

SAME SAME BUT DIFFERENT - HOW THE UK AND AUSTRIA CAME TO CONFLICTING CONCLUSIONS ON META/GIPHY

CE LINKEDIN PULSE ON META/GIPHY MERGER INVESTIGATIONS
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In this article, we discuss Meta's acquisition of Giphy, and the different treatment that it received between UK courts and European courts. The acquisition is exemplary of diverging views and enforcement in merger control, in particular in relation to anti-competitive effects arising from potential competition. In the UK, the Competition Appeal Tribunal (CAT) upheld a Competition and Markets Authority (CMA) decision ordering the unwinding of Meta's acquisition. In stark contrast, the Austrian Supreme Court rejected the Austrian competition authority's theory of harm, painting Giphy as a potential competitor of Meta in digital advertising.

Predicting markets is hard – but a key component of merger control

“Prediction is very difficult, especially if it's about the future.”

Niels Bohr, Nobel laureate in Physics

Merger control relies on predictions.¹ When two firms merge, competition authorities need to foresee whether the merger will result in significant future harm to consumers. This raises the question of how competition authorities should best deal with this uncertainty.

¹ See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation); European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

At the same time, making predictions can be very difficult, not just in natural sciences like physics, but also in business and legal contexts. This struggle makes sense: It is much easier to use economic tools to explain the past and present. Firms constantly face this difficulty, for example when looking to grow through acquisitions, as they have to predict the success of another business model. There are numerous examples of acquisitions gone wrong, for example eBay's acquisition of Skype.²

Meta's acquisition of Giphy is exemplary of a key challenge in merger control

A recent case demonstrating these difficulties is Meta's acquisition of Giphy, a provider of an online database and search engine that allows users to search and share Graphics Interchange Format (GIF) bitmap images and GIF stickers. When competition authorities assessed the acquisition, they faced several questions that required predictions:

- What services would a self-standing Giphy offer absent the acquisition?
- How successful would a self-standing Giphy be absent the acquisition?
- How would Meta integrate Giphy? Would Meta's and/or Giphy's services change?

Answering these questions is hard – and competition authorities as well as judges came to different conclusions.

Difficulties lead to different legal outcomes in different jurisdictions

In the following, we compare the outcomes of investigations in the UK and Austria.

In the UK, the Competition and Markets Authority (CMA) investigated the acquisition in detail and in November 2021 ordered the unwinding of the acquisition. On 14 June 2022, the Competition Appeal Tribunal (CAT) largely upheld the decision.³

In Austria, the Austrian competition authority (BWB) investigated the Giphy acquisition in detail based on EU and Austrian law. An Austrian court approved the acquisition subject to remedies, a decision the Austrian Supreme Court confirmed on 23 June 2022.⁴ Most other national competition authorities in the EU did not investigate the acquisition in detail, neither did the European Commission.

² In 2005, eBay acquired Skype for USD 2.6bn. Two years later, eBay wrote-off over half of the price acknowledging that the acquisition had not performed as expected, see <https://www.ebayinc.com/stories/news/ebay-inc-reiterates-truth-about-skype/>.

³ See CAT (2022), Case No: 1429/4/12/21: https://www.catribunal.org.uk/sites/default/files/2022-06/20220614_1429_Judgment_FINAL%20%5B2022%5D%20CAT%2026.pdf.

⁴ <https://www.bwb.gv.at/news/detail/zusammenschluss-metafacebook-giphy-ogh-bestaetigt-freigabe-unter-auflagen-durch-kartellgericht>.

In both the UK and Austria, competition authorities investigated both horizontal and vertical theories of harm, see Table 1. The horizontal theories of harm considered whether the acquisition would result in a loss of potential competition in display advertising by eliminating Giphy as a competitor to Meta.⁵ The vertical theories of harm considered whether Meta could have reduced competition in social media by means of input foreclosure if/where rivals to Facebook rely on access to GIFs as an input.

Table 1
Treatment of theories of harm across jurisdictions

	UNITED KINGDOM	AUSTRIA
Horizontal theory of harm	Competition authority and Court found a substantial lessening of competition (SLC).	The Courts found no significant anti-competitive effects.
Vertical theory of harm	Competition authority and Court found a substantial lessening of competition (SLC).	The Courts found possible anticompetitive effects, which could be addressed by behavioural remedies.
Outcome	Prohibition	Clearance with remedies

Note: The Austrian competition authority also investigated a theory of harm based on Meta gaining access to sensible information through Giphy. We do not discuss this theory in this article.

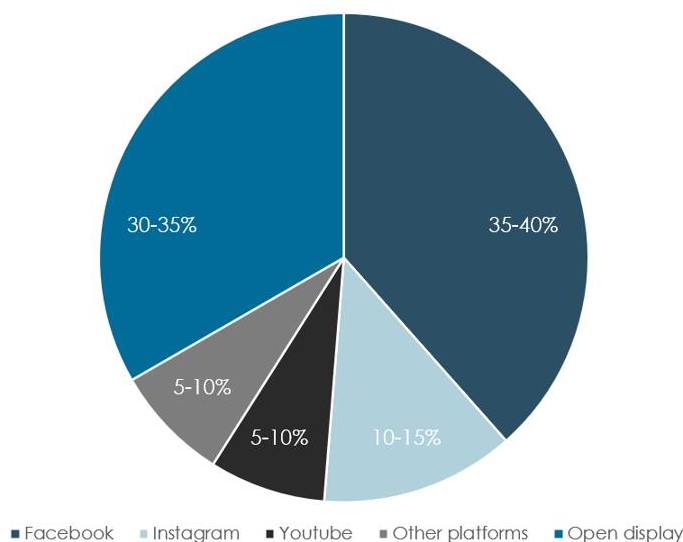
Source: Copenhagen Economics based on CMA (2021) Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. – Final report; CAT (2022), Case No: 1429/4/12/21; <https://www.bwb.gv.at/news/detail/zusammenschluss-metafacebook-giphy-bwb-erhebt-rekurs-gegen-freigabe-unter-auflagen>.

UK and Austrian courts reach different conclusions on future competition in digital advertising (horizontal concerns)

The competition authorities in both the UK and Austria advanced horizontal theories of harm which considered the likelihood of the acquisition substantially lessening competition by removing Giphy as a potential competitor to Meta/Facebook in display advertising. The theory of harm focused on Giphy as a *potential* competitor, as Giphy had a negligible market share at the time of the acquisition, see for example Figure 1.

⁵ We do not discuss the definitions of relevant markets in this article.

Figure 1
Meta's market share in display advertising is strong, while Giphy's is negligible
Shares of expenditure in UK display advertising (2019)



Note: Segments shown in the chart are illustrative, based on mid-points of the stated ranges rather than actual revenue figures. The 'other platforms' segment includes: Amazon, LinkedIn, Pinterest, Snapchat, TikTok and Twitter, each of which have shares in the range [0-5]%. Giphy is neither mentioned in this figure, nor elsewhere in the report.

Source: CMA (2020) Market study final report - Online platforms and digital advertising, Figure 5.9.

In both cases, the theories of harm have since been reviewed by national courts. But the assessment of the (similar) theories has resulted in different outcomes.

The Austrian Courts found no anti-competitive effects based on Giphy's potential service in digital advertising. While little information is publicly available, it is likely that the Austrian Courts considered the European Commission's guidelines on the assessment of horizontal mergers. According to the guidelines, horizontal anti-competitive effects arise only there is no "sufficient number of other potential competitors" after the acquisition.⁶ This condition may provide a stiff challenge, as it is naturally problematic to predict which companies *could* compete on a specific market.

⁶ European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Paragraph 60: "For a merger with a potential competitor to have significant anti-competitive effects, two basic conditions must be fulfilled. First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion. Second, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger."

In the UK, the CAT supported the CMA's findings that the acquisition will lead to a substantial lessening of competition in the market for display advertising services in the UK, arising from a loss of dynamic competition. To explain this finding, the CMA specifically noted the difficulty in predicting Giphy's future success as a competitor of Meta but did not view this uncertainty as a legal barrier: "[...] whilst the likelihood of successful expansion by GIPHY was necessarily uncertain at the time of the Merger, our view is that its ongoing efforts to innovate and expand would have driven dynamic competition in the display advertising market."⁷

The CMA appears amenable to considering potential competition from market entrants that do not have an established product. This is a relatively novel approach, based on a type of competition requiring assessment with a different economic toolbox than that of actual competition.⁸

Only the Austrian courts were convinced by Meta's remedies (vertical concerns)

The competition authorities in both the UK and Austria advanced vertical theories of harm considering whether Meta could have substantially lessened competition and strengthened its market power in the social media sector by foreclosing its rivals from access to Giphy's GIF service after the acquisition. While the courts in the UK and Austria agreed on the fact that Meta had the ability and incentive to practise input foreclosure after the acquisition, potentially resulting in a substantial lessening of competition (SLC) in the social media sector, they had diverging predictions regarding the effectiveness of behavioural remedies in this case.

In its final report, the CMA concluded that Meta had both the ability and incentive to foreclose its rivals. The CMA argued that Meta had the ability to foreclose because GIFs are an important input for social media platforms and only one other GIF provider offers a comparable service to Giphy (Tenor, owned by Google)⁹. Regarding the incentive to foreclose, the CMA found that reducing the engaging features, i.e. GIFs, on rival social media platforms would likely mean that users would switch at least part of their time to Facebook. At the same time, the cost of foreclosure arising from limiting access to Giphy and thus reducing the revenues of its GIF service would not be large enough to deter Meta from engaging in this strategy (as it would have more to gain than to lose).¹⁰

The CMA did not find behavioural remedies suitable to address the competition concerns in this case due to the dynamic nature of the SLC and the fact that they are not time-limited, stating that this would reduce the likelihood of behavioural remedies to provide an effective solution. Instead, the CMA found a full divestiture of Giphy to be the only effective remedy.¹¹ Meta contested the imposed remedy arguing that the CMA had failed to assess remedies for the vertical SLC in isolation, without considering the horizontal SLC, as the divestiture could not rationally be justified by the vertical SLC alone.

⁷ CMA (2021) Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. – Final report, Para 7.253.

⁸ See the article by our colleagues Norbert Maier and Kalle Kantanen published in the CPI Antitrust Chronicle for a related discussion: <https://copenhageneconomics.com/publication/economics-of-potential-competition/>.

⁹ CMA (2021) Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. – Summary of final report, Para 48.

¹⁰ CMA (2021) Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. – Summary of final report, Para 49.

¹¹ CMA (2021) Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. – Summary of final report, Para 59.

The Austrian Cartel Court and the Austrian Supreme Court also found that Meta had the ability and incentive to foreclose its rivals from accessing Giphy.¹² However, it did not agree with the CMA's prediction that behavioural remedies would be ineffective in this case. The court approved the acquisition with remedies, which would mitigate the anticompetitive vertical effects. These include that Meta must (i) ensure non-discriminatory access for its rivals to Giphy's Gif library for five years and (ii) support an alternative Gif provider in building a Gif library within seven years.¹³

Conclusions

Predictions in merger case are a difficult task for competition authorities and courts and can lead to a range of repercussions, as Meta's acquisition of Giphy shows. Multinational companies will watch this case closely and notice that they have to account for the risk of differing outcomes of acquisitions in different jurisdictions. They also have to be aware that acquisitions of companies with a negligible market share may also lead to investigations and even to prohibitions in some jurisdictions.

Please reach out to the authors of this article if you are interested in discussing issues related to this case or similar matters. The article is exclusively based on publicly available information.

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¹² <https://www.bwb.gv.at/news/detail/zusammenschluss-metafacebook-giphy-ogh-bestaetigt-freigabe-unter-auflagen-durch-kartellgericht>

¹³ <https://www.bwb.gv.at/news/detail/zusammenschluss-metafacebook-giphy-bwb-erhebt-rekurs-gegen-freigabe-unter-auflagen>