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Article

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Knowledge Shapes Decisions: The Evolving EU Experience with Tech Giant Mergers

This paper analyzes the European Commission's evolving approach to mergers in digital markets, as reflected in its decision to block Booking's acquisition of eTraveli. The case exemplifies a shift toward assessing mergers within digital ecosystems, where long-term risks of dominance may outweigh short-term efficiencies. By situating this decision within two decades of cases involving tech giants, the paper shows how the Commission has progressively refined its understanding of digital market dynamics. It argues that Booking/eTraveli is not a rupture but a continuation of a broader, deliberate evolution in merger enforcement.

I. Introduction

In June 2024, the European Commission (EC) made headlines with its first-ever merger decision based on the competitive dynamics triggered by digital ecosystems. In what is poised to become a landmark move, the EC blocked the merger between Booking, an online travel agency (OTA) dominating the hotel sector, and eTraveli, a key player in flight OTA services.[1] The reason? The EC was concerned that expanding Booking's flight offerings alongside its existing travel services would strengthen its OTA ecosystem and further entrench its dominance in the hotel market.[2]

It is likely that the decision will generate a wide range of opinions.[3] On the one hand, many may see it as a long-overdue step in controlling the unchecked expansion of digital ecosystems in various markets. On the other hand, some could view it as a move that hinders the potential efficiencies the merger might have brought, interpreting it as more a reaction to scale than a thorough evaluation of the transaction's benefits.

This paper offers a different perspective. It acknowledges that the *Booking/eTraveli* decision marks the first time a merger has been blocked on the basis of a theory of harm focused on the competitive dynamics of digital ecosystems. However, the paper also shows that the decision is not as revolutionary as it may seem. By examining more than two decades of EU merger decisions involving digital giants such as Google (Alphabet), Amazon, Facebook (Meta), Apple, and Microsoft, the paper traces the roots of the *Booking/eTraveli* case to a broader evolution in the Commission's merger enforcement. It reveals how the Commission has progressively refined its approach to digital competition, gaining a deeper understanding of market structures, consumer behavior, and long-term strategic effects.

In essence, this paper challenges the simplistic view that the first merger prohibition involving a digital ecosystem results merely from a shift in the European Commission's stance toward tech giants – ironically, not two U.S. undertakings as some had expected, but European ones.[4] The Commission has never been overly deferential to these companies or superficial in its analysis of their operations. Instead, the key point is that the EC's growing expertise in digital industries now leads it to recognize that digital markets are difficult to contest, digital consumers often exhibit biased behavior, and the long-term anticompetitive effects of mergers can far outweigh the short-term efficiency gains they promise.

The paper unfolds as follows. It begins by setting the stage for the *Booking/e-Traveli* case, with Section II examining the context and highlighting the key aspects of the European Commission's approach up to that point.

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1 *Booking Holdings/eTraveli Group* (Case COMP/M.10615) Commission Decision of 25 September 2023 [2022] OJ C2022/402.

2 The decision has been challenged before the EU's General Court, see Case T-1139/23 *Booking Holdings v Commission*.

3 See Alexandre Vande Walle, 'The European Commission prohibits a dominant hotel booking platform from acquiring a flight booking platform based on an "ecosystem theory of harm"' (2024) 1 Concurrences 114-15; Christian Bergqvist, 'The Blocking of Booking/eTraveli – When the First Victim of EU's Anti-US Tech Stand was a European' (2024) Computer Law & Security Review 106025; Manu Batra, Paul de Bijl and Timo Klein, 'Ecosystem Theories of Harm in EU Merger Control: Analyzing Competitive Constraints and Entrenchment' (5 August 2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4887890> accessed 15 April 2025; Eliana Garces, Olga Kozlova Guglielmi and Devin Reilly, 'Ecosystem Theories of Harm in Merger Enforcement: Current Direction and Open Questions' (2024) 15(4) Journal of European Competition Law & Practice 272; Jorge Padilla, Joe Perkins and Salvatore Piccolo, 'Booking/eTraveli and One-Stop Shopping' (*Compass Lexecon*, 26 January 2024) <https://www.compasslexecon.com/insights/publications/cpi-antitrust-chronicle-booking-etraveli-and-one-stop-shopping> accessed 15 April 2025.

4 Bergqvist (n 3).

Moving forward, Section III presents the specifics of the *Booking/e-Traveli* case and the theory of harm that led the EC to block it. Finally, Section IV delves into the so-called 'novelties' introduced by this case, critically examining whether they truly represent new developments. Section V concludes.

II. The EC's approach to tech giants' mergers before *Booking/e-Traveli*

As of May 2025,[5] the European Commission had evaluated 22 mergers involving major tech giants acquiring control over other companies: six involving Google (Alphabet), two each with Apple, Meta (Facebook), and Amazon, and ten with Microsoft. None were prohibited. In two cases, the parties withdrew following statements of objections from the Commission indicating concerns about potential dominance.[6] Among the remaining mergers, 15 were cleared at the end of Phase I – only one subject to commitments[7] – while five proceeded to Phase II, with three of those also requiring remedies.[8]

These figures may strike observers as surprisingly low, especially given the intense wave of merger activity across digital ecosystems between 2010 and 2020.[9] More striking still is the apparent leniency of the Commission's approach over the past two decades – an approach that stands in sharp contrast to its 2022 designation of these very same undertakings as 'gatekeepers' pursuant to the Digital Markets Act (DMA).[10] With that designation, the Commission now formally recognizes them as powerful economic actors, controlling critical gateways between businesses and consumers in core platform services, and enjoying entrenched advantages that make their dominance difficult to dislodge.

This tension – between years of permissive merger control and the Commission's recent readiness to label these undertakings as structurally dominant – suggests a shift in regulatory thinking, if not a quiet course correction. Still, drawing conclusions too hastily risks oversimplifying a more complex picture. To fully grasp the evolution in merger enforcement, context is key – and so is understanding what is genuinely new in the *Booking/eTraveli* case.

First, between 2004 and 2023, the Commission reviewed 6,525 merger cases. Of these, 6,135 (94%) were cleared unconditionally at Phase I, and only 138 (just over 2%) were referred to an in-depth Phase II review. Among these, a mere 15 mergers were ultimately blocked. In other words, prohibitions have always been rare, and the digital sector is not an outlier in this regard.[11]

5 See also Vicktoria HSE Robertson, 'Antitrust Law and Digital Markets' in Heinz D Kurz and others (eds), *The Routledge Handbook of Smart Technologies: An Economic and Social Perspective* (Routledge 2022) 432; Viktoria HSE Robertson and Jürgen Fleiß, 'Computational Antitrust and the Future of Competition Law Enforcement' [2024] GRUR International 915-16; Anna Lyle-Smythe and Jacopo Pelucchi, 'A New Order for EU Merger Control in Digital Markets' (2024) 12(2) Journal of Antitrust Enforcement 260-66; Nicholas Levy, Anita Magraner Oliver and Conor Opdebeeck-Wilson, 'Survey – EU Merger Control Developments' (2024) 15(1) Journal of European Competition Law & Practice 57-67. For a systematic comment of the relevant decisions, see also Jasper van den Boom and Peerawat Samranchit, 'Digital Ecosystem Mergers in Big Tech – A Theory of Long-Run Harm with Applications' (2022) 13(5) Journal of European Competition Law & Practice 365; Elena Argentesi and others, 'Merger Policy in Digital Markets: An Ex-Post Assessment' (2019) CESifo Working Paper No 7985, 26-28; Luís Cabral, 'Merger Policy in Digital Industries' [2020] Information Economics and Policy 100866 <https://www.sciencedirect.com/science/article/pii/S0167624519302537> accessed 28 August; Nelson Jung and Elizabeth Sinclair, 'Innovation Theories of Harm in Merger Control' (2019) 40 ECLR 266; Frederic Jenny, 'Competition Law and Digital Ecosystems: Learning to Walk Before We Run' (2021) 5 Industrial and Corporate Change 1143; Michael G Jacobides and Ioannis Lianos, 'Ecosystems and Competition Law in Theory and Practice' (2021) 30 Industrial and Corporate Change 1199.

6 *Amazon/iRobot* (Case COMP/M.10920), Notice of withdrawal by the Parties, 29 January 2024; and *Microsoft/Time Warner/Contentguard JV (4064)* (Case COMP/M.3445), Notice of withdrawal by the Parties, 12 July 2004.

7 *Google/Photomath* (Case COMP/M.10796) Commission Decision of 28 March 2023; *Alphabet/ResMed/JV* (Case COMP/M.8991) Commission Decision of 1 October 2018; *Sanofi/Google/DMI JV* (Case COMP/M.7813) Commission Decision of 23 March 2016; *Google/Motorola Mobility* (Case COMP/M.6381) Commission Decision of 13 February 2012; *Apple/Beats* (Case COMP/M.7290) Commission Decision of 25 July 2014; *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision of 3 October 2014; *Amazon/MGM* (Case COMP/M.10349) Commission Decision of 15 March 2022; *Microsoft/Nuance* (Case COMP/M.10290) Commission Decision of 21 December 2021; *Microsoft/ZeniMax* (Case COMP/M.10001) Commission Decision of 5 March 2021; *Microsoft/GitHub* (Case COMP/M.8994) Commission Decision of 19 October 2018; *Microsoft/Nokia* (Case COMP/M.7047) Commission Decision of 4 December 2012; *GE/Microsoft/JV* (Case COMP/M.6474) Commission Decision of 10 February 2012; *Microsoft/Skype* (Case COMP/M.6281) Commission Decision of 7 October 2011; *Microsoft/Yahoo! Search Business* (Case COMP/M.5727) Commission Decision of 18 February 2010; *Microsoft/LinkedIn* (Case COMP/M.8124) Commission Decision of 6 December 2016.

8 *Google/DoubleClick* (Case COMP/M.4731) Commission Decision of 11 March 2008; *Apple/Shazam* (Case COMP/M.8788) Commission Decision of 6 September 2018; *Meta/Kustomer* (Case COMP/M.10262) Commission Decision of 27 January 2022; *Google/Fitbit* (Case COMP/M.9660) Commission Decision of 17 December 2020; *Microsoft/Activision Blizzard* (Case COMP/M.10646) Commission Decision of 15 May 2023.

9 See Mario Mariniello, 'Reinforcing EU Merger Control Against the Risks of Acquisitions by Big Tech' (*Bruegel*, 13 March 2025) <https://www.bruegel.org/policy-brief/reinforcing-eu-merger-control-against-risks-acquisitions-big-tech> accessed 28 August 2025; Geoffrey G Parker, Georgios Petropoulos and Marshall W Van Alstyne, 'Platform Mergers and Antitrust' (2021) B.U. Questrom School of Business Research Paper No 376351; Ginger Zhe Jin, Mario Leccese and Liad Wagman, 'How Do Top Acquirers Compare in Technology Mergers? New Evidence from an S&P Taxonomy' (2022) NBER Working Paper No 29642; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (*Publications Office of the European Union*, 20 May 2019) 110 <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en> accessed 28 August 2025; Jason Furman and others, 'Unlocking Digital Competition: Report of the Digital Competition Expert Panel' (*HM Treasury*, 13 March 2019) <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel> accessed 28 August 2025; Fiona Scott Morton and others, 'Committee for the Study of Digital Platforms: Market Structure and Antitrust Subcommittee Report' (*Chicago Booth*, 15 May 2019)<https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure—report-as-of-15-may-2019.pd> accessed 28 August 2025; Steven C Salop, 'Modifying Merger Consent Decrees: An Economist Plot to Improve Merger Enforcement Policy' [2016] Antitrust 15; Steven C Salop and Carl Shapiro, 'Whither Antitrust Enforcement in the Trump Administration?' (*Antitrust Source*, February 2017) <https://faculty.haas.berkeley.edu/shapiro/trumpantitrust.pdf> accessed 28 August 2025; Herbert Hovenkamp and Carl Shapiro, 'Horizontal Mergers, Market Structure, and Burdens of Proof' (2017) 127 Yale LJ 1742.

10 See Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act or DMA) [2022] OJ L265/1, rec 3, arts 2-3.

11 Basak Arslan, 'Finding the Fix Under Regulation 139/2004 and the Myth of Irremediable Transactions' (2024) 15 Journal of European Competition Law & Practice 419.

Second, many of the hundreds of transactions carried out by tech giants over the years simply fell outside the Commission's jurisdiction. They failed to meet the EU's turnover thresholds and thus escaped notification requirements.[12] Notably, even six of the 22 mergers assessed by mid-2024 only came under review due to referrals from national competition authorities[13] or because they triggered multiple national laws.[14] The appearance of inaction, therefore, was less a matter of regulatory neglect than of legal limitation:[15] many targets were simply too small on paper.[16]

Third, the Commission's earlier permissiveness may reflect structural and temporal realities, rather than regulatory complacency. Two decades ago, tech giants did not occupy the commanding heights of today's digital economy. Many of their acquisitions involved small, seemingly innocuous undertakings with uncertain competitive relevance. Meanwhile, competition authorities were still grappling with how to conceptualize digital markets, consumer behavior, and cross-market effects. The prevailing analytical tools – rooted in horizontal[17] and non-horizontal merger guidelines[18] – were designed for the industrial economy, and often ill-equipped to capture the fluid, ecosystem-based logic of digital consolidation. In this world, the lines between horizontal, vertical, and conglomerate effects often blurred, complicating enforcement.[19]

The following sections delve deeper into this evolution. First, we analyze cases in which the limited size of the target undertakings constrained the application of traditional theories of harm – whether related to dominance, potential competition, or foreclosure. Second, we highlight instances where the Commission acted decisively, imposing commitments to address emerging concerns. Third, we show how, even prior to *Booking/eTraveli*, early glimpses of the Commission's new understanding of digital markets and consumer behavior were already surfacing in merger decisions.[20]

1. Small targets

As is well known, under Art. 3 of the EU Merger Regulation, mergers must be prohibited when they significantly impede effective competition and, in particular, when they lead to the creation or strengthening of a dominant position. The analysis set out here of the EC's decisions concerning tech giants reveals that many of the acquired targets were small companies. In most cases reviewed, the combined market shares of the merging parties in the relevant market remained below the 20% threshold,[21] signaling minimal concern over dominance resulting from the horizontal overlaps of the parties' market shares. However, two notable exceptions stand out: *Microsoft/Skype* (2011)[22] and *Facebook/WhatsApp* (2014).[23]

In the *Microsoft/Skype* case, the EC did acknowledge that the merger would give the combined entity a dominant position in the video calling market. However, the Commission did not view this dominance as a major concern. It pointed out that Windows Live Messenger – Microsoft's existing platform – was already in decline. Additionally, Microsoft still faced significant competition from established players, while new entrants were successfully bringing innovative products to market. Another critical

12 To be sure, the EC's reliance on turnover thresholds reflects its traditionally static approach to merger review – an approach that primarily addresses cases where both the acquiring and target firms are already well-established players with significant revenues. However, turnover alone is a poor indicator of a company's future competitive potential, particularly in the tech and digital sectors. As a result, the EC's methodology lacks the dynamism needed to capture emerging threats and innovation-driven competition. See, in this regard, Mariniello (n 9) and Alan McCarthy, 'Sub-threshold Transactions under EU Merger Control – An Analysis of the Relevant EU Guidance and a Comparison With Certain Other "Call-in" Systems' (2024) 47 World Competition 213.

13 See *Google/Photomath* (n 7); *Facebook/Whatsapp* (n 7); *Microsoft/Zenimax* (n 7); and *Microsoft/GitHub* (n 7).

14 See *Meta/Kustomer* (n 8) and *Apple/Shazam* (n 8).

15 See, eg, Massimo Motta and Martin Peitz, 'Removal of Potential Competitors: A Blind Spot of Merger Policy?' (2020) CRC TR 224 Discussion Paper No 208.

16 This is what scholars have named the 'enforcement gap' – see, eg, Sophia Alessia D'Amico, 'Closing the Tech Acquisitions Enforcement Gap: From Article 22 to Article 102' (2024) 20 European Competition Journal 193; and Christophe Carugati, 'Which Mergers Should the European Commission Review Under the Digital Markets Act?' (9 December 2022)<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4366703> accessed 28 August 2025. See also Frank Scholl, 'Why the New Merger Control Thresholds in Germany?' (2017) 8 Journal of European Competition Law & Practice 611; Bengt Holmström and others, 'Killer Acquisitions? The Debate on Merger Control for Digital Markets' [2018] Yearbook of the Finnish Competition Law Association <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465454> accessed 28 August 2025; Oliver Budzinski and André Stöhr, 'Competition Policy Reform in Europe and Germany – Institutional Change in the Light of Digitization' (2019) 15 European Competition Journal 153.

17 See Commission, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' [2004] OJ C31/5 (Horizontal Merger Guidelines or HMG).

18 Commission, 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings' [2008] OJ C265/6 (Non-Horizontal Merger Guidelines or NHMG).

19 Batra, de Bijl and Klein (n 3).

20 In developing this analysis, we acknowledge that some mergers will appear multiple times in our discussion. This is no accident. The multi-product, multi-service nature of tech giants means their acquisitions often generate effects across several dimensions: they may involve substitute goods, but also complementary services, technologies, and datasets. See, eg, *Google/DoubleClick* (n 8); *Apple/Beats* (n 7); *Microsoft/Nuance* (n 7); *Facebook/WhatsApp* (n 7); and *Microsoft/GitHub* (n 7).

21 *Google/Photomath* (n 7) para 73; *Sanofi/Google/DMI JV* (n 7) para 52; *Google/Motorola Mobility* (n 7) para 14; *Apple/Shazam* (n 8) paras 168-169; *Apple/Beats* (n 7) para 26; *Amazon/MGM* (n 7) para 16; *Microsoft/Nuance* (n 7) para 102; *Microsoft/Zenimax* (n 7) para 58; *Microsoft/GitHub* (n 7) paras 81-84; *Microsoft/LinkedIn* (n 7) para 169; *Microsoft/Nokia* (n 7) para 93; and *Microsoft/Yahoo! Search Business* (n 7) para 118.

22 See Inge Graef, 'Stretching EU Competition Law Tools for Search Engines and Social Networks' (2015) 4 Internet Policy Review 3; Jasper van den Boom and Peerawat Samranchit, 'Assessing the Long Run Competitive Effects of Digital Ecosystem Mergers' (10 December 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3746343> accessed 28 August 2025.

23 See, *ex multis*, Harry First, 'Merger Policy for a Platform Economy' (2023) 4 Journal of Competition Law (ZWeR) 334; Vicente Bagnoli, 'Questions That Have Arisen Since the EU Decision on the Whatsapp Acquisition by Facebook' (2019) 3 Market and Competition Law Review 15; Marco Botta and Klaus Wiedemann, 'EU Competition Law Enforcement Vis-à-Vis Exploitative Conducts in the Data Economy: Exploring the Terra Incognita' (2018) Max Planck Institute for Innovation and Competition Research Paper No 18-08 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184119> accessed 28 August 2025.

factor was the low switching costs in the video calling space, as these services typically cater to small groups, limiting the potential for network effects to entrench any one provider. Therefore, back in 2011, the EC's approach to *Microsoft/Skype* was not careless or overly lenient towards a tech giant. Rather, it was based on the informed guess that, after the merger, competition in the video calling market would still be sufficiently spurred by innovation and consumers' ability to switch.[24] The pandemic later validated this prediction, as the video calling market saw a surge in innovation and new entrants. Therefore, while we cannot say with certainty how the market would have evolved without the merger, the EC's approach at the time was rooted in a reasoned and reasonable forward-looking assessment.

In the *Facebook/WhatsApp* case, the Commission noted that while Facebook Messenger and WhatsApp were not close competitors, their combined market share did reach between 30% and 50% in the market for consumer communication apps working on iOS and Android operating systems. However, the EC considered this figure to be fleeting, given the sector's rapid growth, frequent new entries, and short innovation cycles. Furthermore, the European Commission maintained that consumers were not locked-in, were accustomed to using multiple apps simultaneously (multi-homing), and were willing to switch.[25] As a result, even the existing network effects protecting the relevant market could be overcome, and the combined market share of 30% to 50% was not considered harmful to competition. Once again, hence, the Commission's approach to the *Facebook/WhatsApp* merger cannot be seen as superficial or politically compromised, as it was grounded on a thorough analysis of the available facts and market dynamics.

It could be argued that the Commission did not fully anticipate the rapid evolution of digital markets and, as a result, may have underestimated the extent to which Messenger and WhatsApp would come to be seen as close competitors. However, the Commission did add up the market shares of the two rival companies and still found them not to be a threat, based on reasonable factors. The real critique lies elsewhere – in the fact that the Commission may have overlooked the broader strategic impact of Facebook acquiring a 'killer app' like WhatsApp. By doing so, Facebook secured its dominance in the market, just as its Messenger service was starting to lose momentum. However, it is important to note that, in 2014, there was no theory of harm that could have addressed this issue, and even today there is no established framework specifically designed to prevent such acquisitions. Until now, no one in the antitrust community has seriously argued that an undertaking – even a dominant one – should be prevented from acquiring a successful company merely because that success might help the dominant undertaking maintain its market position. Nor do we intend to suggest that such a theory of harm should be endorsed. After all, what would be the alternative? Should acquirers be expected to target only unsuccessful undertakings?

2. Small potential competitors

When assessing the horizontal effects of mergers, the EC may consider not only whether the merger creates or strengthens a dominant position, but also whether it eliminates a potential rival that could have become an effective competitor that could significantly constrain the acquirer, with no other rivals capable of stepping in.[26]

However, in none of the analyzed cases involving tech giants did the strict conditions of the harm theories that focus on the elimination of potential competitors materialize. Specifically, in the *Apple/Beats* case (2014) there was neither a significant likelihood that Beats – a producer of audio products and a developer of a music streaming application – would have evolved into a substantial competitive force capable of constraining Apple's behavior without the merger, nor that a considerable number of other actual and potential competitors would remain capable of challenging Apple after the merger.[27]

Similarly, in the *Facebook/WhatsApp* case the EC ruled out the possibility of WhatsApp evolving into a provider of social networking services, as it did not find any evidence of such a plan in the company's documents.[28]

Circumstances were slightly differently in the *Google/DoubleClick* merger (2008),[29] which led to the integration of Google's online advertising operations with DoubleClick's advanced display ad serving technology. There, the EC did find evidence that DoubleClick had planned to expand into ad intermediation and potentially become a direct competitor to Google. Nevertheless, the EC determined that the merger did not satisfy the second condition stipulated by traditional theories of harm that focused on the elimination of potential competition. Indeed, following the merger, a sufficient number of other competitors would remain in the market to maintain adequate competitive pressure on Google, both in the online ad intermediation sector and in the combined provision of online ad intermediation and ad serving services.[30]

In summary, in the cases reviewed, the EC has generally dismissed concerns over the elimination of potential competitors. However, the request for strong evidence that the target would have likely grown into a significant rival with nobody else in a position to challenge the acquirer's market position may not fully capture the dynamics of digital markets, which are characterized by rapid innovation cycles, tipping effects, and winner-takes-all outcomes. In such environments, a nascent rival can quickly evolve into a meaningful competitor, and the acquisition of

24 *Microsoft/Skype* (n 7) paras 96, 99, 102, 110-11, 132-34.

25 *Facebook/WhatsApp* (n 7) para 87.

26 ibid para 60.

27 *Apple/Beats* (n 7) paras 35-40; see Kalpana Tyagi, *Mergers, Innovation and Remedies' Design' (2019) in Promoting Competition in Innovation Through Merger Control in the ICT Sector*, Munich Studies on Innovation and Competition, vol 10 (Springer 2019) 143.

28 *Apple/Beats* (n 7) para 145.

29 See Samson Esayas, 'Data Privacy in European Merger Control: Critical Analysis of Commission Decisions Regarding Privacy as a Non-Price Competition' (2019) 40 European Competition Law Review 166.

30 See *Google/DoubleClick* (n 8) paras 254 and 274-75, 278 and 285.

such an undertaking can significantly alter competitive trajectories before they fully materialize.

Thus, it is not a coincidence that in response to these realities scholars and regulators have begun advocating for a relaxation of the conditions under which potential competition concerns are assessed. This has given rise to new theories of harm such as *killer acquisitions* and *kill-zone acquisitions*.[31] They suggest that dominant undertakings may acquire emerging rivals not merely to integrate their technologies, but to eliminate future competition – either by shutting down the target's operations or by sending a deterrent signal to other startups that challenging the incumbent is futile because acquisition is the only viable exit.[32] Notwithstanding its mixed empirical support[33] and other theoretical doubts,[34] this evolving perspective has gained traction in competition policy discourse, particularly in the United States, where the latest Merger Guidelines explicitly allow for the prohibition of deals involving nascent competitive threats.[35]

3. Common inputs and unimproved performances

Horizontal mergers may also raise issues when they grant the acquiring undertaking control over key inputs that could hinder the entry or expansion of rivals by providing it with enhanced capabilities and a resulting competitive advantage.[36] In other words, the central concern underlying this theory of harm is that the merger would allow the acquirer to exploit significant economies of scope that, in turn, could create high barriers to entry and expansion that disadvantage horizontal competitors.

In the case of *Google/Photomath* (2023),[37] the EC noted that the transaction would combine Photomath's and Google's capabilities in solving math questions and that this would likely enhance the quality of math-related search results on Google, thereby reinforcing Google's dominant position in general search services. However, the EC also acknowledged that math search queries constitute only a small fraction of all search queries, and that Photomath's technical capabilities were neither unique nor scarce enough to significantly hinder competition or harm users.[38]

Similarly, in *Apple/Shazam* (2008),[39] the EC assessed whether Shazam's user data could be integrated with Apple's data to improve Apple Music, raising barriers to entry in the market for competing apps in digital music streaming. Nevertheless, the EC concluded that the combination of Shazam's and Apple's datasets on user data would not confer a unique competitive advantage in the market for digital music streaming, since competitors would still be able to access similar datasets.[40]

The only notable (kind of) exception was the 2020 *Google/Fitbit* merger.[41] In this case, the focus on the value of Fitbit's health and fitness data prompted the EC to impose commitments. On the one hand, the EC found that Fitbit's data were not sufficiently relevant to affect the competitive position of Google's search engine. On the other hand, to avoid reinforcing Google's dominant position in search advertising, the EC required Google to refrain from using Fitbit's data for advertising purposes

31 Massimo Motta and Martin Peitz, 'Removal of Potential Competitors – A Blind Spot of Merger Policy' [2020] Competition Law & Policy Debate 19; OECD, 'Start-ups, Killer Acquisitions and Merger Control – Background Note; Materials for the Meeting of the Competition Committee' (2020) <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf> accessed 28 August 2025; Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2021) 129 Journal of Political Economy 649-702; Nicholas Levy, Henry Mostyn and Bianca Buzatu, 'Reforming EU Merger Control to Capture "Killer Acquisitions" – The Case for Caution' [2020] Competition Law Journal 51; Sai Krishn Kamepalli, Raghuram Rajan and Luigi Zingales, 'Kill Zone' (2020) Working Paper No 2020-19.

32 See Anne C Witt, 'Big Tech Acquisitions: The Return of Conglomerate Merger Control?' (31 August 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3683922> accessed 28 August 2025; and Jonathan Barnett, '"Killer Acquisitions" Reexamined: Economic Hyperbole in the Age of Populist Antitrust' (2023) University of Southern California Gould School of Law, Research Paper Series No CLASS23-1.

33 Despite the intuitive appeal of the killer acquisition theory in digital markets, empirical support for it remains limited and quite mixed. Elena Argentesi and others (Elena Argentesi and others, 'Merger Policy in Digital Markets: An Ex Post Assessment' (2021) 17(1) Journal of Competition Law & Economics 95) examine mergers and acquisitions in digital platform markets but do not uncover conclusive evidence either supporting or refuting the existence of killer acquisitions. Similarly, Gautier and Lamesch (Axel Gautier and Joe Lamesch, 'Mergers in the Digital Economy' (2021) 54 Information Economics and Policy 100890) analyze acquisitions by GAFAM undertakings and observe that targets are more frequently discontinued when they operate in the acquirer's core business area. Ivaldi, Petit and Unekbas (Marc Ivaldi, Nicolas Petit and Selçukhan Unekbas, 'Killer Acquisitions: Evidence from European Merger Cases' (2025) 86(2) Antitrust Law Journal (forthcoming)) take an indirect approach by analyzing competitors' language in 10-K filings as a proxy for perceived threats from such acquisitions.

34 What may initially appear to be a killer acquisition can sometimes have pro-competitive effects. For instance, acquisitions can increase the efficiency of the acquirer or enhance the quality of its products (David J Teece, 'Innovation, Governance, and Capabilities: Implications for Competition Policy' (2020) 29(5) Industrial and Corporate Change 1075). Moreover, the prospect of acquisition itself can act as a catalyst for innovation. If startups anticipate being bought out, they may be more incentivized to innovate and attract venture capital; see Eric Rasmussen, 'Entry for Buyout' (1988) 36 Journal of Industrial Economics 281; Igor Letina, Armin Schmutzler and Regina Seibel, 'Killer Acquisitions and Beyond: Policy Effects on Innovation Strategies' (2024) 65 International Economic Review 591; Tiago S Prado and Johannes M Bauer, 'Big Tech Platform Acquisitions of Start-Ups and Venture Capital Funding for Innovation' (2022) 59 Information Economics and Policy C1.

35 In particular, the agencies examine whether, in a concentrated market, a merger would (a) eliminate a potential entrant or (b) eliminate current competitive pressure from a perceived potential entrant. US Department of Justice and Federal Trade Commission, 'Merger Guidelines' (18 December 2023) <https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf> accessed 28 August 2025. Similarly, the CMA found that a merger entailed a 'substantial lessening of competition' because it eliminated 'a dynamic competitor that [was] making efforts toward entry or expansion', 'even though entry by such a participant [was] unlikely and [could] ultimately be unsuccessful'. After all, in para 5.23 of its Merger Assessment Guidelines of 18 March 2021, the CMA distances itself from the Commission by establishing that competitive concerns may arise even when the entry of the potential competitor is against the odds.

36 ibid para 36.

37 See Shourya Mitra, 'Competition Concerns with Foundation Models: A New Feast for Big Tech?' (2024) 21 European Competition Journal 140.

38 *Google/Photomath* (n 7) paras 74-85.

39 See Nicolò Zingales, 'Apple-Shazam Data Is Power, But Not a Problem Here' (December 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707808> accessed 28 August 2025; Stephen Whitfield, Richard J Brown and Ingrid Rogers, 'The Impact of Data on EU Merger Control' [2019] Competition Law Journal 151-61.

40 *Apple/Shazam* (n 8) paras 179 and 317. See, also, *Facebook/Whatsapp* (n 7) para 189.

41 Walle (n 3) 123-27.

and to store the data in a separate 'data silo' for a period of ten years.[42]

Hence, in the cases reviewed, the EC has never taken the position that a tech giant's ability to enhance one product by leveraging data or other inputs from another product within its digital ecosystem – thereby benefiting from a 'unique advantage' – was sufficient to raise serious competition concerns. In particular, these decisions indicate that, when assessing input synergies within digital ecosystems, two factors seem to be particularly important: the distinctiveness or scarcity of the acquired asset, and the degree to which it enhances the performance of the acquirer's existing offerings.[43]

4. Small foreclosure effects

In all the vertical cases scrutinized,[44] the European Commission consistently applied the standard foreclosure theory,[45] evaluating whether the merged entity would gain both the ability and incentives to significantly restrict competitors' access to key inputs[46] or market outlets,[47] and whether such a strategy, if successful, would lead to a significant negative impact on competition.

However, the Commission found that these requirements were simultaneously met only in the *Amazon/iRobot* case (2023),[48] where Amazon would have acquired the producer of robot vacuum cleaners (RVCs). The EC argued that Amazon would have had both the ability and the incentive to foreclose iRobot's rivals by either preventing them from selling their own RVCs on Amazon's online marketplace or by degrading their access to it. Amazon marketplace is, indeed, a significant sales channel in certain Member States, where consumers rely on Amazon for both product discovery and final purchasing decisions. Additionally, the EC demonstrated that this strategy would have resulted in higher prices, lower quality, and less innovation for consumers in the RVC market. As a result of the EC's position, Amazon withdrew its merger proposals.[49]

In the numerous other cases where the potential vertical effects of mergers were examined, the EC consistently found that the conditions for foreclosure were never simultaneously satisfied. For example, in *Google/Photomath* (2023), the EC observed that access to Google's search engine and Google's in-app store were not of significant importance to gain new users for math tools, such as Photomath's rivals, mainly because these new users could be acquired through other channels, such as recommendations by friends and teachers, social media, and advertising campaigns.[50]

In a similar vein, the EC's investigation into the *Apple/Shazam* merger focused on whether Shazam served as a significant means for digital music streaming services to acquire users, and whether Apple might restrict or impair access to this tool for rival services. However, the EC concluded that Shazam did not represent a critical gateway in the relevant markets and therefore did not pose any significant competitive threat.[51]

Likewise, in *Apple/Beats* (2014) the Commission maintained that the vertical relationship between Apple and Beats Electronics was unlikely to lead to either customer or input foreclosure, given the limited market shares of Beats and Apple in the supply of sound devices, such as headphones. Furthermore, the Commission found that it was not plausible that Apple would have the ability and incentive to use its bargaining power to persuade major record labels(!) to withhold music from streaming services that compete with Beats Music and iTunes.[52]

In the same way, in *Facebook/WhatsApp*, the Commission noted that, regardless of whether the merged entity would start using WhatsApp user data to improve targeted advertising on Facebook's social network or not, there would continue to be a large amount of valuable Internet user data available for advertising purposes and not within Facebook's exclusive control.[53]

Also in *Amazon/MGM* (2022), the EC maintained that MGM's upstream activities as a producer and licensor of audio-visual content was limited compared to other market players' activities; that MGM's content could not be considered as must-have (despite its rights over successful film franchises such as James Bond) and, finally, that a wide variety of alternative content existed for Amazon's rivals. Therefore, the merger did not lead to any input foreclosure.[54]

Similarly, in *Microsoft/Nuance* (2021) the EC analyzed the markets in which Microsoft's cloud computing service (Azure) and Nuance's transcription software for the healthcare sector operated, and concluded that, on the one hand, competing transcription providers in healthcare

42 *Google/Fitbit* (n 8) para 967.

43 See also Garces, Guglielmi and Reilly (n 3).

44 See Stéphane Dewulf and others, 'EU and UK Vertical Merger Control: What's the State of Play?' (2023) 14 Journal of European Competition Law & Practice 113; Garces, Guglielmi and Reilly (n 3); Viktoria HSE Robertson, 'Vertical, Conglomerate Effects (in Merger Control)' in Johan van de Gronden and others (eds), *Elgar Encyclopedia of Competition Law* (Edward Elgar) (forthcoming).

45 NHMG, para 29.

46 ibid paras 34-35.

47 ibid para 58.

48 See Batra, de Bijl and Klein (n 3); Ben Evans, 'Amazon/iRobot: Harbinger of Legal Dissonance, or Lesson in Unintended Consequences?' (2024) 23(1) Competition Law Journal 33-41.

49 In contrast, the CMA had already unconditionally cleared the transaction in June 2023. The CMA reckoned that Amazon would not have the incentive to foreclose iRobot's rivals in the UK, mainly because the UK robot vacuum cleaner market was small and not expected to grow significantly in the future.

50 *Google/Photomath* (n 7) paras 97-116 and 139-67. See, also, *Google/Motorola Mobility* (n 7) paras 92-98 and 100-59 (holding that there was neither input nor customer foreclosure. After all, in 2012, Google had every incentive to promote Android across as many OEMs as possible rather than shutting them out or exploiting them by leveraging Motorola's intellectual property rights (IPRs), since OEMs still had alternative options available to them). Furthermore, see *Google/DoubleClick* (n 8) paras 325-29 (where the Commission found that, although the merged company would have controlled both a major ad intermediary platform (AdSense) and a leading provider of ad-serving tools for display ads, the evidence reviewed by the Commission did not indicate that the new entity would have had the ability or incentive to exclude competitors in the ad intermediary markets by leveraging its dominance in ad serving. Additionally, there would still be credible alternatives available to customers, and the network effects were not strong enough to lead to tipping).

51 *Apple/Shazam* (n 8) para 265.

52 *Apple/Beats* (n 7) para 41.

53 *Facebook/Whatsapp* (n 7) paras 177 and 188.

54 *Amazon/MGM* (n 7) paras 179 and ff.

did not rely on Microsoft for cloud services and, on the other hand, transcription providers in the healthcare sector were not a major user group for Microsoft's cloud computing service. Therefore, the entity resulting from the merger would not have had either the ability or the incentives to foreclose its rivals.[55]

In essence, in many cases involving vertical effects, the EC found that the target companies were so small that their acquisition was unlikely to deprive the tech giant's horizontal rivals of critical inputs or market outlets, and this clearly limited the potential for significant antitrust harm due to foreclosure.

It is not a coincidence, hence, that some scholars believe the existing ability-incentive-effect framework is insufficient for the assessment of tech giants' mergers because of this emphasis on the specific relevant markets between which the vertical relationship should exist, the exclusionary conduct of the merged entity, and its anticompetitive impact.[56]

5. Small conglomerate effects

A similar pattern emerges in the European Commission's analysis of the conglomerate effects of tech giant mergers. Indeed, conglomerate concentrations are considered anticompetitive not only when they facilitate oligopolistic behavior – particularly in cases involving cross-shareholdings or interlocking directorates[57] – but also when they enable exclusionary practices designed to shield the newly merged entity from horizontal competition with the acquirer's rivals, ultimately harming consumer welfare.[58]

As outlined in the Non-Horizontal Merger Guidelines (NHMG), this second scenario hinges (again) on whether the merged entity has both the ability and the incentive to foreclose competition, and whether such foreclosure would lead to higher prices, lower quality, reduced consumer choice, and/or diminished innovation. In essence, the application of this theory of harm requires the definition of the relevant markets, the identification of the potential practices through which foreclosure might occur – such as tying, bundling,[59] or full-line forcing[60] – and the indication of how they will harm consumer welfare.

However, when the Commission applied this approach to digital ecosystem mergers, it frequently found that key conditions for anti-competitive behavior were missing. For example, in the *Sanofi/Google/DMI JV* and *Amazon/MGM* cases, the Commission determined that the parties had little incentive to bundle their products to exclude rivals since the entities resulting from the mergers still benefited from remaining interoperable and compatible with as many competitors as possible.[61]

Likewise, in *Apple/Shazam*, the EC recognized that the merged entity could theoretically leverage its position in music recognition apps to disadvantage rivals in digital music streaming – by restricting access to Shazam's referral mechanism, advertising tools, or user data, or by integrating Shazam's functionalities exclusively with Apple Music. However, the EC found that Shazam's role as an entry point to competitors' services was limited, meaning any foreclosure by Apple would have had negligible impact.

Similarly, in *Google/Motorola Mobility* (2012) and *Microsoft/Skype*, the Commission found that even if bundling occurred – such as combining Motorola's essential patents with Android's mobile services or Microsoft's OS with Skype – it would not block competitors. Consumers could still access those competitors' products, maintaining choice in the market.[62]

In *Microsoft/Zenimax* (2021), the companies lacked the market power necessary to execute any exclusionary or anticompetitive strategies,[63] while in *Google/DoubleClick* the merged company continued to face strong competition from its rivals.[64]

In summary, the EC often found itself unable to block mergers because the specific factual and legal conditions for intervention were not met. As a result, it missed opportunities to develop its case law in ways that could have

55 *Microsoft/Nuance*(n 7) paras 131-39 and 144-49. See also *Microsoft/ZeniMax* (n 7) paras 69-77 and 82-88 (observing, in particular, that ZeniMax video games were not significant enough for a customer foreclosure strategy to be profitable for Microsoft. Therefore, the tech giant would continue to acquire content from other video game publishers and would not degrade the terms on which it did so); *Microsoft/GitHub* (n 7) paras 133-53 (establishing that Microsoft had no ability or incentive to refuse or degrade access to GitHub's data to its downstream DevOps tools and/or IaaS/PaaS competitors, for several reasons ranging from the limited relevance of GitHub's data to Microsoft's intent to cater for the needs of developers); and *Microsoft/Nokia* (n 7) para 184 (noting that Microsoft had no ability or incentive to foreclose competing providers of smart mobile devices by restricting access to its mobile OS, its apps, and its licenses to patents on communication protocols enabling interoperability between Microsoft's mail server software and competing smart mobile devices).

56 Batra, de Bijl and Klein (n 3).

57 NHMG, paras 25-26.

58 Case T-210/01 *General Electric v Commission* ECLI:EU:T:2005:456, paras 327, 362-63, 405; *GE/Amersham* (Case COMP/M.3304) Commission Decision of 21 January 2004, para 37; *GE/Smiths Aerospace* (Case COMP/M.4561) Commission Decision of 23 April 2007, paras 116-26.

59 Indeed, tying and bundling may cause increased prices, including as a result of price discrimination imposed through the sale of product bundles, and reduced choice. See *Tetra Laval/Sidel* (Case COMP/M.2416) Commission Decision of 30 October 2001, para 367; *GE/Honeywell* (Case COMP/M.2220) Commission Decision of 3 July 2001; *St Gobain/BPB* (Case IV/M.3943) Commission Decision of 9 November 2005, para 59; and *Boeing/Hughes* (Case COMP/M.1879) Commission Decision of 29 October 2000, paras 82 ff.

60 In other words, conglomerate mergers can increase the potential for portfolio effects: the extension of a product portfolio, typically in consumer goods, can allow the merged entity to leverage market power in one product to the other products in its range, and thus the merged entity can force retailers to buy its complete line of products, thereby deterring entry and potentially raising prices. See *Coca-Cola/Amalgamated Beverages* (Case IV/M.796) Commission Decision of 22 January 1997; *Coca-Cola Company/Carlsberg AS* (Case IV/M.833) Commission Decision of 11 September 1997; and *Guinness/Grand Metropolitan* (Case IV/M.938) Commission Decision of 15 October 1997.

61 Consider, indeed, that the Sanofi/Google joint venture intended to offer, including via an integrated digital e-medicine platform, services for the management and treatment of diabetes. Therefore, preventing third parties' insulins and devices from working with the joint venture would be a suicidal strategy – see *Sanofi/Google/DMI JV* (n 7) para 80. Likewise, given the limited content of MGM, preventing Amazon from working with other content providers would have been nonsense – similarly, see *Microsoft/Nuance* (n 7) and *Microsoft/GitHub* (n 7).

62 *Microsoft/Skype* (n 7) para 170.

63 *Microsoft/Zenimax* (n 7) para 103.

64 *Google/DoubleClick* (n 8) para 358.

more proactively addressed the distinctive competitive challenges of the tech industry.

6. The EC's diligent approach

To highlight the Commission's diligence, it is worth noting that in instances where a tech giant had even the potential or incentive to foreclose competitors, the EC imposed specific conditions to address these concerns and ensure the merger's approval.

Namely, in *Microsoft/LinkedIn* (2016) the EC was concerned that Microsoft might foreclose competing productivity software and online recruitment service providers. To address this, the EC prohibited Microsoft from preinstalling LinkedIn on its Windows operating system and required Microsoft to open its APIs, ensuring interoperability between Windows and other professional social networks.[65] In addition, the Commission was concerned that the merged entity might use its dominant position in operating systems (and similar Office software) to extend its reach into related markets, particularly the professional social networking sector where LinkedIn was already strong. To address this, Microsoft agreed to: (i) not preinstall LinkedIn on Windows (allowing manufacturers to uninstall it if it was preinstalled), and (ii) ensure that professional social networks could still work with its Office products by sharing interoperability codes (APIs).

In the *Google/Fitbit* case (2020), the EC assessed that the merged entity might have both the ability and the incentive to restrict access to Fitbit's Web API, potentially harming competition in various digital healthcare markets. Therefore, to address this concern, the EC required Google to commit to providing free access to Fitbit's Web API for ten years post-merger, with access contingent on user consent as stipulated by the GDPR. As to conglomerate effects, concerns were raised because, following the acquisition, Google might start behaving like Apple by reducing interoperability between their wearable devices and the Android operating system, ultimately favoring its own device, Fitbit. Indeed, the EC determined that Google held a dominant position in providing licensed operating systems for smart mobile devices, that there was significant overlap between Android smartphone users and Android-compatible wearable device users, and that Google could effectively block attempts by Android smartphone OEMs to counteract exclusion. As a result, the EC required Google to commit to licensing certain Android APIs for ten years to ensure ongoing interoperability between Fitbit's competitors and the Android operating system.

In the *Meta/Kustomer* case (2022),[66] concerning the markets for CRM software and customer service/support CRM software, the Commission found that Meta had both the ability and incentive to implement foreclosure strategies against Kustomer's close rivals and new entrants by denying or degrading their access to application programming interfaces (APIs) for Meta's messaging channels, such as Messenger, Instagram messaging, and WhatsApp. As a result, Meta offered, and the Commission approved, non-discriminatory, free, and comprehensive access commitments to its current, improved, and future messaging APIs for a ten-year period.

Similarly, in *Microsoft/Activision Blizzard* (2023),[67] the Commission found that even if Microsoft withdrew Activision's games from PlayStation, it would not significantly impact competition in the console market as Sony was the leading distributor of console games. However, the Commission was concerned that the acquisition could affect competition in the emerging cloud game streaming market. If Microsoft made Activision's games exclusive to its own cloud service, Game Pass Ultimate, it could stifle competition among rival streaming providers. Therefore, to tackle this issue, Microsoft offered, and the EC approved, a free ten-year license allowing consumers to stream all current and future Activision Blizzard games on any cloud streaming service of their choice. Furthermore, Microsoft committed to providing a similar free license to cloud gaming providers so that EU players could stream all Activision Blizzard games.

In essence, the claim that the EC has been overly deferential to tech giants is unfounded. Whenever the Commission had concerns about the competitive impact of a merger, it took steps to address these issues by imposing specific commitments. However, it is also worth noting that three out of the four relevant cases occurred after 2020, a period when the ecosystem-like structure of tech giants was more fully developed, and the antitrust community had a greater understanding of these dynamics.

7. Seeds of novelty in the EC's analysis

Despite the consistent approach previously described, decisions taken before *Booking/eTraveli* reveal early indications of the current stance toward tech giants. These earlier cases reflect an evolving understanding of how tech giants operate and their broader market impact, laying the groundwork for the more nuanced approach seen today.[68]

First, consider that the *Facebook/WhatsApp* merger brought a new dimension to the table. It was the first case where the EC factored in consumers' *status quo* bias when analyzing the possibility that users might become 'locked in' to the communication app they were already using.[69] However, in this case, the EC found that

65 *Microsoft/LinkedIn* (n 7) para 446. See also Jay Modrall, 'Big Data and Merger Control in the EU' (2018) 9 Journal of European Competition Law & Practice 569-78.

66 Giuseppina Gianfreda and Luisa Scorciarini Coppola, 'Small-Firm Acquisitions, Merger Control, and Digital Markets: The Meta/Kustomer Case' in Emanuela Carbonara and Maria Tagliaventi (eds), *SMEs in the Digital Era* (Edward Elgar 2023) 122-38.

67 Fabian Ziermann, 'Assessing the World's Largest Gaming Acquisition under EU Competition Law' (2023) 14 Journal of European Competition Law & Practice 203-19.

68 See Philippa Allan, Georgia Zele and Alex White, 'Theories of Harm for Digital Mergers' (2023) 22 Competition Law Journal 189-99.

69 See William Samuelson and Richard Zeckhauser, 'Status Quo Bias in Decision Making' (1988) 1 Journal of Risk and Uncertainty 7. Moreover, note that status-quo bias can be examined not only at the individual level but also at the societal level. See, eg, Anastasia Telesetsky, 'Eco-restoration, Private Landowners and Overcoming the Status Quo Bias' (2017) 26 Griffith Law Review 248.

since neither Facebook Messenger nor WhatsApp came pre-installed on devices, consumers were not at risk of being locked into a single app.[70] Curiously, just two years earlier, in 2012, the Commission approved the *Google/Motorola Mobility* merger without considering this bias. A key concern in that case was Google's potential to pressure original equipment manufacturers (OEMs) to pre-install its services by tying the licensing of Motorola Mobility's standard-essential patents (SEPs) to the distribution of its mobile services. But the European Commission concluded that consumers could still download competing services, change default settings, and access rivals' offerings via web browsers. Based on this, the EC determined that consumers' ability to make informed choices would offset any coercion on OEMs, and thus the merger did not create a serious conglomerate effect.[71] In essence, this 2012 decision rested on the belief that digital consumers were savvy enough to seek out alternatives to tech giants' pre-installed services. However, just two years later, the European Commission's stance was on the verge of shifting, although the *Facebook/WhatsApp* merger did not provide the right circumstances for such a change.[72]

Moreover, in *Google/Fitbit* the European Commission made a quite revolutionary observation. It dismissed the argument that Google's acquisition of Fitbit's data would be procompetitive by enhancing the quality of Google's products and services for both advertisers and end-users. Specifically, Google argued that this ability should not be seen as a drawback of the acquisition, as it enhanced the experience for both end-users by providing them with tailored ads, and for advertisers by ensuring their ads were shown to highly targeted audiences. However, the European Commission countered that any short-term improvement in advertising quality would be outweighed by the negative long-term consequences – specifically, increased barriers to entry and reduced market contestability.[73] In other words, the Commission focused its attention on the structural effects of the merger and the resulting long-term impact on prices, rather than on short-term consumer welfare gains.

Furthermore, in both *Google/Fitbit* and *Apple/Shazam*, which also involve the transfer of rivals' data from the target to the acquirer,[74] the European Commission evaluated potential concerns related to the tech giant's one-sided access to such commercially sensitive information. In both cases, the EC concluded that the merged entity would likely lack both the ability and the incentive to use such a 'privileged' access to rivals' data to put them at a competitive disadvantage. Additionally, the EC found that any impact from such a strategy would not be substantial. However, by focusing on this issue, the Commission began to develop a new theory of harm concerning the one-sided use of sensitive competitive information. This theory was later applied in the *Amazon-Buy Box* abuse of dominance case[75] and in drafting Art. 6(2) of the DMA.[76]

In summary, claiming that the EC has always maintained the same attitude toward tech giants would be incorrect. Over the years, the Commission has explored and adapted new approaches, including considerations of both short- and long-term effects, as well as evolving conceptualizations of digital consumers. Consequently, the *Booking/eTraveli* case did not emerge in isolation but rather as a result of this ongoing refinement and development of antitrust perspectives.

III. The *Booking/e-Traveli* case

Imagine you are planning your dream vacation. You are not sure where to start, but you know you need a flight, a place to stay, and perhaps a car to get around. That is where an OTA steps in as your personal travel assistant. An OTA is indeed a bustling marketplace where you can browse various options, compare them, and find flights, accommodation, and cars that fit your needs. But OTAs do more than just help consumers plan their holidays – they also serve as intermediaries, connecting travelers with travel service providers (TSPs), such as airlines, hotels, and car rental companies. In more detail, OTAs offer TSPs a platform to showcase their services and reach a global audience – much larger than TSPs could reach on their own – while also providing marketing and booking tools to help them stand out and manage reservations. In fact, TSPs are the primary clients of OTAs, contributing the majority of OTA revenue through commission.[77]

Naturally, in such a nascent and dynamic industry, each OTA may be on its own path to offering customers a unique blend of services, with varying degrees of specialization. For example, one OTA might excel in securing hotel accommodation, while another might shine in flight bookings, as was the case with Booking and eTraveli. At the time of the proposed transaction, Booking was indeed a dominant force in the hotel sector, whereas eTraveli stood out as a key player in flight services.

70 *Facebook/WhatsApp* (n 7) para 111.

71 *Google/Motorola Mobility* (n 7) para 180.

72 That moment would come in 2018 with the *Google Android* abuse of dominance case. Indeed, in this decision, the Commission required Google to provide consumers with a 'choice screen' upon activating their Android phones, allowing them to select their preferred search engine. This was based on the understanding that, without such a prompt, consumers would not actively seek out alternatives to Google's services. More specifically, the Commission recognized that digital consumers often struggle to switch from pre-installed services to superior alternatives due to their inherent status-quo bias, which played a significant role in the finding of anticompetitive effects in the Google Android case. Furthermore, the Tribunal affirmed the Commission's decision: it recognized not only that the status-quo bias was linked to pre-installation, but also that the advantage arising from it could not be offset by Googles' rivals competing on the merits. See *Google Android* (Case AT.40099) Commission Decision of 18 July 2018, para 782; General Court, Case T-604/18 *Google and Alphabet v Commission* ECLI:EU:T:2022:541, para 594.

73 ibid paras 425, 431, 446 and 497.

74 *Apple/Shazam* (n 8) paras 221-38.

75 See *Amazon-Buy Box* (Case AT.40703) Commission Decision on Commitments of 20 December 2022.

76 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

77 To fully understand the industry, it is important to recognize that a smooth and efficient flow of content and services – like availability, pricing, and booking details – between Travel Service Providers (TSPs) and Online Travel Agencies (OTAs) also relies on additional players, such as Global Distribution Systems (GDS) and bed banks. See *Booking Holdings/eTraveli Group* (n 1) paras 50-54.

If the truth be told, similar to some of the earlier tech mergers discussed above, the *Booking/eTraveli* deal did not meet the EU scrutiny thresholds. eTraveli's EU-wide turnover fell short of the EUR 250 million mark and did not reach the EUR 25 million bar in at least three Member States. However, in October 2022, the transaction was notified to the EC because, pursuant to Art. 4(5) of the Merger Regulation, the parties requested the EC to review it as it had the potential to be assessed under the national competition laws of at least three Member States.[78] In other words, without this EU rule regarding the geographical impact of proposed mergers, eTraveli would have been yet another case of a digital company with a turnover too small to attract the EC's scrutiny on its own.

Turning to the structural effects of the deal, the EC first noted that while Booking dominated the hotel OTA market across the European Economic Area (EEA), eTraveli was focused on flight OTA services and ranked among the top four flight OTAs in the EEA. In technical terms, the EC found that, given that the two companies offered largely complementary services, they were acting in two collaterally-related markets. Therefore, the EC decided to examine how acquiring eTraveli's flight OTA capabilities might further reinforce Booking's dominance in the hotel OTA market within the EEA: it chose to assess whether, by gaining a foothold in the secondary market for flight OTA services, the dominant undertaking would further entrench and prolong its market position in the primary market for hotel OTA services.

Specifically, the Commission noted that the merger would allow Booking to gain a new, significant, and growing customer-acquisition-channel through eTraveli's flight OTA operations.[79] This, in turn, would generate substantial additional traffic for Booking's hotel OTA offerings, boosting hotel reservations.[80] Moreover, by adding flight services to its existing OTA portfolio, Booking would expand its ecosystem of travel services.[81] As a result, the merger would enhance network effects and consumer inertia[82] in the hotel OTA market,[83] raising barriers to entry and expansion for competitors where Booking is already dominant and shielded by significant investments in advertising, brand strength and by the very same network effects and customer inertia.[84]

The merger would therefore make it more expensive for potential and actual rivals to enter or expand in the hotel OTA market and become fully-fledged competitors of Booking.[85] After the transaction, these rivals would indeed lose flight traffic and struggle to compensate for it, as other verticals would not generate as much traffic as flights and as Booking would lack the incentive to cooperate with them.[86] Consequently, this would further solidify Booking's dominant position,[87] allowing it to potentially increase costs for its clients – both hotels listing on its platform and end consumers searching for accommodation.[88]

In essence, no differently from what it could have done under Art. 102 of the Treaty on the Functioning of the European Union (TFEU) on the abuse of dominance, the EC claimed that the merger served to implement a reverse leveraging strategy,[89] by which Booking could capitalize on its position in the secondary market for flight OTA services to strengthen its dominant position in the primary market for hotel OTA services.[90] Therefore, the EC reached the conclusion that, pursuant to Art. 2(2) and (3) of the Merger Regulation, the merger was likely to result in a significant impediment of effective competition, in particular as a result of the creation or strengthening of a dominant position in the internal market.[91]

True, the parties perceived this as illegitimate since it was not explicitly outlined in the HMG or NHMG.[92] However, this argument lacks merit. The guidelines are not binding: they serve to systematically restate case law and facilitate undertakings' self-assessment. Consequently, they cannot limit the European Commission's role in safeguarding competition against anti-competitive behavior, especially when the market scenarios with which the EC has to deal are novel and raise novel concerns.[93] Of course, this does not preclude the possibility that a revision of the merger guidelines could take into account emerging theories of harm developed in relation to digital ecosystems.

Furthermore – and interestingly – in defense of the merger, the parties argued that it would yield significant efficiency gains, consistent with the benefits typically

78 *Booking Holdings/eTraveli Group* (n 1) paras 6-8.

79 ibid paras 735, 752, 903-04 (noting that, compared to other travel products, such as car rental, taxis, and attractions, flights are the most important customer acquisition channel).

80 ibid paras 606-07 (noting that the acquisition of eTraveli would help counterbalance the slowdown in growth that Booking had already been experiencing).

81 In Booking's words, this was the 'Connected Trip Strategy' intended to make the offering of flight services the key component of a travel ecosystem revolving around Booking's dominant position in the hotel OTA market – see ibid para 755.

82 Interestingly, as to consumer inertia, the CMA (UK) did not express any concern about the transaction. The CMA referenced consumer studies showing that customers often shopped between multiple OTAs, even after selecting their flights, and frequently would acquire the latter directly from the airline and were price-sensitive in general.

83 *Booking Holdings/eTraveli Group* (n 1) paras 920, 926 and 933.

84 ibid paras 737 and 919.

85 In other words, the EC's concern related to the direct and indirect network effects that Booking could accumulate across its products, and to the resulting difficulty that new or smaller competitors might face in attracting users especially when the value of Booking's services depends heavily on the participation of other users.

86 *Booking Holdings/eTraveli Group* (n 1) paras 972-74.

87 ibid paras 917-18.

88 ibid paras 187, 193-94.

89 For the sake of clarity, a 'forward' (or offensive) leverage theory would have focused on leveraging Booking.com's leading position in accommodation OTA to foreclose rival providers in the flight OTA market. In *Booking/eTraveli*, by contrast, the 'reverse' (or defensive) analysis centered on whether eTraveli's relatively modest position in flight OTA could be used to reinforce Booking.com's dominance in accommodation OTA. See, in this regard, Bergqvist (n 3) 106025, writing that '[a] traditional theory of harm would be how Booking could combine services and gradually take over the market for flight OTAs through acquiring Etraveli. The decision does cite this, but the main concerns are directed at the hotel OTA market, which is a reverse logic, representing a novelty not foreseen in the Non-Horizontal Merger Guidelines. The merging parties refer to this as reverse leveraging'.

90 *Booking Holdings/eTraveli Group* (n 1) paras 197 and 909-12.

91 ibid para 734.

92 ibid paras 200-201.

93 ibid paras 202-205. See also Bergqvist (n 3).

seen from integrating complementary products. They emphasized that the merger would reduce consumers' search costs by offering a 'one-stop solution'.[94] More broadly, the parties highlighted that the merger would enable Booking to offer a comprehensive and diversified range of services across markets, benefiting consumers seeking such an integrated solution.[95] Additionally, they referenced the classic Cournot effect, which suggests that by bundling two or more products together at a single price, consumers would pay less than if the products were sold separately, as the firm would apply one mark-up instead of multiple.[96]

The EC considered these arguments[97] but rejected them. While it showed that some were poorly formulated and assessed,[98] more importantly it found that the claimed efficiency gains were insufficient to offset the anticipated anticompetitive price increases in the hotel OTA market. Namely, the merger was expected to bolster Booking's dominant position, leading to reduced competition and higher prices in the hotel OTA market. Consequently, the potential benefits for users of the integrated solution could not outweigh the significant anticompetitive effects on consumers of hotel OTA services.[99] To mount a successful efficiency defense, the parties should have demonstrated that the merger would produce efficiency gains for consumers of hotel OTA services.

IV. New food for thought?

The *Booking/eTraveli* decision marks a significant moment in which the European Commission openly addresses the concept of digital ecosystems and how they should be governed in the context of mergers.[100]

The Commission begins by outlining Booking's ecosystem, which offers a broad range of services spanning various aspects of travel: accommodation, flights, taxis, car rentals, and attraction tickets.[101] What emerges from this description – and reveals the EC's attitude toward the merger – is the notion that Booking can attract customers not primarily because of the quality or price of its services (i.e., its competitive merits), but due to its strong brand and consumer inertia.[102] These factors, according to the Commission, drive users to engage with Booking and subsequently purchase multiple travel services through the platform.[103] However, one should wonder whether it is fair to dismiss the competitive value of building a strong brand. Brand power, while it can raise entry barriers, often stems from legitimate investments in advertising and quality improvements that ultimately benefit consumers. Hence, criticizing ecosystems on these grounds seems misplaced and overlooks the legitimate ways in which firms compete.

As for consumer inertia, Booking and eTraveli offered a contrasting perspective. They argued that consumers are free to choose and are not locked into the ecosystem after their first interaction. In support of this, they pointed to the absence of sunk costs – such as membership fees – as well as the lack of any 'walled garden' effect typically associated with digital platforms.[104] The Commission, however, did not base its concern about consumer inertia on any proactive conduct by Booking. As in previous cases since *Facebook/WhatsApp*, the EC recognized the influence of behavioral biases and moved away from the assumption that consumers always act rationally. Instead, it adopted a more nuanced view that took into account how decision-making could be shaped by cognitive limitations.

While this raises the question of whether the practices of digital ecosystems should be limited based on factors not rooted in their own decisions,[105] it also highlights how, in *Booking/eTraveli*, the Commission's reliance on external structural features that confer a unique market position[106] is particularly striking. This is what signals a shift in how the EC assesses competitive harm in digital markets[107] and helps explain why some scholars view the *Booking/eTraveli* decision as a novel development.[108]

Importantly, the novelty does not lie in the traditional concept of leveraging, where a firm uses dominance in one market to gain power in another. Nor does it reflect the defensive variant, where leveraging occurs from a non-dominant to a dominant market. Rather, the innovation in this case lies in the EC's decision to prohibit the merger based on the structural reinforcement of Booking's dominance – as if the merger were horizontal in nature, even though the markets are adjacent or complementary.

The Commission did not adopt the standard approach for non-horizontal mergers. It did not evaluate whether the merged entity would have the ability or incentive to exclude rivals through conduct such as bundling, tying, or

94 *Booking Holdings/eTraveli Group* (n 1) para 570.

95 ibid para 730.

96 ibid para 1151.

97 ibid para 607 (where the EC did not even take into consideration the one-stop-shop argument).

98 ibid paras 1154 and ff.

99 ibid paras 744-45, 1151, and 1171.

100 ibid, para 193. Some scholars elaborated a notion of ecosystems. See Batra, de Bijl and Klein (n 3); and Michael Jacobides, Carmelo Cennamo and Annabelle Gawer, 'Towards a Theory of Ecosystems' (2018) 39 Strategic Management Journal 2255.

101 *Booking Holdings/eTraveli Group* (n 1) at footnote 229.

102 See also, Batra, de Bijl and Klein (n 3).

103 *Booking Holdings/eTraveli Group* (n 1) para 916.

104 ibid paras 912-13.

105 See Maurice E Stucke and Ariel Ezrachi, 'Ecosystems, Antitrust Errors & the Numerator Bias' (2025) 40 Berkeley Technology Law Journal (forthcoming).

106 See Batra, de Bijl and Klein (n 3).

107 See Ben Rininger, 'The Ecosystem Theory of Harm in Merger Enforcement: A Transatlantic Comparison' (2025) 93 University of Cincinnati Law Review 830.

108 Some sources consider the ecosystem-based theory used in *Booking/eTraveli* to be a unique theory of harm, while others contend that this is merely a new form of the conglomerate theory of harm. See, respectively, Garces, Guglielmi and Reilly (n 3); and Olivier Guersent, 'Ecosystem Theories of Harm' (speech at BIAC webinar) <https://competition-policy.ec.europa.eu/system/files/2023-12/20231206_CRA_conference_Olivier-Guersent_speech.pdf> accessed 28 August 2025; Lucy M R Chambers, 'Back to the Future? The Examination of Portfolio Effects, Conglomerate Analysis, and Bargaining Leverage in Merger Control' (2024) 15(6) Journal of European Competition Law & Practice 349; Tomaso Duso, Lea Bernhardt and Joanna Piechucka, 'The Evolution of Theories of Harm in EU Merger Control' (*DIW Berlin*, 2024) <https://www.diw.de/documents/publikationen/73/diw_01.c.907984.de/dp2090.pdf> accessed 28 August 2025; Viktoria HSE Robertson, 'Digital Merger Control: Adapting Theories of Harm' (2024) 20 European Competition Journal 437.

line-forcing.[109] Nor did it consider whether such practices would result in harm to consumers. Moreover, it chose not to weigh the efficiencies claimed by the merging parties. Booking argued that the merger would enhance consumer experience by offering better-integrated travel services and cost savings from vertical integration benefits like one-stop shopping and operational synergies. But the EC dismissed these claims, prioritizing the potential structural impact of the merger over any efficiency gains.

This structural focus also emerges in the EC's distinction between consumers in the primary market – where the ecosystem leader is dominant – and users of the integrated products offered within the ecosystem. The Commission declined to balance anticompetitive effects in the primary market with potential benefits from integration, such as improved services or user convenience. While this approach is in line with existing guidelines, it risks overlooking the very advantages that ecosystems can offer consumers.

In essence, the Commission's concern centered on the idea that the merger would entrench Booking's dominance,[110] particularly in light of network effects, consumer inertia, and brand power. The theory of harm based on entrenchment argues that a merger can reinforce a dominant position not by directly excluding competitors, but by reshaping the market structure in a way that gradually undermines competition. The harm, therefore, arises from the structural shift itself, not necessarily from any anticompetitive conduct the merger would enable.

What remains unclear, however, is the threshold at which these external factors – brand strength, behavioral inertia, network effects – become problematic in the EC's view.[111] It is not evident how the Commission weighs each factor or how much each contributes to a finding of competitive harm.[112] Nonetheless, this reliance on structural features that are largely independent of the merging parties' conduct gives the decision a distinctly regulatory flavor. It suggests an approach aimed less at policing specific actions and more at preserving long-term market contestability.

In focusing on the merger's structural consequences rather than on specific exclusionary conduct, the Commission mirrors the logic it applies when dealing with dominant undertakings' unilateral practices. Just as dominant undertakings can raise rivals' costs or erect barriers to entry through conduct, mergers can have similar structural effects – enabling tech giants to expand into adjacent markets, deepen consumer lock-in, and compel even the most efficient competitors to adapt or exit.[113] Interestingly, this structural approach aligns with recent updates to the U.S. Department of Justice and Federal Trade Commission's Merger Guidelines. Guideline 6, in particular, affirms that mergers can violate antitrust law when they entrench or extend a dominant position. These guidelines recognize that dominance may be reinforced in various ways, including by raising switching costs, limiting alternatives, or expanding into adjacent markets – echoing the EC's concerns in *Booking/eTraveli*.[114]

V. Concluding remarks

The European Commission's approach to assessing tech mergers has evolved significantly over the past two decades. What began as a cautious engagement with unfamiliar markets has matured into a more structurally attuned and analytically sophisticated enforcement strategy. In this context, the *Booking/eTraveli* case stands not merely as a singular decision, but as a landmark that consolidates this evolution while pushing the boundaries of merger control into new theoretical territory.

The fact that the EC has blocked only one merger involving a tech company – out of 22 reviewed – might seem surprising, especially given the increasing concentration of digital markets. Yet, as this paper has demonstrated, this pattern cannot be simply attributed to regulatory leniency or institutional inertia. Rather, it reflects a complex interplay of jurisdictional thresholds, market realities, and evolving analytical tools. Many earlier transactions escaped scrutiny due to their limited size or the absence of clear foreclosure risks, while in more recent cases the EC has shown consistent diligence in addressing emerging competition concerns through targeted commitments.

More importantly, the *Booking/eTraveli* decision introduces a new theory of harm – one that places structural entrenchment at the center of the competitive assessment. Unlike traditional theories focusing on foreclosure or leveraging through exclusionary conduct, the EC's reasoning here rests on the idea that a merger may be harmful not because it facilitates specific anticompetitive behavior, but because it reinforces a dominant position by amplifying network effects, consumer inertia, and brand strength. In doing so, the EC shifts the focus from conduct to configuration – from how undertakings act to how markets evolve after structural change.

109 Lucy MR Chambers, 'Back to the Future? The Examination of Portfolio Effects, Conglomerate Analysis, and Bargaining Leverage in Merger Control' (2024) 15(6) Journal of European Competition Law & Practice 349.

110 Hans Zenger, 'Theories of Harm for Digital Mergers' (OECD Competition Open Day, Paris, 6 March 2024) <https://www.youtube.com/watch?v=ehYeuged6sk> accessed 28 August 2025; Crémer, de Montjoye and Schweitzer (n 9); Zhijun Chen and Patrick Rey, 'A Theory of Conglomerate Mergers' (2023) TSE Working Paper No 23-1447.

111 Sven Volcker, 'Leveraging as a Theory of Competitive Harm in EU Merger Control' (2003) 40 Common Market Law Review 581.

112 See Peter Georg Picht, 'Gulliver's eTravelis: AI Ecosystem Building and Competition Law Intervention' (22 October 2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4995202> accessed 28 August 2025.

113 Richard Schmalensee, 'Entry Deterrence in the Ready-to-Eat Breakfast Cereal Industry' (1978) 9 Bell J. Econ. 305. Steven C Salop and David T Scheffman, 'Raising Rivals' Costs' (1983) 73 Am. Econ. Rev. 267; B Curtis Eaton and Richard G Lipsey, 'The Theory of Market Pre-emption: The Persistence of Excess Capacity and Monopoly in Growing Spatial Markets'(1979) 46 Economica 149; Thomas Eisenmann, Geoffrey Parker and Marshall Van Alstyne, 'Platform Envelopment' (2011) 32 Strategic Mgmt. J. 1270, describing platform envelopment as a strategy that does not rely on offering 'revolutionary functionality to gain significant market share'.

114 US Department of Justice and Federal Trade Commission, 'Merger Guidelines' (n 35).

This structuralist turn in merger analysis mirrors developments in other areas of EU competition law,[115] particularly in the enforcement of Art. 102 TFEU, and aligns with the emerging consensus in other jurisdictions, such as the U.S. FTC/DOJ 2023 Merger Guidelines. There, as in *Booking/eTraveli*, the notion of 'entrenchment' plays a pivotal role in assessing how mergers may distort the long-term contestability of digital markets.

At the same time, this novel approach raises critical questions. What thresholds must be met for structural reinforcement to be considered harmful? How should regulators weigh long-term harms against short-term efficiency gains, especially when these gains accrue to consumers in adjacent markets? And, crucially, to what extent should behavioral biases and ecosystem dynamics justify intervention even in the absence of exclusionary conduct? Without clearer guidance, the line between legitimate ecosystem building and impermissible entrenchment remains uncertain, posing challenges for legal certainty and predictability.

Ultimately, the *Booking/eTraveli* decision should not be viewed as an abrupt break from the past, but as the culmination of an ongoing intellectual shift in European merger control. It draws upon insights gradually formed across previous decisions and introduces a forward-looking framework capable of addressing the unique competitive dynamics of digital ecosystems. In doing so, it calls for a broader recalibration of merger guidelines and enforcement priorities to ensure that competition remains robust, innovation is not stifled, and digital markets remain open and contestable.

115 Magali Eben and David Reader, 'Taking Aim at Innovation-Crushing Mergers: A Killer Instinct Unleashed?' (2023) 42 Yearbook of European Law 286; Elias Deutscher and Stavros Makris, 'Sustainability Concerns in EU Merger Control: From Output-Maximising to Polycentric Innovation Competition' (2023) 11 Journal of Antitrust Enforcement 350.