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BOOKING/ETRAVELI: navigating the tension between the EU principles of legal certainty and effectiveness

The General Court´s judgement in *BOOKING/ETRAVELI* brings into focus the tension between legal certainty and effective merger control. By validating the Commission´s *"reverse leveraging"* theory of harm, it confirms that the Non-Horizontal Merger Guidelines leave room to address emerging competition concerns in digital markets. This article explores the limits of this flexibility and how the duty to state reasons and the principle of legal certainty safeguard predictability in this evolving regulatory context.

I. The Commission's prohibition of BOOKING/ETRAVELI: dominance and the 'reverse leveraging' theory of harm

On 10 October 2022, the European Commission (the **EC**) was notified of the acquisition of exclusive control of Flugo Group Holdings AB (**ETRAVELI**), a Swedish online travel agency (**OTA**) specialising in flights, by Booking Holdings Inc. (**BOOKING**), the dominant operator in the European hotel OTA market.

Notably, the transaction did not meet the thresholds for having a Community dimension under Article 1(2) or (3) of the Merger Regulation,[1] and could instead have been reviewed under the national merger control laws of Germany, Cyprus and Austria. BOOKING nonetheless submitted a reasoned request to the EC under Article 4(5) of that regulation, asking that the transaction be referred to it. As no Member State objected within the statutory time limit, the EC accepted jurisdiction and proceeded to assess the concentration.

Despite the commitments proposed by BOOKING, the EC found the concentration incompatible with the internal market and the European Economic Area Agreement and accordingly prohibited it.

Blocking decisions are exceptional in any competition authority's practice. As the EC itself noted when announcing its decision in September 2023,[2] it had cleared approximately 3,500 concentrations over the preceding ten years, and *BOOKING/ETRAVELI* was only its eleventh prohibition in that period. National authorities show a similar tendency: in Spain, for instance,

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[2] See press release: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4573

the Spanish Competition Authority (the **CNMC**) issued its first prohibition decision only on 29 September 2025, in Case C/1501/24, *CURIUM/IRAB.*[3]

The theory of harm underpinning the blocking decision rested on the premise that BOOKING held a dominant position in the hotel OTA market. In reaching that conclusion, the EC looked beyond BOOKING's consistently high market shares to several further factors:

- Higher commission rates: BOOKING's average effective commission charged to hotels was significantly higher than that charged by its competitors.
- Indispensable trading partner: BOOKING was an unavoidable trading partner for hotels, enabling it to impose certain general terms and conditions on them.
- Limited competitive constraints: neither BOOKING's existing competitors nor other market participants exerted sufficient competitive pressure on it.
- Lack of effective potential competition: there was no evidence of likely market entry or expansion capable of constraining BOOKING effectively.

Access to customers is particularly important in this context. Customer acquisition channels are limited and costly, and BOOKING already dominated most of them; flights remained one of the few channels for acquiring hotel customers that it did not yet control. Although ETRAVELI had a modest market presence (10–20% via its own flight platforms), acquiring it would give BOOKING additional customer traffic and better access to customer data, making it possible to target potential hotel customers with tailored offers.

Indeed, according to BOOKING, the acquisition of control of ETRAVELI formed part of a strategy called "*Connected Trip*", aimed at expanding the range of travel services offered through its platform: accommodation and complementary services such as car rentals or flight bookings.

On this basis, the EC built its theory of harm around the risk that the transaction would enable BOOKING to strengthen its dominant position in the hotel OTA market through a strategy of "*reverse leveraging*".

[3] Decision of the Spanish Competition Authority (CNMC) of 29 September 2025, Case C/1501/24, *CURIUM/IRAB*.

Unlike the traditional scenario envisaged in the 2008 EC Guidelines on the assessment of non-horizontal mergers[4] (the **Non-Horizontal Merger Guidelines**), where a company uses its dominant position in one market to strengthen its presence in another, BOOKING would instead have used its newly acquired position in the flight OTA market to consolidate its dominance in the hotel OTA market, making it harder for competitors to challenge that position.

II. The Court's ruling upholding the prohibition: reverse leveraging within the 2008 Guidelines

On 5 December 2023, BOOKING brought an action for annulment of the EC's blocking decision before the Court of Justice of the European Union (the **Court**), raising the following pleas:

- The EC departed from the Non-Horizontal Merger Guidelines by failing to demonstrate the likelihood of anticompetitive foreclosure, as those guidelines require, even though the transaction involves a conglomerate merger.
- The EC made a number of errors when identifying the counterfactual scenario.
- The EC's decision does not meet the standard of proof necessary to demonstrate a significant impediment to effective competition: it fails to prove any of the steps underpinning the theory of harm, and it incorrectly dismisses the efficiencies the transaction would bring about.

On 9 September 2026,[5] the General Court dismissed BOOKING's action for annulment and upheld the Commission's decision prohibiting the concentration.

This article focuses on the Court's reasoning regarding BOOKING's first plea: the EC's departure from the Non-Horizontal Merger Guidelines in assessing the concentration's potential implications for competition.

BOOKING argued that the EC had departed from the Non-Horizontal Merger Guidelines by relying on an unconventional theory of "*reverse leveraging*". According to BOOKING, since the

[4] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07).
[5] Judgment of the General Court, *Booking Holdings v Commission*, Case T-1139/23, ECLI:EU:T:2026:535.

concentration involves a conglomerate merger, the EC should instead have assessed possible anticompetitive foreclosure under those guidelines, in particular the ability and incentive of the merging undertakings to foreclose their rivals and any resulting anticompetitive effects (paragraphs 93 to 104 of the Non-Horizontal Merger Guidelines).

The Court held that allowing the EC to assess leveraging that strengthens a non-dominant position, while precluding it from assessing leveraging that reinforces an existing dominant position, would undermine the effectiveness of EU competition law. Accordingly, the Court rejected BOOKING's argument that the EC had failed to comply with paragraphs 93 to 104 of the Non-Horizontal Merger Guidelines.

In the same vein, the Court clarified that the Non-Horizontal Merger Guidelines do not set out an exhaustive list of possible theories of harm. Indeed, paragraph 8 of the Non-Horizontal Merger Guidelines expressly allows the EC to further develop and refine the principles they establish when assessing concentrations, and paragraph 93 identifies foreclosure as the main competition concern in conglomerate mergers without ruling out other concerns.

In that context, the Court observed 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 (recital 202 of the contested decision).*"

III. EC Guidelines as a constraint on discretion: legal certainty versus the effectiveness of merger control

The starting point is that, by adopting Guidelines, the EC sets out how it intends to exercise its discretion. As the Court has explained, they are "*an instrument intended to define, while complying with higher-ranking law, the criteria which the Commission proposes to apply in the exercise of its discretion (...).*"[6]

That published framework matters because economic operators adapt their conduct to it. The Guidelines therefore do more than describe the EC's intended approach: they also constrain it. In the Court's words, "*the institution in question imposes a limit on the exercise of its discretion and*

[6] Judgment of the General Court of 14 December 2022, *PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo v European Commission*, T-143/20, ECLI:EU:T:2022:811, paragraph 215.

cannot depart from those rules under pain of being found to be in breach of general principles of law, such as the principles of equal treatment or the protection of legitimate expectations."[7]

This constraint is not absolute. Although Guidelines are not rules of law that the administration must invariably observe, they remain "***rules of practice from which* the administration *may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment***."[8]

The resulting balance is clear: the EC must, in principle, follow the framework it has published, but may depart from it on sufficient grounds and consistently with general principles of EU law. The key question is therefore not simply whether flexibility is permissible, but what justification is required to ensure that it does not undermine the predictability the Guidelines are intended to provide.

BOOKING/ETRAVELI brings that balance into focus. As explained above, the Court accepted that the "*specific characteristics*" of digital markets could give rise to competition concerns not sufficiently addressed when the Non-Horizontal Merger Guidelines were adopted. Its reasoning thus leaves room for a flexible application of those Guidelines to theories of harm beyond the traditional foreclosure scenario.

The rationale for that flexibility is the principle of effectiveness of EU rules and, in particular, of merger control. The Court was concerned that an unduly restrictive approach could prevent the EC from addressing the reinforcement of an existing dominant position. As it put it, "***the effectiveness of merger control and the Commission's ability to oppose the strengthening and consolidation of existing dominant positions would be undermined if it were subject to a particularly high burden of proof to demonstrate the likely growth of a dominant undertaking's competitors***, *since that dominance makes such development more difficult to prove a priori, or at least more difficult to predict.*"[9]

Outside merger control, the Court has insisted that departures from adopted EC Guidelines require particularly careful justification. In *Printeos and Others v Commission,* the General Court

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[7] Judgment of the General Court of 14 December 2022, *PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo v European Commission*, T-143/20, ECLI:EU:T:2022:811, paragraph 216.
[8] Judgment of the General Court of 9 September 2026, *Booking Holdings v Commission*, T-1139/23, ECLI:EU:T:2026:535, paragraphs 70–71, referring to the judgment of the Court of Justice of 28 June 2005, *Dansk Rørindustri and Others v Commission*, joined cases C-189/02 P and others, ECLI:EU:C:2005:408, paragraphs 209–211.
[9] Judgment of the General Court of 9 September 2026, *Booking Holdings v Commission*, T-1139/23, ECLI:EU:T:2026:535, paragraph 439.

annulled a fine for insufficient reasoning after the EC exceptionally adjusted the basic amounts applicable to certain cartel members.

The relevance of *Printeos* lied in the stringency it attached to such departures: "*the requirements relating to the duty to state reasons must be complied with all the more rigorously*". The explanation had to enable the undertakings "*to ascertain the reasons for the adjustment of the fine imposed on them* (...) *and enabled the Court to exercise its powers of review.*"[10]

Commission v Icap and Others reinforces the same point. The Court upheld the annulment of fines imposed on a cartel facilitator because the EC, relying on point 37 of its 2006 Guidelines on fines, had departed from its general methodology without adequately explaining the alternative approach it had used.[11]

Taken together, the two judgments show that flexibility does not diminish the obligation to state reasons: where the EC moves away from its adopted Guidelines, a correspondingly rigorous explanation is required, rather than mere deference to its assessment of the need for flexibility.

The *Illumina/Grail* case identifies a further limit:[12] flexibility in applying adopted EC Guidelines must not be confused with an extension of the EC's statutory powers. In particular, the Court stated that "*the need to permit effective control of all concentrations with significant effects on the structure of competition in the European Union cannot, in any event, lead to the scope of Regulation No 139/2004 being extended.*" The judgment thus confirms that the effectiveness of merger control must be reconciled with the principles of legal certainty and predictability. Effectiveness could not, by itself, justify extending the EC's powers beyond the legislative framework.

Ultimately, BOOKING/ETRAVELI illustrates the delicate balance between legal certainty and the effectiveness of EU merger control. While the Commission must retain sufficient flexibility to address emerging theories of harm, particularly in digital markets, that flexibility must remain consistent with its published Guidelines, the duty to state reasons and the limits of its statutory powers.

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[10] Judgment of the General Court of 13 December 2016, *Printeos and Others v Commission*, T-95/15, ECLI:EU:T:2016:722, paragraph 48.

[11] Judgment of the Court of Justice of 10 July 2019, *Commission v Icap and Others*, C-39/18 P, ECLI:EU:C:2019:584, paragraphs 29 and 30.

[12] Judgment of the Court of Justice of 3 September 2024, *Illumina and Grail v Commission*, joined cases C-611/22 P and C-625/22 P, ECLI:EU:C:2024:677, paragraphs 203–209, 215–216 and 222.