Anti-unfair competition developments
The Facebook and AdBlock Plus cases in Germany

Adrian Emch
Partner,
Hogan Lovells, Beijing
Outline

• Overview
• Facebook case
• AdBlock Plus cases
• Discussion
Overview
Anti-monopoly law

- Germany: Art. 101 and 102 TFEU, EUMR
- China: AML

Anti-unfair competition Law

- China: AUCL

Other entities:
- Germany: BKA, SAMR, Courts
- China: UWB, SAMR & Courts
Germany

GW§ 18 Market Dominance
(1) An undertaking is dominant where, as a supplier or purchaser of a certain type of goods or commercial services on the relevant product and geographic market, it
1. has no competitors,
2. is not exposed to any substantial competition, or
3. has a paramount market position in relation to its competitors.
(2) The relevant geographic market may be broader than the area of application of this Act.
(2a) The assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge.
(3) In assessing the market position of an undertaking in relation to its competitors, account shall be taken in particular of the following:
1. its market share,
2. its financial strength,
3. its access to supply or sales markets,
4. links with other undertakings,
5. legal or factual barriers to market entry by other undertakings,
6. actual or potential competition from undertakings domiciled within or outside the area of application of this Act,
7. its ability to shift its supply or demand to other goods or commercial services, and
8. the ability of the opposite market side to resort to other undertakings.
(3a) In particular in the case of multi-sided markets and networks, in assessing the market position of an undertaking account shall also be taken of: 1. direct and indirect network effects, 2. the parallel use of services from different providers and the switching costs for users, 3. the undertaking’s economies of scale arising in connection with network effects, 4. the undertaking’s access to data relevant for competition, 5. innovation-driven competitive pressure.
(4) An undertaking is considered to be dominant if it has a market share of at least 40 per cent.
(5) Two or more undertakings are dominant to the extent that
1. no substantial competition exists between them with respect to a certain type of goods or commercial services and
2. they fulfill in their entirety the requirements of paragraph 1.
(6) A body of undertakings is presumed to be dominant if
1. it consists of three or fewer undertakings reaching a combined market share of 50 percent, or
2. consists of five or fewer undertakings reaching a combined market share of two thirds.
(7) The presumption of paragraph 6 can be rebutted if the undertakings demonstrate that
1. the conditions of competition are such that substantial competition between them can be expected, or
2. that the body of undertakings has no paramount market position in relation to the remaining competitors.

China

Art. 17(2)
For the purposes of this law, a dominant market position is a market position where a business operator is able to control the price, the quantity or other trading conditions in the relevant market, or is able to restrict or affect the ability of another business operator to enter into the relevant market.

Art. 18
The dominant market position of a business operator shall be determined based on the following factors:
1. the market share of the business operator and the state of competition in the relevant market;
2. the ability of the business operator to control the sales market or the market for the purchase of raw materials;
3. the financial and technical capacity of the business operator;
4. the extent of economic dependence by other business operators on that business operator;
5. the degree of difficulty for other business operators to enter the relevant market;
6. other factors relevant to the determination of the dominant market position of the business operator.

Art. 19
Business operators which meet any of the following conditions can be presumed to have a dominant market position:
1. the market share of one business operator in the relevant market amounts to 1/2;
2. the aggregate market share of two business operators in the relevant market amounts to 2/3;
3. the aggregate market share of three business operators in the relevant market amounts to 3/4.

In the situations stipulated in the preceding indents (ii) and (iii), if a single business operator has a market share of less than 1/10, that business operator shall not be presumed to have a dominant market position.

If the business operator presumed to have a dominant market position can prove with evidence that it does not have a dominant market position, it shall not be held to have a dominant market position.
# Anti-Monopoly Law – Abuse

<table>
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<tr>
<th>Germany</th>
<th>China</th>
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<tr>
<td><strong>GWB § 19 Prohibited Conduct of Dominant Undertakings</strong>&lt;br&gt;(1) The abuse of a dominant position by one or several undertakings is prohibited.&lt;br&gt;(2) An abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services 1. directly or indirectly impedes another undertaking in an unfair manner or directly or indirectly treats another undertaking differently from other undertakings without any objective justification;&lt;br&gt;2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition exists shall be taken into account;&lt;br&gt;3. demands less favorable payment or other business terms than the dominant undertaking demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation;&lt;br&gt;4. refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate consideration, provided that without such joint use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such joint use is impossible or cannot reasonably be expected;&lt;br&gt;5. requests other undertakings to grant it advantages without any objective justification; in this regard particular account shall be taken of whether the other undertaking has been given plausible reasons for the request and whether the advantage requested is proportionate to the grounds for the request.</td>
<td><strong>AML Art.17(1)</strong>&lt;br&gt;A business operator in a dominant market position is prohibited from engaging in the following activities that amount to an abuse of that dominant market position: 1. selling products at unfairly high prices or purchasing products at unfairly low prices;&lt;br&gt;ii. without legitimate reasons, selling products at prices below cost;&lt;br&gt;iii. without legitimate reasons, refusing to deal with trading partners;&lt;br&gt;iv. without legitimate reasons, forcing trading partners to exclusively deal with the business operator or with business operators designated by the latter;&lt;br&gt;v. without legitimate reasons tying products, or attaching other unreasonable trading conditions;&lt;br&gt;vi. without legitimate reasons, applying differential treatment concerning trading conditions, such as prices, to trading partners in equivalent conditions;&lt;br&gt;vii. other abuses of a dominant market position as determined by the Anti-Monopoly Enforcement Authority under the State Council.</td>
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Anti-unfair competition law

Germany

China

Competitors

Interference
Facebook case
BKartA issues press release on "preliminary assessment" on 19 December 2017

Vorläufige Einschätzung im Facebook-Verfahren: Das Sammeln und Verwerten von Daten aus Drittsignalen außerhalb der Facebook Website ist missbräuchlich

Meldung vom: 19.12.2017


Andreas Wandt, Präsident des Bundeskartellamts: „Wir sehen vor allem die Datensammlung außerhalb des sozialen Netzwerks von Facebook und ihre Zusammenführung mit dem Facebook-Konto als problematisch an. Informationen von Schnittstellen fließen auch dann Daten an Facebook und werden dort gesammelt und verwendet, wenn man andere Internetseiten besucht. Dies geschieht sogar schon, wenn man z.B. einen „Gefällt mir-Button“ gar nicht nutzt, aber eine entsprechende Seite aufgerufen hat, die die ein solcher Button innehatet ist. Die...
Dominance

- Market preliminarily defined as that for social networks
- Professional networks (eg, LinkedIn), messaging services or other social media (YouTube, Twitter, etc.) are not included
- Geographic scope is preliminarily defined as Germany, because majority of users contact friends and acquaintances in Germany
- Network effects and "lock-in" effects
- Economies of scale
- Indirect network effects towards advertisers
- Multi-homing allegedly not decisive, since Facebook has 90% user share
- "Superior access" to user personal data?
Facebook (3)

Abuse

• Data transmitted from third-party websites (through "like" buttons or "Facebook login" option) via APIs to Facebook
  – Allegedly even if user blocked web tracking on browser or device

• Facebook allegedly imposing "exploitative business terms"
  – Making use of services conditional upon user granting extensive permission to use personal data
  – Following Federal Court of Justice case, BKartA is looking at data protection principles to examine whether conduct is "exploitative"
  – Negative effects allegedly are "loss of control" over personal data for users, increase of user lock-in, and impact on advertisers
"The extent and form of data collection violate mandatory European data protection principles."

"Market dominance constitutes an interface to data protection law."

"Monitoring the data processing activities of dominant companies is therefore an essential task of the competition authority which cannot be fulfilled by a data protection authority."
AdBlock Plus cases
Adblock Plus

- Browser extension for adblocking
- ABP first released in 2006, initially for Firefox, later other browsers
- Owned and distributed by Eyeo GmbH (Cologne, Germany)
- Increasing usage, around 67m users
- Most popular adblocker and browser add-on worldwide
Adblock Plus (2)

Blacklisting (ad filtering)
Adblock Plus (3)

Whitelisting ("Acceptable Ads")

- Community controlled criteria
- Static appearance
- Preferably text only
- No interfering or disturbing placement
- Clearly labeled as advertisement

- Requires application and consent from Eyeo
- "Free for small companies and bloggers"
- "Proposed and discussed in community forum"
- Set as default: User must take action to disable whitelisting
- Eyeo gets 30% of revenues of white-listed ads
On 29 September 2015, 1st instance judgment by the Regional Court of Cologne dismissed plaintiff's claim.

2nd instance judgement by the Higher Regional Court of Cologne (OLG Cologne) on 24 June 2016 overruled 1st instance judgment.

19 April 2018 Bundesgerichtshof decision reverses 2nd instance judgment.

Only press release is available so far.
Bundesgerichtshof

- **Deliberate obstruction of competitor**
  - Intention to drive out competitor?
  - Direct interference?
  - Indirect interference?

- **General market obstruction**
  - “Destruction” of business model of free content with ads?

- **Aggressive commercial practice**
  - Undue influence significantly restricting ability to make informed decision?

- **Court's key focus on absence of countermeasures by Axel Springer**
2nd instance (OLG Cologne)

- **Deliberate obstruction of competitor**
  - Competitors for UWB purposes?
  - Physical impact on product or ads?
  - Free content in exchange for ad views – "tacit agreement" / obligation for users?
  - “Negative right to information”?

- **General market obstruction**
  - Conduct able to drive out competitors?

- **Aggressive commercial practice**
  - "Undue influence“?
    - Physical violence or threat, or undue influence?
    - Same as dominance threshold in antitrust sense?
    - Users' wish to view ad-free content as defense?

**Significant impairment of freedom of choice?**
  - Forcing purchase of services without real value?
Discussion
Discussion

• Boundaries between anti-monopoly law and unfair competition law?
  – Is Germany a special case?

• Differences Germany v. China in terms of markets and policies?
  – Historical focus on privacy (first against State, then also businesses)
    – Extreme focus on individual user – constitutional right ("negative right to information")
    – Wide-spread adversity towards ads (eg, mail boxes)
  – Not many Internet platforms from Germany
    – Limited focus on impact on them
    – Short-term gain (ads-free) v. long-term gain (substainable platforms)
  – Specific circumstances of Chinese development – significant investments by Internet platforms into copyrights
Thank you!

For any questions, please contact:

Adrian Emch

Tel: +86 10 6582 9510

Email: adrian.emch@hoganlovells.com