



Brussels, 15 September 2023

Final Report of the Hearing Officer⁽¹⁾

Case M.10615 – BOOKING HOLDINGS / ETRAVELI GROUP

1. INTRODUCTION

1. On 10 October 2022, the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation² by which Booking Holdings Inc. ('Booking') intends to acquire, within the meaning of Article 3(1)(b) of the Merger Regulation, certain activities of Flugo Group Holdings AB ('Flugo') operating under the trading name 'Etraveli Group' (together with Booking the 'Parties'), by way of a purchase of shares (the 'Proposed Transaction').³

2. WRITTEN AND ORAL PROCEDURE

2. On 16 November 2022, the Commission adopted a decision to initiate proceedings pursuant to Article 6(1)(c) of the Merger Regulation (the 'Article 6(1)(c) Decision'), as the Phase I investigation raised serious doubts as to the compatibility of the Transaction with the internal market.
3. On 28 November 2022, on request of the Parties, the Commission extended the legal deadline of the procedure by 15 working days pursuant to Article 10(3), second subparagraph, of the Merger Regulation.
4. On 16 December 2022, the Commission adopted two decisions pursuant to Article 11(3) of the Merger Regulation, addressed to Booking and Flugo respectively, requiring the Parties to supply certain information in response to three Commission requests for information. Subsequently, the decisions resulted in the suspension of the time limit referred to in the first subparagraph of Article 10(3) of the Merger Regulation as of 9 December 2022, ending on 18 April 2023.⁴

¹ Pursuant to Article 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 ('Decision 2011/695/EU').

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation').

³ The Transaction was referred to the Commission pursuant to Article 4(5) of the Merger Regulation. It does not have an EU dimension within the meaning of Article 1(2) nor within the meaning of Article 1(3) of the Merger Regulation. However, it could have been reviewed under the national merger control laws of three Member States (Austria, Cyprus and Germany).

⁴ The Article 11(3) Decision addressed to Booking led to a suspension from 9 December 2022, ending on 5 April 2023. The Article 11(3) Decision addressed to Flugo led to a suspension from 13 December 2022, ending on 18 April 2023.

5. On 9 June 2023, the Commission adopted a Statement of Objections (the ‘SO’), addressed to Booking. The SO was formally notified to Booking on 13 June 2023,⁵ and it was given a deadline of 23 June 2023 to submit its observations.
6. In the SO, the Commission reached the preliminary conclusion that the Transaction is likely to result in a strengthening of Booking’s dominant position in the hotel online travel agency (‘OTA’) market in the EEA. In particular, the SO preliminarily finds that the Transaction ‘may increase barriers to entry, hamper the expansion of Booking’s competitors and lead to higher costs for hotels and higher prices for end customers’.⁶
7. The Parties were granted access to file on 9 June 2023 by way of a DVD. A data room was also accessible to the Parties between 13 and 21 June 2023. Following a request to the Commission from Flugo’s counsel on 16 June 2023 for further access to certain information, the data room was reopened on 4 July 2023. Further access to file was granted on 14 July, 2 and 18 August and 11 September 2023. Further access to the data room was granted on 19 July and 24, 25 and 30 August 2023.
8. I have not received any complaint or request from the Parties regarding access to the file.
9. In the night of 23 to 24 June 2023, Booking submitted its reply to the SO (the ‘SO Reply’). In the SO Reply, Booking requested a formal oral hearing.
10. On 6 July 2023, in agreement with the Parties, the Commission again extended the legal deadline of the procedure by 5 working days pursuant to Article 10(3), second subparagraph, third sentence of the Merger Regulation.
11. During the course of the proceedings, I admitted three interested third persons, pursuant to Article 5 of Decision 2011/695/EU. Two requests were received shortly before the oral hearing, while the third one was received after the oral hearing took place.
12. Both interested third persons admitted before the oral hearing, requested to participate in it. One subsequently withdrew its request. I admitted the other interested third person to the oral hearing, however, given the lateness of its request and in order not to impose an additional burden on the Parties to revise their presentations, to take account of confidentiality issues, this person was only allowed to attend part of the oral hearing.
13. The oral hearing took place on 7 July 2023. It was attended by the Parties; the Parties’ external legal and economic counsel; an interested third person; the relevant Commission services; representatives from the competent authorities of nine Member States as well as the EFTA Surveillance Authority.

⁵ An informal advance information copy of the SO was sent to Booking on 9 June 2023. Flugo was offered the opportunity to request a non-confidential version of the SO and submit (separate) observations pursuant to Article 13(2) of Commission Regulation (EC) 802/2004.

⁶ SO, paragraph 812.

14. The oral hearing proceeded smoothly and did not give rise to any requests or complaints. In accordance with Article 15(8) of Regulation 802/2004,⁷ the Parties received a copy of the recording of the oral hearing.

2.1. Letters of Facts

15. Following the oral hearing, the Commission addressed four letters of facts ('LoF') to the Parties:
 - on 13 July 2023 ('the First LoF'). The Parties replied to the First LoF on 18 July 2023, by the deadline set by the Commission;
 - on 26 July 2023 ('the Second LoF'). On the Parties' request, the Commission granted a five-day extension of the original deadline to reply, set for the 31 July 2023. The Parties replied to the Second LoF on 8 August 2023;
 - on 10 August 2023 ('the Third LoF'). On the Parties' request, the Commission granted a one-day extension of the original deadline to reply, originally set for the 16 August. The Parties replied to the Third LoF on 17 August 2023; and
 - on 23 August 2023 ('the Fourth LoF'). The Parties replied to the Fourth LoF on 25 August 2023, by the deadline set by the Commission.
16. In the LoFs, the Commission pointed out additional and updated factual elements in support of the preliminary conclusions reached in the SO, which it had concluded were potentially relevant to substantiate its final decision.

2.2. Submission of commitments

17. On 31 July 2023, the Notifying Party submitted commitments, with a view to rendering the Proposed Transaction compatible with the internal market and the functioning of the EEA Agreement, pursuant to Article 8(2) of the Merger Regulation (the 'Initial Commitments'). The offer of commitments triggered the automatic extension of the time limit for adopting a final decision by 15 working days pursuant to the first subparagraph, last sentence, of Article 10(3) of the Merger Regulation.
18. On 2 August 2023, the Commission launched a market test of the Initial Commitments submitted by the Notifying Party. On 18 August 2023, access to file regarding the market investigation was granted to the Notifying Party.
19. On 21 August 2023, a State of Play meeting between the Commission and the Notifying Party took place. During that meeting, the Commission informed the Notifying Party that it maintained its competition concerns and gave the Notifying Party detailed feedback on the outcome of the market test.
20. On 24 August 2023, following the Commission's observations on the Initial Commitments, the Notifying Party submitted revised and final commitments in accordance with Article 8(2) and 10(2) of the Merger Regulation, with a view to rendering the Proposed Transaction compatible with the internal market and the functioning of the EEA Agreement (the 'Final Commitments'). On 31 August 2023, the Commission gave Booking feedback on the Final Commitments and indicated that they were not sufficient to address its competition concerns.

⁷ Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p.1.

3. PROCEDURAL ARGUMENTS

21. In the SO Reply and during the oral hearing, the Parties essentially argued that the Proposed Transaction is ‘*a typical conglomerate merger*’ and that the Commission is violating the principle of legal certainty and going against the protection of legitimate expectations by not basing the assessment of Proposed Transaction on the Non-Horizontal Merger Guidelines.
22. In my view, no breach of rights of defence has been demonstrated in this regard. Firstly, for this claim to be well founded the Commission should have issued ‘unconditional’ assurances⁸ that the transaction would be assessed on the basis of the aforementioned Merger Guidelines, however this text does not claim exclusivity as regards the assessment of all conglomerate transactions that come before the Commission. Secondly, it is constant case law that the Commission’s decision-making practice is subject to change, depending on changing circumstances or the evolution of its analysis.⁹ Importantly, the SO set out the legal framework for the assessment applied, thereby giving the Parties the opportunity to make their views known on the objections raised by the Commission on the basis of that framework.

4. DRAFT DECISION AND CONCLUSION

23. The draft decision finds that the Transaction would significantly impede effective competition in the market for hotel OTAs. As regards the Final Commitments, the draft decision concludes that they do not eliminate the significant impediment to effective competition arising from the Transaction. Given these findings, the draft decision concludes that the Transaction is incompatible with the internal market and functioning of the EEA Agreement.
24. I have reviewed the draft decision pursuant to Article 16(1) of Decision 2011/695/EU and I conclude that it deals only with objections in respect of which the Parties have been afforded the opportunity of making their views known.
25. Overall, I conclude that the effective exercise of the procedural rights of the Parties has been respected in this case.

Dorothe DALHEIMER
Hearing Officer

⁸ Three conditions must be satisfied in order for a claim to entitlement to the protection of legitimate expectations to be well founded. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the EU authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules. Judgment of 18 May 2022, *Canon v Commission* (‘*Canon*’), T-609/19, ECLI:EU:T:2022:299, paragraphs 392 and 393 and the case law cited and judgment of 13 July 2022, *Illumina v Commission*, T-227/21, ECLI:EU:T:2022:447, paragraph 254.

⁹ *Canon*, paragraph 395 and the case law cited.