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The Evolving Concept of Market Power in the Digital Economy – Note by Austria

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1. Introduction

1. The increasing prevalence of digital mergers and relevance of digital markets in general throughout the last few years have led competition authorities to question the appropriateness of their tools and concepts in merger control. Some of them seem to have been caught off guard in their handling of digital mergers and a general discomfort emerged that the characteristics of digital markets may have made traditional approaches to antitrust increasingly insufficient. As a consequence of that, in-depth investigations in digital markets followed and resulted in the production of a series of reports (e.g., ACCC 2019, Crémer et al. 2019, Stigler Center 2019, and CMA 2020), and the topic of digital markets has been put on top of the agenda at many conferences, round-tables and seminars over the last few years. The general conclusion seems to be that something has to be done to adopt antitrust tools and concepts to the new and evolving digital environment, and several competition authorities have done so in the past, but the jury is still out whether these adjustments have been appropriate.

2. This note describes one important experience of the Austrian Federal Competition Authority (AFCA) in the context of digital markets. Its in-depth review of Facebook's acquisition of GIPHY and, which is perhaps more important, its application of the transaction value threshold (TVT) to assess Facebook's obligation to notify its acquisition of GIPHY.¹ Without the latter, the former would not have been possible and the AFCA's conclusion that the merger is likely to strengthen Facebook's dominant position in social media and non-search-based online advertising would have been immaterial as the merger could not have been referred to the Austrian Cartel Court for in-depth review in phase II. Since GIPHY, an important provider of a large GIF library, had not yet generated any revenues at the time of the merger in Europe, the AFCA's challenge in both the application of the TVT prior to the retroactive notification and the in-depth review during phase I was to find reasonable measures to assess GIPHY's significance in the Austrian market and its market position in the worldwide market for GIF libraries, respectively. Below, we will discuss several measures that one may bring up in this respect. However, only a few can be viewed to be appropriate for the assessment of GIPHY's significance and both parties' market position in the relevant markets.

3. As for GIPHY, the AFCA found it relevant to consider both *direct* and *indirect users* of GIPHY's GIF library. Whereas direct users use GIPHY via its website or apps, indirect users access its GIF library via integrated interfaces in third-party services such as Facebook, Twitter, or Tiktok, to name just a few. In traditional markets, upstream firms do not care so much about the indirect use of their goods and services but only about selling them to downstream firms. The decisions that downstream firms and consumers make thereafter are of little interest to traditional upstream firms as long as revenues are earned. In contrast, indirect users of GIFs are central for both the strong indirect network effects on GIPHY and its monetarization strategy. Without taking indirect users into account, GIPHY's activity in Austria would not have been significant and no obligation to notify would have arisen. In phase I then, search queries via integrated interfaces were used as the

¹ It is very well recognized that Facebook is now called Meta. However, since the economic analyses had been taking place before the rebranding in October 2021, we will use Meta's former name throughout this note.

primary measure for the assessment of GIPHY's market position in the worldwide market for GIF libraries. Daily user reach, a measure which is less accessible anyways, ignores the average intensity (i.e. intensive margin) of utilization of the GIF library and hence was deemed less suitable. All these measures have one thing in common: they are not based on revenues because the services provided have zero prices.

4. The view that firms like Facebook, Twitter, or TikTok compete in a market for time or attention has been rejected, thereby following the reasoning of the German Cartel Office, as outlined below. The users and their data would be the product on such a market for attention. Clearly, the time spent on the Internet does not serve one particular need but rather a myriad of needs. To put a long story short, the zero-price services that Facebook provides are part of a market for social media. To assess Facebook's dominant market position in this market, the AFCA used the monthly average time spent on each platform in the social media market.

5. In non-search based online advertising, a market in which both parties' activities overlapped in the United States, the AFCA used a standard revenue-based measure which supported the presumption of Facebook's market dominance. The market definition was more involved with a distinction between offline and online advertising on the one hand and a separation of non-search-based online advertising from search-based online advertising on the other hand. Whereas the latter target customers with a buying intention, the former is primarily used to increase brand awareness. The AFCA concluded that most advertisers on GIPHY are particularly interested in increasing brand awareness. Hence, the AFCA directed its resources to the investigation of the market for non-search-based online advertising and concluded that Facebook's acquisition of GIPHY might result in a loss of potential competition.

6. In the following, we describe the AFCA's experience in the Facebook/GIPHY case, starting with the assessment of GIPHY's significant domestic activity. Then, we briefly elaborate on the AFCA's approach to determine both parties' market power in the relevant markets. The final section concludes and gives a short summary of the lessons that the AFCA learned in this case.

2. The Assessment of GIPHY's Significant Domestic Activity

2.1. Traditional Revenue-based Thresholds

7. When Facebook acquired GIPHY in May 2020, the transaction had not been notified in any jurisdiction. Cursory market observations made the AFCA aware of it. From June 2020, several rounds of requests for information (RFIs) were sent out in order to determine whether an obligation to notify was violated.

8. While Facebook is known to be the most important social media platform in the world, the significance of GIPHY with its digital library and search engine for GIFs and stickers is more difficult to pin down. Facebook earned more than EUR 60 billion in worldwide revenues in 2019, in the year prior to the acquisition. Its revenues in Austria were found to be significantly larger than EUR 15 million. In contrast, the AFCA learned that GIPHY earned significantly less than EUR 30 million worldwide with zero revenues in Europe.² The traditional revenue thresholds in the Austrian Cartel Act would not have

² For confidentiality reasons, more precise numbers cannot be given. However, the numbers in the text can be deduced by a combination of the Austrian Cartel Court's decision in July 2021 (<https://edikte.justiz.gv.at/edikte/ek/ekedi17.nsf/alldoc/04ebf40d2f011c46c125878900351ef1!Ope>)

established an obligation to notify in this case. However, the AFCA continued its review process because an obligation to notify was still a possibility under the transaction value threshold (TVT), where reasonable non-revenue-based measures would suffice to require a notification.

2.2. Transaction Value Threshold

9. The TVT was introduced in the Austrian Federal Act in 2017 in order to catch mergers where the target company's competitive potential is not reflected in its current or past revenues.³ Beside the requirements that both parties need to have earned, in aggregate, more than EUR 300 million worldwide and more than EUR 15 million in Austria in the year prior to the merger—which are both easily fulfilled by Facebook's activities alone—, the transaction value of the merger is required to exceed EUR 200 million, while the activity of the target company in Austria has to be significant (§ 9 para. 4 KartG).⁴ Since Facebook bought GIPHY for EUR 285 million, the third requirement is certainly satisfied. This left the AFCA with the challenge to find appropriate indicators to determine whether the target company's activities in Austria are significant. In order to qualify as an „appropriate“ indicator, it must be in line with industry standards and cannot be easily manipulated. Note that significant domestic activity can but need not be demonstrated by revenue figures.⁵ In the digital sector, user numbers (monthly active users or daily active users) and the access frequency of a website (unique visitors) may be regarded as appropriate criteria for the assessment of a firm's significance in a market. In this respect, however, the location of the user, i.e. the place where the service is provided or the product is sold, must be in Austria, even if the relevant market in which the target company is active is EEA-wide or even worldwide. A local nexus is necessary.

2.3. Non-Revenue-based Measures and Obligation to Notify

10. Since GIFs are ubiquitous, it was not far-fetched to presume the existence of a sufficient number of GIF-users in Austria. However, the AFCA had to overcome some challenges in terms of user classification. First, one has to distinguish between direct and indirect users of GIFs. Direct users access the website of GIPHY or use its apps, upload and search for GIFs, and use them through downloading or by copying the corresponding URLs. However, the sending and receiving of GIFs is impossible by using either the website or the GIPHY-apps. These two functions are only possible via third-party services, e.g. social networks or instant messaging apps. The integration of application programming interfaces (APIs) or software development kits (SDKs) enables users of third-party services to access the GIPHY library. Note that GIPHY's APIs and SDKs can be integrated by third-

[nDocument](#)) and the CMA's phase I decision in March 2021 (https://assets.publishing.service.gov.uk/media/605b60758fa8f545d10b3bf6/Facebook_GIPHY_-_Summary_of_P1_Decision_-_25032021_---.pdf). In the latter, see para 3 and 15 for GIPHY's revenues in Europe prior to the merger.

³ See the Cartel and Competition Law Amendment Act 2017 (KaWeRÄG 2017).

⁴ For a recent and more elaborate discussion of the concept of significant domestic activity in the TVT in the context of online platforms, see Ivanova and Thanhäuser (2022).

⁵ For an extensive discussion of the transaction value threshold in both Germany and Austria, see the following guidelines: https://www.bwb.gv.at/fileadmin/user_upload/Guidance_Transaction_Value_Thresholds_January_2022_final.pdf

party services free of charge. When users access the GIPHY library via third-party services, which we will call API partners hereafter, we refer to it as an indirect use of GIFs.

11. One may argue that the indirect use of GIFs should not be included as an indicator of GIPHY's significance in the Austrian market since, after having integrated GIPHY's APIs or SDKs, the third-party service remains fully independent in terms of its decisions where and to whom it provides its services. While this argument could be applied in traditional sectors, where—roughly speaking—a producer of car engines, for example, cares only about the revenues it earns by selling its engines to car manufacturers but not about the car manufacturers' decisions how the engines are used after all, this reasoning can hardly be maintained in digital markets. In particular, GIPHY has pursued an open API policy for third parties since its foundation in 2013. This helped it grow the number of both GIF users and GIF creators, the two sides on GIPHY. The indirect use of GIFs allows GIPHY to establish and reinforce indirect network effects which in turn are relevant for potential monetization strategies. Indeed, in 2019 GIPHY introduced a *paid alignment model* in the US market that provides advertisers with the opportunity against payment of a fee to have their branded GIFs tagged to specific search keywords in order to make them appear at the top in the search results. Another opportunity is to have your GIFs appear in the trending feed on specific days. For example, Pepsi's GIFs were shown in the trending feed during the Super Bowl, whereas Dunkin' Donuts' GIFs entered a paid alignment partnership with GIPHY on Valentine's Day. Since the majority of GIPHY's users are indirect in nature, with more than 50% of them coming from Facebook services⁶, the importance of these users for GIPHY cannot be disregarded in the assessment of GIPHY's economic significance. The number of direct users of GIPHY would not have rendered its activities in Austria significant and the AFCA would have concluded that there was no obligation for the parties to notify the merger.

12. The AFCA then proceeded to use and calculate several measures in order to assess GIPHY's domestic significance:

- the total number of GIFs sent per month in Austria,
- the number of monthly active users (MAUs) who sent at least one GIPHY-GIF,
- the number of daily average users (DAUs) who received at least one GIPHY-GIF, and
- the number of GIF uploads of (prominent) Austrian GIPHY accounts including their reach.

13. The last measure was obtained through a sample of prominent Austrian GIPHY accounts and serves as a rough indicator for GIPHY's significance in Austria for GIF-creating users. All of these measures pointed to significant domestic activity. Therefore, the AFCA reached the conclusion that GIPHY's domestic activity is indeed significant and brought the case to the Austrian Cartel Court which ruled on June 2021 to impose a fine on Facebook of EUR 9.6 million for the violation of the obligation to notify (28 Kt 6/21y-7).⁷ It is interesting that the Austrian Cartel Court specifically acknowledged the number of MAUs as an appropriate measure for the assessment of GIPHY's significant domestic activity. In particular, GIPHY's indirect MAUs in Austria in May 2020 amounted to about

⁶ See <https://about.fb.com/news/2020/05/welcome-giphy/>

⁷ Also see <https://www.bwb.gv.at/en/news/detail/austrian-federal-competition-authority-files-application-to-fine-facebook-for-failing-to-notify-giph> and <https://www.bwb.gv.at/en/news/detail/facebook-fine-for-illegal-merger-now-final>

[0.5-1] million. For a comparison, Austria's population is roughly 9 million. The Austrian Cartel Court concluded that „*the threshold of marginal activities was clearly surpassed.*“ However, it did not define the threshold but only suggested that the number was large enough to reach the conclusion of significant domestic activity.

2.4. Lessons

14. The lessons learned in the Facebook/GIPHY case for competition authorities is to consider using non-revenue measures in pre-merger screenings so as to be able to catch mergers, especially in the realm of digital markets, that are potentially harmful to competition but fall below traditional revenue thresholds. Measures such as monthly or daily active users of particular services might come in handy for that purpose, especially for markets with zero prices.⁸ However, the most important lesson in this case has been the necessity to identify indirect users and analyze their significance for the parties. Indirect use of digital services through third-party services might have to be considered if the full economic potential of the companies is to be assessed. In particular, one may ask the question whether the indirect use of services is relevant for a company's monetization strategy. If yes, competition authorities will have to consider the number of indirect users in order to be able to assess the significance of a party's domestic activity.⁹

3. The Assessment of Market Power

15. The parties retroactively notified the merger to the AFCA in July 2021. Since the AFCA could not rule out a strengthening of Facebook's dominant position in social media and non-search-based online advertising post-merger, the AFCA requested an in-depth investigation by the Austrian Cartel Court. In the following, we provide an outline of the definition of the relevant markets and the theories of harm that the AFCA thought to apply in this case and of the measures used to assess market power.

3.1. Market Definition

16. In phase I, the AFCA assumed a worldwide market for searchable GIF libraries, thereby following the CMA's view in its phase I decision about Facebook/GIPHY.¹⁰ The CMA initiated a phase I investigation in this case at the end of January 2021. The AFCA's investigations did not suggest sufficient substitutability with other shareable online content.

17. For the market definition of Facebook's services, a market for time or attention was deemed inappropriate as a relevant market for Facebook's social networking services. *Attention* or *time* do not constitute products that satisfy some needs of the majority of users,

⁸ For mergers in digital markets, this has not been an unfamiliar approach for the last few years. See para. 67 in the outdated guidance on transaction value thresholds of both the German Cartel Office and the AFCA: https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Leitfaden/20180709_Leitfaden_Transaktionswertschwellen_final.pdf (German)

⁹ For a brief discussion of the importance of indirect users in vertical relationships for the assessment of significant domestic activity according to the TVT, see Ivanova and Thanhäuser (2022).

¹⁰ See CMA's decision in phase I: https://assets.publishing.service.gov.uk/media/60927a498fa8f51b909ca199/Facebook_GIPHY_-_PIDecision_to_refer_unless_undertakings_accepted.pdf

apart from advertisers.¹¹ Users are rather interested in interacting or socialising with other users. Hence, the market for social media seems to include the relevant options for users to choose from in their desire to socialize with other people online. The geographic scope of this market is more tricky to determine because national particularities may be brought forward, as did the German Federal Cartel Office (B6-22/16, para. 348). For example, the network effects on social media are more likely to be *non-uniform* (i.e. group-specific) rather than *uniform*.¹² To be sure, many users in Austria will be interested in interactions with or exposure to foreign users. Note that non-uniform network effects do not necessarily imply that group need to be subsets of national identities. Given that both a national, an EEA-wide, and a worldwide market would not have resulted in different assessments, the AFCA concluded that a the geographic scope of the market can be left open.

18. Another market that the AFCA had to define was the advertising market. First, one had to distinguish between offline and online advertising. Second, the AFCA followed the German Federal Cartel Office by separating non-search-based online advertising from search-based online advertising (B6-22/16, para. 354–360). Search-based online advertising targets customers with a buying intention. In particular, when someone searches for Nike shoes on the Internet, he or she likely intends to buy some new footwear. Ads will pop up that are related to the search query and try to direct the person to products, especially footwear, that he or she may like. In contrast, non-search-based online advertising tries to increase brand awareness and, at least primarily, does not target customers with an immediate buying intention. Since GIPHY's monetarization strategy, which was restricted to the United States prior to the merger, can be regarded as more in line with non-search-based advertising, the AFCA assumed the market for non-search-based online advertising to be the most relevant for its competitive assessment. Finally, since most ads of this sort seem to have Austrian characteristics, the AFCA assume the market to be national in scope.

3.2. The Parties' Market Position

3.2.1. Worldwide Market of GIF Libraries

19. The most important competitors of GIPHY on this market are Google's Tenor and Gfycat, among many small ones that may be included. However, as the AFCA learned, Tenor is by far the most important competitor and is considered by many to be the only viable alternative to GIPHY. For example, Tenor claims that its users search for GIFs about 12 billion times a month. Even though this number seems huge, the AFCA found that GIPHY's search statistics are a multiple of this number, with other GIF providers falling far behind both GIPHY and Tenor.¹³ The search queries via API or SDK were used by the AFCA as a first measure to assess the market share of GIPHY on the global market for GIF

¹¹ See the German Federal Cartel Office's proceedings against Facebook's abuse of market power in 2019 for a short discussion of this issue (B6-22/16): https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufricht/2019/B6-22-16.pdf?__blob=publicationFile&v=6

¹² This terminology was introduced by Rholfs (1974) who distinguished between a *uniform calling pattern* and *non-uniform calling patterns* (in the context of telecommunications). As for the former, users do not care about the identity of other users but only care about the total number of subscribers. However, since people belong to groups and find it easier to socialize with other people who speak the same language, for example, it is more realistic to assume that the identity of users on platforms matter. Hence the term non-uniform calling patterns.

¹³ On its website, for example, GIPHY claims to serve „10+ billion pieces of GIPHY content to a daily user reach of 700+ million people.“ See <https://giphy.com/about>.

libraries. Based on this measure, the AFCA was able to conclude that GIPHY is dominant in the worldwide market for GIF libraries.

20. Another possible measure to assess a GIF library's market power is to look at its daily user reach. However, these numbers were less accessible for the AFCA. In addition, daily user reach might not be appropriate to measure a GIF library's significance in the market because it ignores the average intensity of use of each user, i.e. the intensive margin of utilization of the GIF library. Assuming that GIPHY offers higher quality GIFs and better search results than any other GIF library in the market, it is intuitive to argue that an average user on GIPHY searches for more GIFs than an average user on other comparable GIF platforms, thereby increasing indirect network effects that serve as a „glue“ that sticks the user to GIPHY and allows for potential monetization.

21. In order to assess GIPHY's market power on the worldwide market for GIF library, the AFCA had to resort to a non-revenue based measure given the fact that using GIF libraries, especially the sending and receiving of GIFs via APIs and SDKs, is free of charge and revenue metrics are non-existent. The primary purpose of using GIFs is to increase the user experience on social media platforms, such as Facebook, Snapchat, or TikTok. Consequently, the overall daily or monthly search requests for GIFs appear to be an appropriate measure for the significance of a GIF library for users worldwide.

3.2.2. At least National Market for Social Media

22. In an abuse decision against Facebook in 2019, the German Federal Cartel Office documented that Facebook views the relevant market it is active in to be the market for attention, on which it is competing with numerous other firms for the time of internet users (B6-22/16, para. 154). However, this market definition is inappropriate as it turns the users into products but leaves open the question which needs these users satisfy by using the different services on the Internet. Evidently, every minute of time spent on the Internet may serve the satisfaction of different needs, hence cannot be lumped together into the same market for the majority of users. In traditional markets, this view is somewhat comparable to stating that firms compete for the spending decisions or the income of consumers and hence we have to consider a market for expenditures as the relevant market. Roughly speaking, every Euro of income spent may have different purposes and therefore serve the satisfaction of different needs. Hence, a market for expenditures is as inappropriate as is a market for attention, even though in the latter we may at least agree with the view that users and their attention may be seen as products for advertisers. We therefore have to dismiss an overall market for time or attention.¹⁴

23. While neither time nor attention are products that users consume, they spend time or pay attention and hence leave some marks that can be used to approximate the significance of the services that digital firms provide on the Internet. Note that this is similar to expenditures in traditional markets based on which revenue-based market shares are calculated. The AFCA found it suitable to use the average time spent per month on social media to calculate the market shares in the market for social media. Besides Facebook's social media ecosystem with Facebook, WhatsApp, Instagram, and Instant Messenger, we have TikTok, Twitter, Telegram, Snapchat, Reddit, and many more. However, Facebook outshines them all by a substantial margin, irrespective of whether we assume a national or worldwide scope for the social media market. Therefore, the AFCA concluded that Facebook is dominant beyond any reasonable doubt.

¹⁴ For a similar argument, see B6-22/16 para. 246.

3.2.3. National Market for Non-Search-Based Online Advertising

24. In this market, the AFCA used standard revenue-based measures to determine Facebook's market power. Even though GIPHY has not yet introduced its *paid alignment model* outside the United States, the AFCA concluded that GIPHY has the potential to expand into Europe and Austria in the near future and improve the effective competition in the market. Therefore, and in light of GIPHY's large user base outside the United States, the AFCA feared a loss of potential competition if the merger were approved.

3.2.4. Competition Concerns

25. Without delving into too many details, the competition concerns from the AFCA's in-depth review in phase I can be summarized as follows:

1. Facebook is likely to have an incentive to foreclose access to GIPHY's GIF library which increases Facebook's already dominant position in the social media market;
2. A loss of potential competition in the market for non-search-based online advertising cannot be ruled out, thereby potentially reducing effective competition in the future;
3. Since GIPHY's API and SDK has been integrated into many social media platforms, its acquisition of GIPHY would allow Facebook to obtain access to sensible data of its competitors which in turn strengthens its competitive edge in the market.

26. Due to its significance in an increasingly digital world, the last point deserves some further elaboration. By approving its acquisition of GIPHY, the AFCA concluded that Facebook would be able to collect more data about both its own users and users on other social media platforms with integrated GIPHY APIs or SDKs. By learning about its competitors' strengths and weaknesses, Facebook could further strengthen its already dominant position in the market for social media which in turn would likely result in a strengthen of its dominant position in the market for non-search-based online advertising as well. In addition, access to sensible data will likely dampen competitive dynamics because of Facebook's increased ability to respond to or even effectively preempt innovation efforts by its competitors who find themselves trapped in a severe information disadvantage.

27. In conclusion, the AFCA could not rule out the strengthening of Facebook's already dominant position in the markets for social media and non-search-based online advertising. Hence the case was eventually referred to the Austrian Cartel Court where the merger was approved subject to a pair of conditions:

1. A non-discriminatory access to GIPHY's GIF library for competing social media providers for the duration of five years has to be guaranteed;
2. For the duration of seven years, alternative GIF libraries have to be granted access via API to GIPHY's GIF library to allow the establishment of an additional GIF provider other than GIPHY or Tenor.

28. The AFCA and the Federal Cartel Prosecutor filed an appeal in March 2022. As of yet, the final decision is still pending.¹⁵

¹⁵ <https://www.bwb.gv.at/en/news/detail/meta-facebook-giphy-merger-afca-appealing-against-conditional-clearance>

4. Conclusion and Lessons

29. The necessity to identify indirect users and assess their significance for the parties involved in the merger has been the most important lesson for the AFCA in the Facebook/GIPHY case. If the indirect user of services underpin the network effects on a platform and therefore happen to be central for the platforms current or potential monetarization strategy, then competition authorities will have to consider both direct and indirect users in order to be able to assess both the full economic potential of the parties involved and the likely effect of the merger on competition.

30. Network effects, be they direct or indirect in nature, and zero pricing are posing challenges to competition authorities around the world. In traditional markets, revenue thresholds help competition authorities direct their scarce resources to M&A cases that are more likely to raise competition concerns. The fundamental premise of this conclusion is a positive relationship between the companies' economic significance, as captured by their revenues, and a potential anti-competitive effect of a merger of these companies. This argument is largely sound, at least the traditional economy, even though the spectre of so-called killer acquisitions has made its way into the public discourse in the last few years, a phenomenon largely associated with the pharmaceutical industry (e.g. see Cunningham et al. 2022).¹⁶ However, given the characteristics of digital markets with extreme economies of scale, negligible marginal costs, and network effects, economically insignificant digital firms have the potential to rapidly scale up and become important competitors within a shorter period of time than most other firms in traditional sectors would be able to accomplish. It is not unusual for digital firms to spend several years on growing a sufficiently larger user base without any efforts to monetarize it. As soon as the user base is sufficiently larger and network effects are sufficiently effective, monetarization efforts will be put in place. One has to resort to non-revenue-based measures in order to assess a digital company's potential in its build-up phase. As Teece and Kahwaty (2020) rightly observe, „*market shares need to be forward-looking because the analysis is usually about predicting the effects of a potential transaction in the future.*“

31. Competition authorities will have to be prepared for acquisitions of digital firms that are currently in their build-up phase and have not yet generated sufficient revenues. When services are provided for free, revenue-based thresholds are clearly uninformative. Therefore, it is imperative to make appropriate adjustments to address the increasingly digital environment. In Austria, the Cartel and Competition Law Amendment Act 2017 (KaWeRÄG 2017) has prepared the AFCA for cases such as Facebook's acquisition of GIPHY by introducing the transaction value threshold. Otherwise, there would have been no legal grounds for the AFCA to initiate an in-depth review of the merger.¹⁷ Therefore, in order to catch digital mergers that are potentially harmful to competition, competition authorities will have to resort to non-revenue-based tests in both per-merger screening and phase I proceedings. Getting used to these test and gaining experience will be of paramount importance for competition authorities to fulfil their assigned task of promoting effective

¹⁶ Some scholars even argue that innovation efforts and hence potential competition are also dampened by „reverse“ killer acquisitions which allow incumbent firms to forgo and eventually replace their own R&D investments. For example, see <https://voxeu.org/content/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions#:~:text=Hence>.

¹⁷ In the same year as in Austria, the 9th amendment to the German Competition Act (ARC) established a transaction value threshold in Germany. However, the transaction value must exceed €400 million, which is above the amount Facebook was willing to pay for GIPHY, in order for a merger to require notification.

competition and combatting distortions or restrictions of competition in an environment of increased digitalization.

REFERENCES

- ACCC (2019): *Digital Platforms Inquiry - Final Report*. Australian Competition and Consumer Commission.
- CMA (2020): *Online Platforms and Digital Advertising. Market Study Final Report*. Competition and Markets Authority.
- Crémer, J., de Montjoye, Y.-A., and Schweitzer, H. (2019): *Competition Policy for the Digital Era*. European Commission.
- Cunningham, C., Ederer, F., and Ma, S. (2022): *Killer Acquisitions*. *Journal of Political Economy* 129 (3), 649–702.
- Ivanova, Alexandra, and Thanhäuser, Justin (2022): *Erhebliche Inlandstätigkeit bei digitalen Plattformen*. *Wirtschaft und Wettbewerb*. Advance online publication: <https://research.owlit.de/document/cd8bb6d5-0783-3730-a5e5-2fec1c40e78e>
- Rohlf, Jeffrey (1974): *A Theory of Interdependent Demand for a Communications Service*. *The Bell Journal of Economics and Management Science* 5 (1), 16–37.
- Scott Morton, F., Bouvier, P., Ezrachi, A., Jullien, B., Katz, R., Kimmelman, G., Melamed, A. D., and Morgenstern, J. (2019): *Committee for the Study of Digital Platforms: Market Structure and Antitrust Subcommittee*. George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business.
- Stigler Center (2019): *Stigler Committee on Digital Platforms, Final Report*. George J. Stigler Center for the Study of the Economy and the State, The University of Chicago Booth School of Business.
- Teece, David, and Kahwaty, Henry (2020): *Rebooting Digital Market Power*. Competition Policy International. <https://www.competitionpolicyinternational.com/rebooting-digital-market-power/>