

Contrast and analogies between
Booking/eTraveli &
Microsoft/Activision

TURBULENCE IN MERGER CONTROL

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Booking/eTraveli

At the end of September, the European Commission (EC) decided to prohibit the acquisition of eTraveli, an airline online travel agency (OTA), by Booking, the largest European hotel OTA.¹ Based on its press release, the EC's concerns were driven by three market characteristics:

- Flight and hotel OTAs are complementary: consumers typically book hotels and flights at the same time.
- Many consumers are inert: they tend to make purchases on the same platform rather than shopping around on various different platforms. We are all busy people after all.
- OTA platforms exhibit strong indirect network effects: more hotels listed on a platform make OTAs more attractive to travellers, which in turn makes the platform even more attractive to hotels, triggering a virtuous circle.

Based on these considerations, the EC came to the conclusion that Booking's acquisition of eTraveli would have: "expanded Booking's travel services ecosystem", "reinforced network effects" and "increased barriers to entry and expansion" in the hotel OTA market. This would have "strengthened Booking's dominant position" and could have "resulted in higher costs for hotels and possibly consumers". Ultimately, the acquisition would make Booking's incumbency as a hotel OTA less contestable.

In simple terms, the possibility of booking a hotel room on the same website on which you are booking (or are looking for) a flight, was expected to make you less likely to book that room somewhere else. According to the EC, Booking could take advantage of this "ecosystem effect" and increase prices without losing many customers.

In an attempt to address these concerns, Booking offered to present customers who buy an airline ticket with a choice screen: a subsequent window showing a range of hotels offered by different hotel OTAs ranked on price by Booking's own KAYAK algorithm.² This screen could have eliminated the ecosystem effect described above, making customers more likely to book a room on a website different from Booking.

¹ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4573

² KAYAK, owned by Booking Holdings, is a metasearch service.

However, this remedy was considered by Booking’s rivals and by the EC too obscure (the algorithm responsible for showing alternative hotels was described as a black box) and difficult to monitor. According to the EC, the selection and ranking of hotels shown via KAYAK would not be “sufficiently transparent and non-discriminatory” and rival hotel OTAs would *only* be presented to customers following their flight purchase, whereas there exist opportunities for Booking to cross-sell to its own hotel OTA at various alternate points during the flight OTA customer journey.

Microsoft/Activision

Whilst we are sure that all of our readers have booked a hotel or flight online, we suspect that many of you may not be as familiar with the concept of cloud gaming.

For context, Activision is one of the largest games publishers in the world, with three major game franchises: Call of Duty, World of Warcraft and Candy Crush. Microsoft is ubiquitously known for its software products but it is also a major player in the gaming market, with its flagship console (Xbox), its distribution network (Microsoft Store), and a growing cloud gaming service (xCloud).

In THE case of 2023, Microsoft’s \$69 billion acquisition of Activision was one of the largest mergers investigated by global competition authorities in 2022. Commentators expected authorities to focus on vertical foreclosure theories (i.e., after the merger, Microsoft may withhold or deteriorate Activision’s games on rival consoles, such as Sony’s PlayStation, to induce players to switch to Xbox). However, regulators’ most significant concern turned out to be in the nascent cloud gaming industry. Following the merger, Microsoft could reduce competition in this market by withholding or deteriorating access to Activision’s games on rival cloud gaming platforms.

In order to address these concerns, Microsoft offered to provide access to Activision’s portfolio of games to rival cloud gaming providers for the next decade free of charge. This remedy was sufficient to appease the concerns of most regulators, with the EC notably concluding that such a remedy would “boost the development of ... [cloud] technology” and “unlock significant benefits for competition and consumers”.³

The UK’s Competition & Markets Authority (CMA), however, initially blocked the merger, claiming that the scope of the remedy was insufficient and that it could undercut market forces. According to the CMA, the proposed remedies would impose standard terms and conditions for access to Activision games, rather than allowing such terms to be determined by the “dynamism and creativity of competition in the market”.⁴ The clearance of the deal by the CMA required Microsoft to additionally commit to sell Activision’s cloud gaming rights to a rival, Ubisoft, for a period of 15 years.

³ https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705

⁴ <https://www.gov.uk/government/news/microsoft-activision-deal-prevented-to-protect-innovation-and-choice-in-cloud-gaming>

A comparison of the theories of harm

Let's start with the **similarities**.

In both cases, competition authorities analysed **dynamic competition**: they did not focus on how the markets would look like today with the merging parties becoming a single entity.

Instead, they tried to understand and predict how complex, digital markets would evolve in the next decade and what role the merged entity would play in determining the shape and characteristics of these markets in the future. This is an increasingly common feature in the assessment of mergers with a digital aspect.

Although not an explicit theory of harm considered in the Microsoft/Activision deal, another similarity is that both mergers were consistent in the idea of **market power leveraging** in the context of interconnected product markets, i.e. ecosystems. In the case of Microsoft/Activision, the thinking was that Microsoft would be able to leverage the market power held by Activision in its core market as a games publisher to gain a competitive advantage in the nascent cloud gaming sector. In the case of Booking, its acquisition of eTraveli was concerning as it could facilitate a leveraging of market power from flight OTAs to Booking's core market as a hotel OTA. The concept of ecosystems and market power leveraging are therefore a common aspect of the two cases.

Besides these similarities, we see three main **differences** between them.

First, the level of **maturity of the markets** where competition concerns arose are very different. On the one hand, travel is a mature market with established players and an established core OTA product which has not materially changed over time. On the other hand, cloud gaming is still an embryonic service and the industry is rapidly evolving. Accordingly, the CMA found that Microsoft's market share increased almost 35 percentage points between 2021 and 2022, whilst the global cloud gaming market is expected to grow from \$1bn in 2020 to \$12bn in 2026.⁵ In addition to the fact that the technology underpinning the service is still less developed, the prospect of exponential growth gives rise to "winner takes all concerns", i.e. market tipping. The relative maturity of the markets meant that the level of uncertainty in analysing future market developments in the two cases was radically different and required a much more speculative analysis in the assessment of Microsoft/Activision.

Second, the theories of harm diverge in the fact that one describes **an offensive merger strategy whereas the other depicts a defensive one**.⁶ In the case of Booking/eTraveli, the EC's concern lies in the idea that Booking could further entrench its market power as a hotel OTA following the deal for the reasons listed above (in other words using the transaction as a defensive strategy).

⁵ <https://omdia.tech.informa.com/>

⁶ An offensive strategy would be one that looks to gain market power in a new product market via consolidation, whereas a defensive one attempts to protect an existing incumbent position via a merger.

In contrast, the thinking in the Microsoft/Activision deal is one of Microsoft leveraging Activision's importance as a publisher of games to tip the nascent cloud gaming market in its favour (an offensive strategy in this case).

Third, the Booking theory of harm is a **new and untested theory in the context of an established industry**. There is no horizontal overlap, there is no partial foreclosure (even though one could conceptualise this ecosystem theory of harm with a partial foreclosure framework). The only thing that changes in the post-merger world is that Booking has one more "jewel in its crown" which may lead consumers to choose its platform instead of rival OTAs. Therefore the acquisition of eTraveli may entrench Booking's incumbency as a hotel OTA.

Conversely, the Activision theory of harm is mostly a **standard partial input foreclosure theory, albeit against the backdrop of a novel, rapidly evolving market**; that Microsoft could have had an incentive to deteriorate access to Activision games on rival cloud gaming platforms. Given the popularity of Activision's games, this may have given Microsoft the ability to amass considerable market power in the provision of cloud gaming services in the future.

This distinction will likely make the (pending) appeal process of the Booking decision incredibly interesting and particularly relevant to determine the ability of the EC and national competition authorities to defend similar theories of harm in future merger assessments.

A comparison of the proposed remedies

Let's take a step back. There has been a growing debate about the efficacy of remedies in addressing competition authorities' concerns, especially in the case of digital mergers (for example, see the CMA's decision on Meta/GIPHY). Remedies in the modern merger control regime can be split into three types: structural, behavioural and access. In general, the EC appears to be more open to access remedies than the CMA has been in recent times, whereas behavioural remedies can often be contentious on both sides of the Channel.

In both Booking/eTraveli and Microsoft/Activision a full divestment was not possible, sensible or feasible and therefore the Parties offered to behave in a way that would have prevented any hypothetical lessening of competition for a prolonged period of time. In the Booking case, the remedy offered was a **non-access, behavioural one** – a choice screen from which customers could select hotels offered by Booking's rivals after having bought an airline ticket on the same platform.

In the Activision case, the behaviour Microsoft has committed to is to provide rival cloud gaming providers with free access to Activision's titles (and only in the last instance sell the cloud gaming rights to Ubisoft). While the CMA sought to portray its revised remedy as being structural, it can be better defined as a more significant **access remedy**, rather than a structural remedy which involves the permanent divestment of assets on a global basis.

From our perspective, the EC (and to a certain extent the CMA) ended up accepting Microsoft’s proposed access remedy because the competition concern was very specific and the remedy was appropriately targeted. In this circumstance, an access remedy was deemed acceptable from the perspective of the authority. In fact, the EC went as far as saying that the remedy “fully address[es] the competition concerns identified by the Commission and represent[s] a significant improvement for cloud game streaming compared to the current situation”.

On the other hand, the competition concerns raised in the Booking/eTraveli case were much wider and less specific. As a result, it was very difficult for the Parties to convince the EC that a non-access, behavioural remedy could have been effective against such a generic theory of harm.

In addition, the position of competitors and market participants who we expect to have been involved in the market testing process is materially different. In the Microsoft/Activision case, the two main competitors were large, sophisticated multi-nationals who have been publicly vocal on the implications that the transaction could have had on their businesses.

Conversely, the businesses affected by the eTraveli transaction (other hotel OTAs and actual hotels) are likely to be more fragmented, small enterprises (especially if we think about the hotels that use the business side of the platform). The goal to protect these relatively small actors may have played a critical role in the propensity of the EC to accept behavioural remedies in this context.

Conclusion

Having analysed the contrast and analogies between Booking/eTraveli and Microsoft/Activision, it is evident that merger assessments in digital markets are becoming increasingly complex and a point of debate for competition authorities and practitioners. This will be an interesting feature to monitor throughout the course of 2024.

Markets, especially digital ones, are more interconnected than ever. This gives rise to potential synergies and benefits and these are often facilitated by mergers, improving market outcomes. But command of these ecosystems can also be exploited, and when merging parties are believed to have the incentive and the ability to do so, it can be difficult to appease regulatory concerns.

Lastly, it seems clear that the openness to behavioural remedies shown by authorities applies only for targeted issues – they are not seen as a suitable solution to more holistic theories of harm. Merging parties and their advisors would do well to keep this in mind when interacting with competition authorities in the future.

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