



Antitrust aspects of AdBlocking and counter measures

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I. Introduction: AdBlocking – an issue of antitrust laws?



AdBlocking – an issue of antitrust laws?

Effects of AdBlock software in general:

AdBlock software ...

- prevents the user from being bothered by obtrusive advertising;
- may cut off the revenue stream of advertising-funded websites;
- is by some people regarded even as a violation of the freedom of press.

➡ AdBlocking – an issue of antitrust?

➡ Abuse of a dominant market position / abuse of relative market power?

Effects of whitelisting:

Whitelisting practices ...

- may entail a discrimination of larger companies if a so-called expense allowance is requested;
- may vest AdBlock providers with strong power in selecting so-called “*acceptable*” advertisement;
- may urge advertising companies to agree on a bundle of similar whitelisting agreements with AdBlock providers.

➡ Whitelisting – an issue of antitrust?

➡ Whitelisting as a “*hub and spoke*”-cartel?

AdBlocking – an issue of antitrust laws?

Legal proceedings in Germany

- several legal proceedings in Germany trying to stop the business model of AdBlock software and in particular the system of whitelisting
- recent cases:

Court	Reference number	Status	Antitrust issue?
Regional Court of Hamburg	416 HKO 159/14	decided on Apr. 21, 2015	no
Regional Court of Munich I	37 O 11843/14	decided on May 27, 2015	yes
Regional Court of Munich I	37 O 11673/14	decided on May 27, 2015	yes
Regional Court of Cologne	33 O 132/14	decided on Sept. 29, 2015	no



II. AdBlocking: an abuse of a dominant position?



AdBlocking: an abuse of a dominant position?

Dominant position of AdBlock providers?

- prohibition of the abusive exploitation of a dominant position under sec. 19 (1) ARC and art. 102 TFEU
- German specific provision on unilateral conduct: abusive exploitation of relative market power under sec. 20 (1) ARC

Market domination, despite free download?

- provisions of antitrust law apply to those undertakings offering goods or services in return for payment only
- exception: also a business model that is free to users can constitute a business activity under certain circumstances, e.g. in case of free but advertising-financed newspapers or magazines
- strong connection between free offer of software and system of whitelisting against payment
 - ➡ business model to be regarded as separate entity creating a new market of its own?

AdBlocking: an abuse of a dominant position?

Dominant position of AdBlock providers?

Relevant product market (1)

■ Market of activation?

- market definition to be considered from the perspective of the demand side
- activation of “*acceptable*” ads against payment as *service*?
- But: market definition which focuses on the market for activation without considering the number of users that use AdBlock software “*too narrow*”?
- Regional court of Munich: not to decide if the market of activation is affected or not as this was not covered explicitly by the plaintiff's application for relief and as the disputed conduct didn't concern this relevant market

AdBlocking: an abuse of a dominant position?

Dominant position of AdBlock providers?

Relevant product market (2)

■ Market of AdBlock software?

- no affection of the market due to service for free?
- no service (such as activation) which is provided for / received by the plaintiff?
- other ways or possibilities of blocking advertising not relevant (such as specific browser settings or antivirus programs which might offer overlapping services; there are about 60 close substitutes offering such services, according to AdBlock providers)?

AdBlocking: an abuse of a dominant position?

Dominant position of AdBlock providers?

Relevant product market (3)

■ User market?

- interest of website owners: operating business model / financing content by displayed advertising
- But: impact by AdBlock providers' conduct or impact by users' decision to install AdBlock software?
- Relevant figure: potential addressees of displayed advertising; but: users can rather disable or replace installed AdBlock software in question at any time
- website operators depending on those users having installed AdBlock?
- possibilities of website operators to switch to other users and thus, to display certain advertisements to others (e.g. payment for online content, enforcing of advertising, etc.)
- regional court of Munich: user market as relevant product market

AdBlocking: an abuse of a dominant position?

Dominant position of AdBlock providers?

Relevant geographic market?

- rather national market due to linguistic boundaries

Dominant position?

- dominant position if market share $\geq 40\%$ (sec. 18 (4) ARC and jurisdiction of ECJ)
- current dissemination / frequency of AdBlock software to be considered
- calculation on the basis of the number of downloads?
- fragmentation of the relevant market?
- ability of opposite market side to resort to other undertakings and alternative actions to reach users (sec. 18 (3) no. 8 ARC)

 **no dominant position of AdBlock providers so far according to German courts**

AdBlocking: an abuse of a dominant position?

Alternatively: Abuse of an allegedly dominant position?

- abuse if a dominant undertaking as supplier or purchaser of certain kinds of goods or commercial services impairs the ability to compete of other undertakings in a manner affecting competition in the market and without any objective justification (sec. 19 (2) no. 1 ARC, art. 102 TFEU)





III. Whitelisting: a violation of the cartel prohibition?



Whitelisting: a violation of the cartel prohibition?

Agreement / hub and spoke arrangements?

- no binding agreement, but rather concerted practice arising out of coordination
- “*hub and spoke*” arrangement?
 - concerted practice through third party (coordinated vertical agreements)?
 - intention to collaborate between website operators entered into a whitelisting agreement?
 - restriction on Internet advertising market rather resulting from users’ decisions?
 - indication that website operators agree indirectly on a catalogue of “*acceptable*” forms of advertising in order to protect themselves against competition from other providers of “*not acceptable*” forms of advertising?
- threatening or causing of disadvantages, or promise or granting of advantages to other undertakings to induce them to engage in conduct which, under the ARC or the European Competition Law, shall not be made the subject matter of a contractual commitment, according to sec. 21 (2) ARC?
- violation of sec. 21 (3) ARC in default of coercion?

Whitelisting: a violation of the cartel prohibition?

Aiming at or causing of a restriction of competition?

- purpose of restricting competition by website operators by entering into whitelisting agreements?
- instead: mere response to a pre-existing situation which is detrimental to their own businesses?

Exemption?

- exemption of horizontal agreements according to sec. 2 (1) ARC and art. 101 (3) TFEU?
- exemption of whitelisting agreements as vertical agreements according to sec. 2 (2) ARC and art. 101 (3) TFEU in connection with art. 2 (1) CR 330/2010 (Vertical Block Exemption Regulation)?
 - market share thresholds of art. 3 CR 330/2010 of about 30% exceeded?
 - hard-core restriction under art. 4 CR 330/2010?
 - non-exempted restriction under art. 5 CR 330/2010?



IV. Counter measures and antitrust

Counter measures

Possible counter measures

- limitation of the access to websites to visitors not using Adblock software;
- access for users having installed Adblock software only against payment;
- access for all users only against payment;
- use of software aiming at blocking AdBlocker (e.g. stopadblock.org)

Possible antitrust issues of such counter measures?

- (**Hypothetical!**) Coordination: agreement or concerted practice between website operators aiming to
 - to use Anti-AdBlock software?
 - to deny access to all users having Adblock software installed on their devices?



V. Conclusion



Conclusion

- continuance of the jurisdiction of the German Federal Court of Justice (concerning TV-AdBlocking, 2004)
- difficulties in defining the relevant product market and the dominant position of undertakings
- criticized by some
 - charges for whitelisting?
 - deficient transparency concerning selection criteria?
 - AdBlock provider's ability to take an active role and to thus generate sales by influencing the selection?
- all actions against AdBlock providers in front of German courts dismissed **up to now**
- **however**, potential change in the future indicated if
 - spread of AdBlock software further increases, or
 - system of whitelisting in its current form is considered violating competition law in the next level of jurisdiction



Thank you for your attention!

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Vita

- Admitted to the Bar since 2003
- 1970 in Amberg, Germany

Education and former activities

- Gleiss Lutz Rechtsanwälte, München and Stuttgart (2003-2008)
- Herbert Smith LLP, London (2006)
- Head of the Executive Office of a German Insurance Group (2001-2002))
- Bavarian Ministry of Economics, Transport and Technology, at last Head of the Office of the Minister (1996-2001)
- University of Regensburg (Bar Exam 1996, Dr. jur. 2006)

Affiliations

- DIS Deutsche Institution für Schiedsgerichtsbarkeit e.V.
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