including "*Ecosystems and portfolio effects, such as ecosystems built around a core service with multiple complementary offerings, giving incumbents the ability to provide integrated or bundled solutions that smaller rivals cannot replicate" (§79(c)). The New Draft Guidelines explicitly include consideration of ecosystem-wide effects, including "how the ecosystem reinforces or otherwise impacts the merged firm's market power in the core market including how relevant the ecosystem is for effectively competing in the core market*" (§253. Cf. §§253–256).

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Regarding the 2008 Guidelines, the Court said that "*the Commission correctly observes that digital markets have certain specific characteristics and may therefore give rise to competition concerns which were not sufficiently taken into account when those guidelines were adopted*" (§77). Reverse leveraging was not included in the 2008 Guidelines, but the Commission's experience of reverse leveraging effects has grown since and the guidelines do not preclude such a theory of harm (§87).

The Court also agreed that the relevant anti-competitive effect was foreclosure of the market in which Booking is already dominant, even though the merger may only increase Booking's share of the hotels OTA market by a "*few tenths of a percent*" (§465). The harm was caused by strengthening existing network effects – "[n]*ot only would that expand the dominant undertaking's customer base, but also prevent competitors from expanding their customer bases, which could, given the importance of the size of its customer base for a hotel OTA due to network effects, have a chilling effect on the already weak competitive dynamics and result in the consolidation of the leader's existing dominant position, making that position even less contestable*" (§470).

Entrenchment of existing dominance due to leveraging strength in the flight OTA market was sufficient in and of itself to give rise to a significant impediment to effective competition in the hotel OTA market (§473).

SIGNIFICANCE

This judgment is of obvious interest regarding merger control: the Commission Guidelines cannot be taken to be exhaustive of theories of harm, the Commission is allowed to innovate beyond them where circumstances require, and transactions involving dominant firms that do not significantly increase market share may be found to impede competition where they merely entrench a present status quo using an adjacent market. The CMA's own Merger Assessment Guidelines on 'Conglomerate Effects' also appear to be written from the point of view of investigating leveraging, but those guidelines also do not necessarily discount a reverse leveraging analysis.

Beyond mergers, Booking may indicate that it is open to litigants alleging abuse of dominant position to make use of a reverse leveraging theory of harm, a theory explicitly developed by the Commission to meet the new circumstances of online ecosystems (see Commission Decision, recital (202)).

The CAT has certified abusive leveraging allegations in the context of, for example, self-preferencing (*AD Tech Collective Action LLP v Alphabet Inc*) and content add-on (*Vicki Shotbolt Class Representative Limited v Valve Corp; Epic Games Inc v Alphabet Inc*). After Booking, there is an indication that the conduct relied on does not need to be in the market where the defendant is dominant. For example, where abuse is alleged based on activity in a ring of markets (as in *Ad Tech*) or a cascade effect between markets (see *Epic Games* [2025] CAT 51 at §93), a potential Defendant may not need to be dominant in each market to complete the ring or continue the waterfall.

There are also two issues of practice to consider. First, both the Commission Decision and the General Court's judgment are post-Brexit. Case law on when the English court will follow post-Implementation Period Completion Day ("**IPCD**") judgments and when it will not is still developing, but a factor seems to be whether the post-IPCD judgment is novel or whether it simply reflects pre-IPCD jurisprudence (e.g. *Tower Bridge GP Ltd v Revenue and Customs Commissioners* [2022] EWCA Civ 998 at §119, *Farley v Paymaster (1836) Ltd (t/a Equiniti)* [2025] EWCA Civ 1117 at §§67–76). English courts may choose to take a different approach to the General Court in any event.

Second, a reverse leveraging effect must be proved on the facts. It appears that Booking were explicit about the reasons for adding a flight offering when pursing their "*connected trip strategy*", including in internal documents (see Judgment at §§251–269). Further, the reverse leveraging in this case was from the flight OTA market in which the Commission estimated a 40% share for the post-merger entity. 40% is the level at which Commission's new guidlines indicate that dominance is "*generally unlikely*"[2] , but this is still a not insignificant market share. It is possible that, in practice, some evidence of competitive strength in the non-dominant market will be necessary for reverse leveraging to be established.

Obviously much of this is untested in the abuse of dominance context but, subject to any appeal in *Booking*, one could well start to see new theories of harm as regards reverse leveraging (particularly in the digital markets space) off the back of the decisions of the Commission and the General Court.

2 Absent situations where customers are dependent on the undertaking concerned, or where undertakings face serious capacity limitations (Cf. Guidelines on the Application of Article 102 of the Treaty of the Functioning of the European Union to Abusive Exclusionary Conduct by Dominant Undertakings, 3 September 2026, §24)

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