Ad blocker could contravene German cartel law

IRIS 2020-1:1/11

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In a ruling of 8 October 2019, the German Bundesgerichtshof (Federal Supreme Court – BGH) overturned a decision by the Oberlandesgericht München (Munich Appeal Court – OLG) to declare a well-known ad blocker lawful. Although the judges of the highest German civil court confirmed the appeal court's findings with regard to competition law, they thought a number of questions remained unanswered where cartel law was concerned.

A legal dispute over the functioning of 'AdBlock Plus', which was sold by Eyeo GmbH, has been rumbling on for almost five years. The software, which can block advertisements on websites, is configured in such a way that individual, 'non-disruptive' ads can sometimes appear on websites if they are included on a so-called 'white list'. Small and medium-sized companies can unblock their ads free of charge, while larger website operators have to pay a fee to be added to the white list. Several media companies had complained, accusing the software provider of exploiting their services through unfair commercial practices, and had applied for an injunction. However, the Landgericht München (Munich District Court) had rejected their claim in the first instance. It ruled that the ad blocker's business model should not be classified as an aggressive commercial practice, which was prohibited. The Munich Appeal Court had confirmed this decision. The way in which ad blockers worked had also been approved in other court cases. The German Bundesverfassungsgericht (Federal Constitutional Court), for example, had recently dismissed a constitutional complaint brought by a large German online newspaper against a previous BGH ruling, which had declared the business model behind ad blockers lawful.

In its recent judgment, the cartels chamber of the BGH agreed that the ad blocker did not breach German competition law. Under the Gesetz gegen unlauteren Wettbewerb (Unfair Competition Act), for example, aggressive commercial practices were those that were likely to significantly impair the freedom of choice of the consumer or other market participant. The judges did not think this was the case here.

However, the BGH ruled that the appeal court had been wrong to dismiss claims put forward under cartel law, since the ad blocker could be unlawfully used to create a dominant market position.

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According to the BGH, a company that made software available to Internet users free of charge, enabling them to block adverts when they visited websites funded by advertising, and that offered the operators of the websites concerned the chance to pay to join a white list that enabled them to unblock their adverts, held a dominant position in the market for the provision of access to users who had installed its ad blocker if the operators of the websites concerned had no other commercially viable means of accessing these users.

Under the ruling, the case was referred back to the appeal court for a new decision. The BGH also pointed out that, if the ad blocker provider was found to hold a dominant market position, there would need to be a comprehensive balancing of interests that could also lead to the ad blocker being declared unlawful.

Urteil des Bundesgerichtshofs vom 8. Oktober 2019 - KZR 73/17 -

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=100748&pos=0&anz=1

Judgment of the Federal Supreme Court of 8 October 2019, KZR 73/17

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