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**Bundeskartellamt clears acquisition of Kustomer by Meta (formerly Facebook)**

Sector: Digital economy

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On 11 February 2022 the Bundeskartellamt cleared plans by Meta Platforms, Inc., Menlo Park/USA (formerly: Facebook, Inc.), to acquire sole control of Kustomer, Inc., New York/USA, in the first phase of merger control.<sup>1</sup>

**The parties**

Meta Platforms, Inc., is the Meta group's US American parent company established in 2004 under the name Facebook, Inc. Together with its subsidiaries, the company globally develops and operates digital products, online services and smartphone applications (in the following: apps) especially in the social media area as well as online advertising products. The company's products include the ad-financed social network *Facebook*, the photo and video network *Instagram* and the messenger apps *Facebook Messenger* and *WhatsApp*. Facebook also offers corporate clients application programming interfaces (APIs) for these communication channels, e.g. the WhatsApp Business API or the Messenger API for Instagram, which make it possible to integrate these communication channels into enterprise software.

Kustomer, Inc., established in 2015 and also based in the USA, offers a cloud-based customer relationship management (CRM) service available worldwide. CRM services and software allow companies to manage customer data and interactions, among other things. Kustomer offers a so-called Software as a Service (SaaS) model in which the software is not run locally as part of the corporate clients' IT infrastructure but online, providing corporate clients with corresponding access possibilities. A key feature of Kustomer's product involves the bundling of various communication channels which corporate clients use to communicate with their end customers. This also includes Meta's communication channels *Facebook*,

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<sup>1</sup> See Bundeskartellamt's press release of 11 February 2022 at [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11\\_02\\_2022\\_Meta\\_Kustomer.html;jsessionid=0F9DBE53694EA7A7666F184FOEABF686.1\\_cid362?nn=3591568](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/11_02_2022_Meta_Kustomer.html;jsessionid=0F9DBE53694EA7A7666F184FOEABF686.1_cid362?nn=3591568)

*Facebook Messenger, Instagram and WhatsApp*, which are made available to Kustomer via APIs. In the CRM system all interactions with any given end customer can be unified in a so-called timeline.

### **The proceeding**

The merger was first notified to the Austrian competition authority (BWB) in early 2021. The BWB requested the proceeding to be referred to the European Commission pursuant to Article 22(1) ECMR. Germany did not join the application for referral because it is the Bundeskartellamt's general policy that a referral requires a merger to be subject to notification under national competition law, which still had to be clarified in the present case.

The European Commission granted the request pursuant to Article 22(3) ECMR and examined the merger project in second phase proceedings. Due to competition concerns expressed by the European Commission, the parties to the merger offered commitments which are intended to ensure non-discriminatory access to all business APIs (Messenger, Instagram Direct Messenger and WhatsApp) for ten years. The Commission cleared the merger on 27 January 2022 subject to these commitments.<sup>2</sup>

The Bundeskartellamt first examined in a determination proceeding whether the merger was subject to notification based on the transaction value threshold; this was formally determined in the authority's decision of 9 December 2021.<sup>3</sup> Meta appealed this decision to the Düsseldorf Higher Regional Court. The appeal proceeding is still ongoing.

### **Effects on competition**

Kustomer offers a cloud-based CRM service which is especially characterised by the fact that various communication channels between Kustomer's corporate clients and their end customers can be unified. This allows corporate clients to interact with their end customers on various communication channels. At present, Meta is active in this business area only to a comparatively small extent with its Unified Inbox being limited to the communication channels offered by Meta. The commitments offered in the European Commission's proceeding, which the Bundeskartellamt took into account in its examination, also ensure that competitors will have access to Meta's important communication channels in the future. As a result, the Bundeskartellamt was able to conclude that, when looking at the CRM market alone, the merger project would only have minor effects.

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<sup>2</sup> See press release of the European Commission of 27 January 2022, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_4030](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4030).

<sup>3</sup> See the Bundeskartellamt's press release of 9 December 2021 at [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/09\\_12\\_2021\\_Meta\\_Kustomer.html?nn=3591568](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/09_12_2021_Meta_Kustomer.html?nn=3591568)

However, in the Bundeskartellamt's view, the merger project also had to be examined in the wider context of Meta's ecosystem operated in the social media area,<sup>4</sup> which includes the wide-reaching services Facebook, Instagram and WhatsApp and is mainly monetised through online advertising. It had to be examined whether the merger project could be expected to protect, advance or strengthen the ecosystem in such a way that the creation or strengthening of a dominant position on a certain market as required under Section 36(1) GWB or any other significant impediment to effective competition could be predicted with the necessary level of probability. In the Bundeskartellamt's view, it is conceivable in this regard that the acquisition of certain services and capabilities will overall lead to a strengthening of the ecosystem, which then indirectly translates into the strengthening of Meta's market position on specific individual markets. In this context, it was particularly possible that Meta's position in the social media online advertising area could be strengthened.

The first important aspect in this respect was that, according to the Bundeskartellamt's assessment, Meta would gain improved access to the data of Kustomer's corporate clients and the data of their end customers processed by Kustomer as a result of the merger. According to Kustomer's own description, these clients particularly include customers from the e-commerce sector in a wider sense (retail and e-commerce, financial services, travel and hospitality, marketplace, but also higher education and government) the importance of which has significantly increased in recent years. The data advantage resulting from this can be used by Meta for various services within the ecosystem, especially for online advertising.

In addition, there is much to suggest that Meta will use the planned merger to further develop its own services. For example, Kustomer's communication functions could be used to further develop Meta's marketing services in a wider sense or its tool Shops offered in the shopping area. Shops allows small and medium-sized online retailers in particular to set up a virtual shop to present their own products and initiate purchasing processes. For the further development of Shops, it could be a significant competitive advantage if Meta were able to offer not only product presentation and the handling of almost the entire purchasing process, but if it were also possible for clients to maintain end customer relations via Kustomer.

Both the data advantage and the possibility to further develop Meta's own services could affect the Meta ecosystem as a whole and indirectly also the area of social media online advertising, in which Meta already

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<sup>4</sup> See also the Bundeskartellamt's decision determining Meta's "paramount significance for competition across markets" within the meaning of Section 19a(1) GWB, Bundeskartellamt's press release of 4 May 2022, [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/04\\_05\\_2022\\_Facebook\\_19a.html](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/04_05_2022_Facebook_19a.html)

has at least a very prominent position. First, the further development of Shops outlined above and the associated appeal for online retailers to use Shops could result in an increased demand for online advertising on Meta's social media by these online retailers, especially if Meta offers the full range of individual products as an integrated product. Second, the bundling of individual communication channels offered by Kustomer also simplifies the technical integration of online advertising formats pertaining to direct communication between advertisers and social media users (so-called click-to-message advertising). Third, if Meta integrates Kustomer into its own services, it will also be possible to access the end customer data stored in Kustomer more easily – be it technically or by offering incentives to Kustomer's clients – for the purpose of online advertising.

As a result, it seemed quite possible that the merger would have an indirect effect on competition in markets in which Meta already has a strong position. However, it was not possible to establish with the necessary level of probability that the services and capabilities associated with Kustomer were of sufficient significance for the ecosystem to develop in such a way to warrant a more detailed examination of the merger. Against this backdrop, the Bundeskartellamt decided not to initiate an in-depth investigation.