ITALIAN CONFERENCE VI CONVEGNO NAZIONALE

ASSOCIAZIONE ANTITRUST ITALIANA

I PRINCIPALI SVILUPPI NEL DIRITTO DELLA CONCORRENZA DELL'UNIONE EUROPEA E NAZIONALE

MAIN DEVELOPMENTS IN EUROPEAN AND ITALIAN COMPETITION LAW

ASSOCIAZIONE ANTITRUST ITALIANA

VI CONVEGNO NAZIONALE • *VI ITALIAN CONFERENCE*

SESSIONI PARALLELE A

A2. Concentrazioni: sviluppi e prospettive

«*Standard di valutazione delle operazioni di concentrazione nel settore digitale e una alternativa – Brevi considerazioni*»

Avv. Gian Luca Zampa

Partner

Freshfields Bruckhaus Deringer

- **Aspetti sostanziali e criticità valutative**
  - *Nascent competitor, killer acquisition* e *kill-zone*
  - Incentivi o disincentivi all'innovazione – VC e exit strategica
- **Valutazioni prospettiche e concorrenza potenziale**
  - Concorrenza "potenziale attuale" (pharma) e concorrenza "potenziale potenziale" (tech)
  - Controfattuale statico e dinamico
    - Come si evolverebbe la target? E il suo prodotto?
    - Quali acquirenti alternativi?
  - Complessità nel distinguere prodotti/servizi complementari da prodotti/servizi sostituibili
  - Come valutare le probabilità non solo di sviluppo di prodotti/servizi concorrenti ma anche il grado di successo?
- **Autorità di concorrenza, investitori e….indovini**

Due casi da comparare

- ***Facebook/Instagram (2012)***: Tutti conoscono oggi Istagram ma all'epoca?
  - servizi essenzialmente complementari
  - possibili sovrapposizione future (social networks) molto remote
  - il servizio era di limitato interesse e rilievo dei dati degli utilizzatori dell'epoca
- ***Facebook/Tbh (2017)***: Tbh era un app per social media che permetteva a liceali di mandarsi complimenti pre-scritti. Acquisita nel 2017, chiusa a metà del 2018!
- E' un processo di **'trial and error'** sul futuro sviluppo di una idea
- AquiHires? Il team di Istagram – 5 ingegneri

ASSOCIAZIONE ANTITRUST ITALIANA

VI CONVEGNO NAZIONALE • *VI ITALIAN CONFERENCE*

European Commission's decision to block Three-O2 deal annulled

Rationale for stopping UK telecoms deal in 2016 was based on 'several errors', says court

A top European court has annulled a 2016 decision by Margrethe Vestager, the EU's competition commissioner, to block a merger of two British mobile telecoms companies on consumer interest grounds.

The ruling by the General Court, the EU's second highest court, overturns the European Commission's decision four years ago to block the £10.25bn takeover of Telefonica's O2 network in the UK by Three, owned by Hong Kong's CK Hutchison. It calls into question the commission's approach to merger interventions and could trigger further telecoms consolidation in several European markets.

mlex market insight

Hutchison wins bid to overturn O2 UK deal block at EU court

In Brief

CK Hutchison today won its legal challenge against the European Commission's block on its buyout of O2 UK, in a defeat for the EU merger regulator's strict approach to tie-ups in the mobile sector. "The effects of the operation on prices and on the quality of services for consumers have not been proved to the requisite legal standard," the EU's General Court said.

CK Hutchison today won its legal challenge against the European Commission's block on its buyout of O2 UK, in a defeat for the EU merger regulator's strict approach to tie-ups in the mobile sector.

"The effects of the operation on prices and on the quality of services for consumers have not been proved to the requisite legal standard," the EU's General Court said.

The commission blocked Hutchison's acquisition of O2 UK for 10.25 billion pounds ($12.5 billion) in 2016, saying the merger would have led to higher prices, less choice and reduced innovation by cutting the number of UK mobile network operators from four to three.

The court's case number for the appeal is T-399/16 — CK Telecoms UK Investments v Commission.

Comment: Hutchison-O2 ruling raises bar for EU merger blocks in concentrated markets

By Andrew Boyce and Nicholas Hirst on 28 May 20 | 16:19 GMT

GCR

General Court annuls CK Hutchison/Telefonica block in landmark decision

REUTERS

EU court backs Hutchison challenge to EU veto on O2 takeover

"While EU merger decisions are rarely overturned by the courts, last week the regulator was hit by a **bombshell ruling** from the General Court that quashed its 2016 decision to veto Hutchison's planned takeover of O2." – *MLex – Michael Acton and Andrew Boyce, 2 June 2020*

Il caso T-399/16 CK Telecoms UK Investments v Commission

- *The Commission not only must "…envisage various chain of cause and effects with a view to ascertaining which of them **are most likely**…" Sent., para. 108*
- *But "In the context of an analysis of a significant impediment to effective competition the existence of which is inferred from a body of evidence and indicia, and which is based on several theories of harm, **the Commission is required to produce sufficient evidence to demonstrate with a strong probability** the existence of significant impediments following the concentration." Sent., para. 118*
- Quali implicazioni per l'analisi delle acquisizioni di concorrenti nascenti in un mercato nascente?

Il caso T-399/16 CK Telecoms UK Investments v Commission

- **"Particularly close competitor" (ent par. 234) versus "close competitor"**
- "***By confusing those concepts, the Commission considerably broadens the scope of Article 2(3)*** *of Regulation No 139/2004, since any* ***elimination of an important competitive force would amount to the elimination of an important competitive constraint which, in turn, would justify a finding of a significant impediment to effective competition***" *Sent., para. 173*

Il caso T-399/16 CK Telecoms UK Investments v Commission

*"…the **more prospective the analysis** is and the chains of cause and effect dimly discernible, uncertain and difficult to establish, the **more demanding the EU judicature must be in terms of the specific examination of the evidence produced by the Commission**". Sent, para. 332*

- L'onere della prova è maggiore quanto maggiore è il carattere di novità della *theory of harm*

Osservazioni conclusive

- Siamo sicuri che il controllo delle concentrazioni sia lo strumento ideale?
- Cosa si vuole colpire? Quale è la concorrenza da preservare?
- Gli abusi strutturali – vantaggi e svantaggi
  - durata istruttorie compatibili con il settore digitale?
  - di colpiscono solo le vere «killer acquisition» - minore rischio di errore del Tipo 1
  - effetto di deterrenza e incertezza giuridica – non dissimile da quanto oggi accade oggi negli US