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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

News Media and Digital Platforms – Note by Austria

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This document reproduces a written contribution from Austria submitted for Item 3 of the 136th OECD Competition Committee meeting on 1-3 December 2021.

More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/competition-issues-in-news-media-and-digital-platforms.htm>.

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Austria

1. General remarks on recent developments concerning digital markets in Austria

1. The BWB has not yet dealt with any case relating to competition issues specifically arising from the commercial relationship between news media and digital platforms. Recently, however, the BWB as well as the Austrian legislator have been very active when it comes to digital platforms. On 10 September 2021, an extensive amendment of the Austrian Cartel and Competition Law Act entered into force. With the KaWeRÄG 2021, the legislator has not only implemented requirements by European law (i.e. ECN+-Directive), but above all adapted the Austrian Cartel and Competition Act to the recent developments in economic life. Although the amendment does not introduce sector-specific abuse rules for digital gatekeepers, it clearly takes into account powerful digital platforms by introducing a number of factors to be considered in the analysis of a dominant position, all of which specifically address the market conditions in digital markets.

2. Legal amendments to Austrian Cartel and Competition Law Act with effect as of 10 September 2021

2. Firstly, Section 4 of the Cartel Act names three illustrative criteria to be taken into account when assessing typical market power criteria of the platform economy, including (i) the importance of a company's intermediation services for other companies' ability to access upstream or downstream markets, (ii) the access to data of particular competitive relevance and (iii) the benefit derived from network effects.

3. Secondly, the existing concept of "relative market power", providing that a company is considered to have a dominant market position if it has a superior market position in relation to its customers or suppliers, is moved from Section 4 to the new Section 4a of the Cartel Act. The new Section 4a of the Cartel Act further includes providers of intermediation services in multi-sided digital markets who will be deemed dominant if their customers depend on access to these intermediation services.

4. Thirdly, the new Section 28a of the Cartel Act introduces a new procedure allowing the BWB, the Federal Cartel Prosecutor and the regulators to file a declaratory application with the Cartel Court to have the market power of an undertaking operating in a multi-sided digital market determined. Such a proceeding does not require an allegation of an abuse of a dominant market position. Since the assessment of market dominance is often a hurdle in abuse of dominance cases, this first hurdle can now be taken separately and in advance or in parallel to a substantive assessment of the case. Therefore, the new Section 28a of the Cartel Act will enable the BWB as well as the Cartel Court to possibly speed up future abuse of dominance proceedings.

5. In addition, the BWB increasingly cooperates with the Austrian Regulatory Authority for Broadcasting and Telecommunications ("RTR"), inter alia, in monitoring digital platforms. Accordingly, in autumn 2019, the RTR and the BWB set up a joint task force in order to work more closely together on competition issues in the area of digital

platforms.¹ As a result, the RTR, in cooperation with the BWB, published a method paper on monitoring digital platforms on 19 May 2020 as well as a report titled 'Interpersonal communications services with a focus on instant messaging' on 18 December 2020.² Instant messaging refers to communication channels used by two or more participants to exchange messages (e.g. WhatsApp, Facebook Messenger, Telegram, Skype, iMessage etc.).

6. Moreover, in the course of general market and media monitoring, the BWB became aware of the merger between the two US-based companies Facebook and GIPHY, a provider of GIFs, which took place in May 2020, and consequently initiated investigations based on suspicion of a violation of the standstill obligation, as the merger had not been notified in Austria. The merger should have been notified in Austria as it meets the criterion of the transaction value threshold.³ Therefore, in June 2021, the BWB filed an application with the Cartel Court for the imposition of a fine in the amount of EUR 9.6 million for the violation of the standstill obligation in the merger Facebook / GIPHY. This application was based on a settlement agreed upon with Facebook.⁴ The Cartel Court decided in favour of BWB's application, imposing a fine of EUR 9.6 million on Facebook on the grounds of its failure to notify the merger with GIPHY. In July 2021, Facebook consequently notified the BWB retroactively of its plan to acquire all of the shares in and sole control of GIPHY. Since the BWB's competition concerns could not be dispelled in the course of its investigations, the BWB and the Federal Cartel Prosecutor in August 2021 filed an application for phase II proceedings with the Cartel Court due to competition concerns.⁵ The case is currently still pending in phase II at the Cartel Court.

7. Considering the recent substantive legal amendments in the Austrian Cartel and Competition Law Act as well as the (digital) cooperation with the regulator RTR, there is a clear trend towards enforcement against abuse of dominance in relation to digital platforms.

¹ An English version of the joint announcement is available on the BWB website at https://www.bwb.gv.at/en/news/news_2019/detail/rtr-telecommunications-and-postal-services-and-bwb-stepping-up-digital-cooperation-development-of-a (last accessed 19 October 2021).

² An English version of the method paper is available on the RTR website at https://www.rtr.at/TKP/aktuelles/publikationen/publikationen/Monitoring_Interpersonelle_Kommunikationsdienste_mit.en.html (last accessed 19 October 2021).

³ See § 9 para. 4 Cartel Act 2005.

⁴ An English version of the BWB's press release is available at <https://www.bwb.gv.at/en/news/detail/austrian-federal-competition-authority-files-application-to-fine-facebook-for-failing-to-notify-giphy> (last accessed 27 October 2021).

⁵ An English version of the BWB's press release is available at <https://www.bwb.gv.at/en/news/detail/facebook-giphy-merger-afca-files-request-for-examination-with-cartel-court> (last accessed 27 October 2021).