

Case summary

1 August 2023

Antitrust law examination of “Google News Showcase”

Sector:	Digital economy
File number:	V-43/20
Date of decision:	21 December 2022

On 21 December 2022 the Bundeskartellamt concluded the antitrust law examination of the “Google News Showcase” service (see I.), which was initiated in June 2021. The proceeding against Alphabet Inc., Mountain View, USA, including its associated companies (in the following: “Google”) was initiated due to competition concerns resulting from a possible preferential integration of Google News Showcase content into Google’s search results, contractual provisions making it more difficult for press publishers to enforce their ancillary copyright and possible discrimination in granting access to Google News Showcase (see II.). By taking various measures Google was able to largely dispel these concerns. As a consequence, the anti-trust law examination to determine whether Google abuses its position is discontinued. Within the scope of its discretion, the Bundeskartellamt decided not to issue a formal decision declaring Google’s commitments to be binding pursuant to Section 32b of the German Competition Act (GWB); instead, the authority will monitor the implementation of the remaining measures in a follow-up proceeding (see III.). During the examination, further competition law issues were brought forward beyond the accusations raised at the time the proceeding was initiated. The Bundeskartellamt followed up on some of these issues (see IV.).

I. The “Google News Showcase” service

On 1 October 2020 Google announced the launch of its “Google News Showcase” service in Germany.¹ According to Google, the service presents high-quality journalistic content for which Google pays licensing fees. In Germany, the service started with 20 media companies offering 50 publications. Among those were DER SPIEGEL, DIE ZEIT, Frankfurter Allgemeine Zeitung, Rheinische Post and Tagesspiegel, but also

¹ See blog entry of 1 October 2020, available in German at: <https://blog.google/intl/de-de/produkte/suchen-entdecken/weltweite-premiere-google-news-showcase/>.

publications offered by Burda (Focus Online), Funke Mediengruppe (WAZ), Gruner + Jahr (stern), Handelsblatt Media Group (Handelsblatt, WirtschaftsWoche), Ströer (t-online), Ippen Media Group (Münchener Merkur) and Mediengruppe Pressedruck (Augsburger Allgemeine, Südkurier). Further publishers and publications were added at a later stage.²

A key element of Google News Showcase are the so-called “story panels” which were first included in the Google News app on Android and as of December 2020 also in the Google News app on iOS. The story panels were later integrated into the Google News desktop service and the Google Discover service, a (personalised) news feed which can be accessed on smartphones without a specific app via other Google products, especially via the search app and the Chrome browser. When launching the service, Google also announced that the Google News Showcase content would be integrated into Google’s general search service.³

The story panels are showcase boxes in which photos, titles and other content appear in a condensed form under the publisher’s logo. The participating publishers thus have various options for presenting their content in a more prominent and detailed way than would be possible by generally listing the content in a news feed. In particular, they can offer a detailed preview of a specific article, presenting its content summarised in bullet points as a teaser in addition to the title, or present several articles made available by them together (this includes overviews showing the “news of the day” and “story clusters” which provide other articles related to the content of a current article or articles related to a specific key word, e.g. “Covid-19 news”).

In contractual terms, the service is based on so-called publisher curated news agreements (PCNAs). Under these agreements, the publishers undertake to provide curated panels for integration into Google News Showcase. The publishers decide which content is selected and how it is presented. If a user taps or clicks on a Showcase panel, they are forwarded to the publisher’s website on which the article in question is published. Google also offers publishers an additional agreement under which individual articles for which readers would otherwise have to pay are made available to them via Showcase free of charge.

The provision of the “Google News Showcase” service and the present proceeding have to be seen against the backdrop of the wider discussion about the use of (extracts from) press publications by online services

² See blog entry of 31 March 2021, available in German at: <https://blog.google/intl/de-de/produkte/suchen-entdecken/google-news-showcase-erste-nutzungszahlen-und-neue-partner/>.

³ Blog entry of 1 October 2020, available in German at: <https://blog.google/intl/de-de/produkte/suchen-entdecken/weltweite-premiere-google-news-showcase/>

such as search engines, news aggregators or social networks and their relation to press publishers. With Directive (EU) 2019/790 of 17 April 2019 new copyright rules were created at a European level which are aimed at more broadly protecting press publications with regard to their online use by providers of information society services.⁴ Implementing this directive, the reformed Copyright Act came into force in Germany on 7 June 2021, introducing a new ancillary copyright for press publishers.⁵ This grants press publishers the exclusive right to make their press publications available and reproduce them, in full or in part, for online use by providers of information society services (Section 87g(1) of the German Act on Copyright and Related Rights, UrhG). This exclusive right does not encompass the creation of hyperlinks to a press publication and the use of individual words or very short extracts of press publications (Section 87g(2) no. 3 and no. 4 UrhG), among other things. When interpreting these exceptions, it has to be borne in mind that the interpretation is not allowed to affect the protection of the investments made by press publishers in the production of their content.⁶ The ancillary copyright can be asserted by publishers individually or collectively via a copyright collecting society. In Germany, the copyright collecting society Corint Media GmbH (in the following: Corint Media or complainant) is active in this area. The present proceeding is based on the complaint lodged by this copyright collecting society; at a later stage, the publisher associations BDZV, MVFP and VDL were also admitted to the proceeding.

II. Subject of the proceeding and competition law concerns

The proceeding concerned the Google News Showcase service, its contractual basis and its integration into other Google services, especially the announced link to Google's general search service. The fear was expressed that the integration of the Google News Showcase service into Google's general search service and the prominent placement it was expected to enjoy would result in the prohibited self-preferencing of Google's own competing publishing product. In addition, it was criticised that some provisions included in the underlying agreements impeded press publishers in asserting their ancillary copyright. Furthermore, the proceeding addressed the specific structure of the Google News Showcase service and the

⁴ DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ of the EU L 130/92 of 17 May 2019.

⁵ National rules governing the protection of press publishers had already existed. However, following a decision rendered by the European Court of Justice (decision of 12 September 2019, C-299/17 – VG Media) these rules had become inapplicable due to a failure to submit a notification pursuant to Directive 98/34/EC.

⁶ See statement of reasons for the government bill, Bundestag printed paper 19/27426, p. 113 with reference to Recital 58 of Directive (EU) 2019/790.

accusation that only some of the German publishers had been invited to participate. The negotiations between Google and individual publishers taken up in the course of the proceeding and relating to the remuneration for the ancillary copyright to use press publications outside the Google News Showcase service were per se not part of the proceeding, but had to be taken into account in assessing Google's practices (for more information on the accusations raised in the course of the proceeding see IV.).

According to the Bundeskartellamt's preliminary assessment, different provisions under Section 19a(2) sentence 1 GWB and Google's possible violations of Article 102 TFEU and Sections 19, 20 GWB could be examined:

1.) When launching the Google News Showcase service, Google had announced that it intended to also integrate the story panels characteristic of this service into its general search service. In light of how similar content had previously been presented, it seemed likely that the service would be integrated into the general search service in such a way that news-related search queries would result in the Google News Showcase service's distinct, prominent display on the result pages, for example in a separate "One Box" above or next to the generic search results.

This conduct could constitute self-preferencing within the meaning of Section 19a(2) sentence 1 no. 1 GWB. Google's general search service activities could be seen as mediating access to supply and sales markets within the meaning of the above provision. Google's search service is, among other things, relevant for press publishers to access readers and indirectly also advertising markets. If Google were to create its own service with its "News Showcase Box", it would not be allowed to favour this service over the services of competitors unless such conduct would be objectively justified.

In addition, it was also possible that a measure impeding other undertakings in carrying out their business activities within the meaning of Section 19a(2) sentence 1 no. 2 GWB existed. This provision could be applicable since the publishers are active on various sales markets (reader and advertising markets) and Google's activities relating to the general search service are relevant for accessing these markets. If the News Showcase service is integrated and prominently displayed, it may be expected that other content providing services offered by the publishers or other news providers will be less visible and suffer competitive losses.

Concerns existed also with regard to Google possibly abusing its dominant position in the German market for general search services (Article 102 TFEU). The preferential display and positioning of Google's own news service and the associated loss of user traffic on non-integrated publishers' websites could constitute abusive conduct in the form of bundling or the transfer of market power.

2.) Competition law concerns also arose in relation to individual contractual provisions included in various versions of the PCNA submitted to the Bundeskartellamt. This concerned termination rules which could be interpreted to mean that the possibility to participate in the Google News Showcase programme was linked to the respective publishers' conduct regarding the general enforcement of the ancillary copyright. In some cases, it was also expressly agreed that any potential use of the ancillary copyright in other Google services (outside of Google News Showcase) was deemed paid for and settled.

Stipulating such terms and conditions could be seen as demanding disproportionate benefits within the meaning of Section 19a(2) sentence 1 no. 7 GWB. Under this provision norm addressees can be prohibited from demanding benefits for handling the offers of another undertaking which are disproportionate to the reasons for the demand. In particular, it is prohibited to demand the transfer of rights which are not absolutely necessary for the purpose of presenting the offers (Section 19a(2) sentence 1 no. 7(a) GWB). According to the authority's preliminary assessment, the disproportionate nature could result from the fact that the demanded rights make it significantly more difficult for publishers to assert their ancillary copyright in the future. This seemed problematic also with regard to the general rules relating to abusive business terms (Article 102(a) TFEU, Section 19(1), (2) no. 2 GWB) and the prohibition to demand disproportionate benefits (Section 20(2), Section 19(2) no. 5 GWB) because it was suspected that obligations are imposed on publishers which are not indispensable for achieving the (legitimately) pursued aim and which unfairly restrict their freedom of action.

3.) Lastly, there were indications that participation in the Google News Showcase service was not offered in the same way to all generally eligible publishers.

According to the Bundeskartellamt's preliminary assessment, a discriminatory practice in granting access to the service could impede the excluded publishers in carrying out their business activities on supply or sales markets within the meaning of Section 19a(2) sentence 1 no. 2 GWB. The reason for this is that Google's service is likely to be of considerable significance for publishers to gain access to readers and advertising markets. The unequal treatment of publishers would also be problematic under Article 102 TFEU, Section 19(1), (2) no. 1 GWB as far as Google holds a dominant position at the time the agreements are concluded and access to the News Showcase programme is granted. The prohibition to abuse a dominant position under Section 19(1), (2) no. 1 GWB also applies in cases of relative market power within the meaning of Section 20(1) sentence 1 GWB and in cases of power of intermediation (newly introduced in Section 20(1) sentence 2 GWB with the 10th amendment), which could be considered in the present case.

III. Measures taken by Google to dispel the concerns

In the course of the proceeding the authority was able to ascertain that Google had already changed or stopped some of the practices under examination. In addition, Google declared its willingness to address any remaining ambiguities and concerns by modifying the Showcase agreements and providing clarifying statements. The Bundeskartellamt consulted the publishing sector on Google's proposal for corresponding measures in January 2022. Based on the responses received in this context, Google amended and supplemented its proposal. In light of the already discernible changes and the announced measures, the situation has changed so that, in the Bundeskartellamt's view, it is no longer necessary to continue examining the original competition law concerns.

1.) Non-integration of Google News Showcase into Google Search

Google convincingly stated and, based on internal documents, demonstrated to the Bundeskartellamt that any considerations to integrate Google News Showcase into Google Search are no longer pursued. Google will also declare publicly and vis-à-vis its contractual partners that it has no plans to integrate Google News Showcase into Google Search or the search result pages by way of panels, distinct features or in any similarly prominent form. Should this change and should Google in the future plan to integrate Google News Showcase into Google Search in Germany, Google will inform its contractual partners, the Bundeskartellamt and the associations VDZ and BDZV of these plans at least three months in advance.

Moreover, Google credibly demonstrated and will also publicly declare that a specific press publisher's participation or non-participation in Google News Showcase is not a factor in the algorithm which determines the ranking of the search results in Google Search. Clicks on Showcase panels displayed in Google News and Discover are, for the purpose of their ranking in the Google Search algorithm, not treated differently than clicks on non-Showcase results in Google News and Discover.

Any concerns about Google creating its own news product which is given preferential treatment through its prominent integration in the Google Search results and which in this way creates the risk of impeding and ousting publishing services have thus been dispelled for now. The integration of the Showcase content into the Google News and Discover services was not part of the original complaint. In the Bundeskartellamt's view, it was not necessary to expand the proceeding to include this aspect (see IV. 4 below).

2.) Showcase agreements and negotiations regarding the ancillary copyright

In the proceeding, Google demonstrated that it has already changed some of the rules regarding termination. In particular, Google has given up its special termination right provided for in older versions of the

agreement in case the publisher asserts a legal claim or lodges or participates in a complaint relating to Google's use of news content, and has informed its contractual partners of this. Google has also already modified its termination right provided for in case of changes to the legal framework. In this regard, Google will make another adjustment to clarify that this termination right is limited to changes regarding the licensed Google News Showcase content. If agreements still include a clause stipulating that any potential use of the ancillary right in other Google services (outside of Google News Showcase) is deemed paid for and settled, Google will clarify vis-à-vis its contractual partners that in the future it will no longer invoke this provision and that this clause does not stand in the way of concluding a separate agreement on ancillary copyright fees.

The reason is that during the proceeding Google changed its contractual practice to the effect that separate agreements regarding the use of press content in Google services which crawl the internet, including Google Search, Discover and Google News, can be concluded (so-called "extended news preview" or "ENP" agreements). After having announced this publicly,⁷ Google has meanwhile concluded a large number of ENP agreements with press publishers. Google will once again confirm its intention to conclude such ENP agreements with further press publishers in a public statement. Google has stated to the Bundeskartellamt and will also publicly clarify that the Google News Showcase agreements and the ENP agreements exist separately, meaning press publishers are free to negotiate the licensing agreements individually and separately with Google, or in the case of ENP agreements have such agreements negotiated by a copyright collecting society.

In light of all the above, press publishers are no longer restricted by the contractual practices mentioned above in their freedom to conclude licensing agreements directly with Google for the monetisation of their ancillary copyright or to engage a copyright collecting society, such as the complainant, to enforce their right. The original accusation that specific provisions under the Showcase agreements, especially the termination clauses provided for in these agreements, are intended to make the (separate) enforcement of the press publishers' ancillary copyright more difficult or impossible can no longer be maintained (on licensing in the Showcase agreements see IV. 2. below).

⁷ See blog entry of 20 May 2021, available in German at: <https://blog.google/intl/de-de/unternehmen/inside-google/urheberrecht-reform-google-youtube-unterstuetzung/> and blog entry of 18 November 2021, available in German at: <https://blog.google/intl/de-de/unternehmen/inside-google/google-schliesst-erste-vertraege-mit-deutschen-verlagen-auf-basis-des-neuen-leistungsschutzrechts/>.

3.) Press publishers' access to the Google News Showcase service

The investigations have not confirmed the suspicion expressed to the Bundeskartellamt that Google News Showcase was to be limited to just a few publishing partners. Google moreover stated that the Google News Showcase service is in principle open to press publishers which meet the relevant criteria. According to Google, limitations may, however, result from the fact that, when taking into account the actual requirements, a sufficiently rich variety of press publishers may be reached for Google to be able to offer the intended product experience. Should it emerge in the future that this point will be reached and/or no budget will be available to take on additional Google News Showcase partners, Google will inform the associations VDZ and BDZV, the Bundeskartellamt and the public of this at least three months in advance.

In Germany, Google will provide information for users and press publishers in an easily accessible way under "News Showcase" on Google News on how Google News Showcase works and on what exactly is required from publishers wishing to participate in Google News Showcase. These requirements pertain to the conceptual focus of the participating publications' content, their quality, reach and contribution to media plurality within Google News Showcase as well as the fulfilment of technical requirements. Google made it clear to the Bundeskartellamt that it will not react to possible budget constraints in such a way that Showcase partners joining the programme later than others will be offered different remuneration. Moreover, Google has undertaken to inform the Bundeskartellamt of any planned renewals of the current agreements in good time and to provide for a shorter contractual term in new agreements. In the Bundeskartellamt's view, it is important to limit the term in order to also allow other publishers to newly join the programme in the future.

In view of the available budget as known to the Bundeskartellamt and the, to the authority's knowledge, currently only limited demand from other publishers to access Showcase, there are currently no indications of discriminatory or obstructive practices in granting access to the programme in the sense that a "race" for participation is induced or similar publishers are only selectively granted access. This issue may possibly arise anew once a sufficiently rich variety of press publishers has been reached in Google's view or the budget is exhausted. Since Google will report this in good time, it can then, if necessary, be reassessed whether the suspicion of discrimination based on the creation of a "closed shop" exists.

The Bundeskartellamt did not examine in more detail the conceptual focus of the Google News Showcase content and any limitations associated with this in terms of the general possibility to participate. The reason for this was that this aspect would have been less about unequal treatment for economic reasons and more about quasi-editorial decisions. In this regard, it has to be taken into consideration that access to Google News Showcase is subject to requirements under media law. In November 2021, the

Commission on Licensing and Supervision (ZAK) agreed to classify the Google News Showcase service as a media platform and user interface under media law.⁸ According to the provisions under the German State Media Treaty the company thus has the obligation, among other things, to ensure non-discriminatory and fair access for content providers.

4.) No decision declaring the commitments binding and monitoring of the implementation of measures

In the Bundeskartellamt's view, it was not appropriate in this proceeding to accept formal commitments by Google and declare them binding in a decision (Section 32b GWB). In addition to the fact that Google had already implemented some measures, greater flexibility in the event of future changes in circumstances or new findings was a major argument for terminating the proceeding without a formal decision. In addition, Google's practices in presenting the Showcase content or in granting access to Google News Showcase will not be hidden for long due to their very nature. This is additionally ensured by Google's obligation to report to the Bundeskartellamt.

The authority will oversee the further implementation of the measures in a separate follow-up proceeding. For a period of three years, Google will report back to the Bundeskartellamt once a year on how the implementation of the measures is progressing. Moreover, Google will also inform interested press publishers and the associations VDZ and BDVZ about the implementation in an easily accessible manner once during the three-year period and once at its end.

IV. Further accusations raised in the course of the proceeding

1.) Accusation of discrimination in the ENP negotiations

In the course of the proceeding, the complainant raised the accusation of discrimination by Google based on the grounds that agreements for the remuneration of the ancillary copyright (ENP agreements) were concluded with individual publishers while Google was not willing to seriously negotiate with the complainant. This was later specified to the effect that the complainant criticised the lack of a concrete offer from Google and demanded the interim payment of the "undisputed" amount, as laid down in the German Collecting Societies Act (VGG).

In this regard, the Bundeskartellamt pointed out the prohibition of discrimination under competition law to Google and emphasised that every publisher had to be given the choice to decide whether to enforce

⁸ See ZAK press release of 25 November 2021, available in German at: <https://www.die-medienanstalten.de/service/pressemitteilungen>.

its rights itself or collectively. The authority highlighted that, in this context, being able to seize a court (of arbitration) to clarify the appropriate remuneration amount was an interest worthy of protection.

In early February 2022, Google then submitted to the complainant a concrete offer and a draft interim agreement⁹ which was to include a payment from Google in an amount comparable to the one included in the individual ENP agreements. After cursory review, the interim offer was found to be comparable to the payments under the individual agreements with the specific publishers disclosed by Google. In the Bundeskartellamt's view, this ensured equal treatment and opened up the possibility for the publishers represented by the complainant to clarify the remuneration amount in an arbitration proceeding since at least for the duration of the arbitration proceeding, they would receive a payment equal to that of the publishers which have concluded bilateral agreements with Google.

From the Bundeskartellamt's point of view, the remuneration paid by Google under the Showcase agreements and other "non-cash benefits" received by individual publishers from Google, for example in the form of placed advertising, were not also to be taken into account in the comparative analysis to determine possible discrimination. The reason for this is that, according to the Bundeskartellamt's findings, Google News Showcase is a separate offering for which participating publishers have to provide services and bear costs. In addition to curating the panels' content, the services provided by the publishers particularly also involve making individual articles accessible which would otherwise be protected by a paywall. Costs are incurred for both the initial technical implementation and the ongoing editorial management of the Showcase service. Including the Showcase remuneration would also fail to take into account that the publishers are generally free to decide whether or not to participate in Google News Showcase. In the Bundeskartellamt's view, there were no indications of a concrete link between an "asymmetrical" distribution of advertising volumes, as was also claimed to exist, and the collective enforcement of the ancillary copyright.

As far as the complainant suggested depositing the disputed difference between the interim payment offered by Google as a settlement and the complainant's own demand, for the purpose of which the claimant cited the example of Section 37 VGG, this was not further pursued by the Bundeskartellamt at its discretion. This aspect is primarily asserted based on principles relating to copyright law, and the Bundeskartellamt believes that copyright enforcing bodies are better suited to clarify this. In the Bundeskartellamt's view, there was no clear need for further-reaching antitrust action, for example to protect

⁹ See also Corint Media press release of 3 March 2022, available at: <https://www.corint-media.com/en/3-2-million-euros-for-press-rights/>.

the complainant from possible defaults in Google's payments or to prevent a distortion of competition towards other search providers.

2.) Scope of the licence granted under the PCNA

The complainant criticised that, notwithstanding the separate ENP agreements that can now be concluded, Google continues to have publishers grant it a licence under the Showcase agreements (PCNA) which also covers the press publishers' ancillary copyright. It was argued that this licence would grant Google more extensive rights of use than necessary to present the curated content in the story panels and in particular would also entitle Google to use the content outside the panels. The lack of transparency resulting from the fact that no separate price is specified for the ancillary copyright in the PCNA was also criticised. In the complainant's view, the provision in the PCNA makes it impossible for press publishers to participate in the collective management of copyright. The complainant requests that the licensing of the ancillary copyright and the remuneration for this right be completely removed from the Showcase agreements and instead be included in the uniform and comprehensive licence granted under individual ENP agreements with publishers or under a general contract with the copyright collecting society.

The Bundeskartellamt asked Google to clarify to what extent the ancillary copyright is still included in the PCNAs and why it has not been fully transferred into the ENP agreements. The Bundeskartellamt holds that Google's responses and the wording of the PCNA, at least in its latest version, sufficiently show that the licence granted under the PCNA is limited to presenting the delivered content in the story panels characteristic of the Showcase service. Even if the same wording was displayed outside the story panels, in Google's general search service for example (e.g. because the title of an article is used in both cases), this would not be covered by the licence granted under the PCNA.

As the reason for such a limited licence as described above, Google cites its interest in being able to use the contractual story panels filled by the publishers in a legally secure manner. In the company's view, its conduct is common practice with regard to operative agreements. Google holds that with regard to such agreements it is neither possible nor common practice to conclude separate agreements for the granting of rights of use, or to specify a separate fee. Google further argues that it does not need the rights of all ancillary copyright holders but merely those of the publishers participating (or wishing to participate) in the service. However, in Google's view, this does not rule out the collective management of copyright for these publishers. According to Google, copyright collecting societies in practice apply different mechanisms to combine the collective management of copyright and the granting of individual rights, for example, by way of licensing agreements, conditions subsequent or grant back obligations.

The complainant describes its interests in such a way that it must exercise the ancillary copyright comprehensively and in full in the sense of an exclusive right to sole representation and must be granted exclusive rights of use for this purpose, which serves not least to protect the holders of the rights for whom collective management of copyright guarantees reliable use and exploitation for appropriate fees. The ancillary copyright created by the legislator as a single right can, in the complainant's view, not be licensed separately according to different surfaces, especially since this is also unusual in other areas.

Examining Google's contractual practices to assess whether the demands are disproportionate or the complainant is unfairly impeded essentially requires that the respective interests be considered and weighed up. In this context, neither side can claim that its favoured approach would be provided for under copyright law since, in the Bundeskartellamt's view, it is just as possible to incorporate such rights in an operative agreement as it is to carve out and collectively assert an undivided ancillary copyright. Common practice in other copyright-related areas is not support the one or the other interest either. Google and the complainant can both cite comparable cases supporting their respective approach. The interest in a sole right of representation asserted by the complainant may be partially affected as a result of the contractual provision, namely with regard to the ancillary copyright possibly necessary to display the panels in Showcase. However, since there are mechanisms under copyright law making it possible to combine the granting of rights under individual agreements and the activities of a copyright collecting society, the collective enforcement of the ancillary copyright is not ruled out. Google, in turn, would have to forego the possibility of being granted all necessary rights under an operative agreement. Since it cannot be expected that the supplied story panels are displayed without having clarified this question, publishers could effectively start participating in Showcase only after an ENP agreement has been concluded with the relevant publisher or its copyright collecting society has entered into a general agreement. This could increase the pressure on publishers negotiating individual agreements to agree to an ENP agreement in a timely manner. For publishers asserting their right collectively, it would not be possible to participate before Google and the complainant have reached an agreement (or at least an interim arrangement) – which is currently not expected to happen in the foreseeable future. The provision under Section 37 VGG does not change this since the rule per se merely provides a possibility for copyright users, and a further-reaching obligation under competition law to take action has not been established by the Bundeskartellamt (see above). Given the interests at stake and on the basis of the GWB's purpose of ensuring freedom of competition, there are, in the Bundeskartellamt's view, no indications with regard to the PCNA licence of an objectively unjustified impediment caused or disproportionate demands made by Google.

3.) Linking the access to Showcase to the conclusion of an ENP agreement

During the proceeding, the Bundeskartellamt received information according to which Google employees had supposedly stated in bilateral talks that participating in Google News Showcase was only possible for publishers that conclude an individual ENP agreement with Google. Google is said to have expressly prohibited individual publishers from participating in Google News Showcase while at the same time enforcing their rights collectively.

Such a de facto link between Showcase agreements and agreements on other ancillary copyright fees would contradict the principles declared by Google in the proceeding. In addition, it would be problematic also with regard to the prohibition of discrimination under competition law and due to it impeding the collective enforcement of rights. However, the Bundeskartellamt has so far only received anonymous and unspecified information on this matter, which Google has been confronted with and which Google has rejected. Moreover, the documents provided by Google also show that a large number of publishers which have not (yet) concluded an ENP agreement in fact participate in Google News Showcase. The Bundeskartellamt has agreed with Google that the authority will follow up on any future complaints without the complainant's identity having to be disclosed. This can be ensured, for example, by Google presenting, in the event of a complaint, all cases in which PCNAs were rejected in the period in which the complaint was raised and the reasons for the rejection to the Bundeskartellamt for the purpose of assessing the complaint's objective justification.

4.) Prohibition of the Google News Showcase service

In the course of the proceeding and most recently at the hearing regarding Google's proposed measures, the complainant and the associations admitted to the proceeding raised fundamental concerns about the Google News Showcase service and, with reference to Section 19a(2) sentence 1 no. 7 GWB, demanded measures which would result in the termination of Showcase in its current form and would have considerable effects on Google and the press publishers which have so far participated in this service. In particular, the statements outline arguments against the integration and prominent presentation of the story panels in the Google Discover and News services since the aim and consequence of this was to impede the publishers and replace publishing products. Furthermore, the limiting of the circle of participating publishers and the paying of a lump sum remuneration independent of the use of rights are also criticised. It is demanded that Google be obliged to include every press publisher in any news index without discrimination. This demand that all publishers which hold an ancillary copyright be treated as absolute equals would mean that a limited service such as Google News Showcase would not be possible per se.

The Bundeskartellamt does not fail to recognise that there may be potential for abuse if Google News Showcase is used as an instrument to selectively (and temporarily) improve the position of individual publishers. There are also indications, based on the findings gathered by the French competition authority for example, which suggest that Google News Showcase was originally intended by Google as a strategic instrument in the discussion about ancillary copyright fees. However, this potential for abuse has meanwhile been reduced significantly: Since the Showcase panels are only embedded in Discover and News and are not ranked higher in the news feed there and the traffic generated by them is of only limited importance (to date), there is no economic pressure for publishers to participate. At the same time, additional publishers can still participate and they do not have to fear lower fees if they participate at a later point in time. In addition, Google now also concludes agreements on ancillary copyright licensing fees irrespective of the publishers' participation in Google News Showcase and the adequacy of the remuneration amount offered in these agreements can be clarified in a proceeding before the board of arbitration of the German Patent and Trade Mark Office.

In contrast, extending the proceeding to review a possible prohibition of the Google News Showcase service in its current form as called for in the statements would require considerable additional investigations due to the far-reaching nature of this intervention and the differing interests pursued by the publishers, and would affect not only Google but also the economic and legal interests of numerous publishers. According to the Bundeskartellamt's findings so far, there are very different opinions on new forms of cooperation such as Google News Showcase in the publishing sector, which are also a result of different business models, corporate structures and the publishers' expectations for the future. In light of the developments described above and in the overall assessment to be exercised at its discretion, the Bundeskartellamt (currently) sees no reason for continuing and expanding the proceeding in this regard.

5.) Remuneration amount and comparison with France

In the proceeding, the possibility of assessing under competition law the remuneration offered and paid by Google for the licensing of ancillary rights was also discussed, with the aim of possibly setting a preliminary minimum fee. In this regard, the Bundeskartellamt decided not to examine this matter in greater detail. The fact that the board of arbitration at the German Patent and Trade Mark Office is a specialised body that can be called upon by copyright collecting societies and users in disputes over the use of copyright protected works or services and the fees to be paid in return, played an important role in this context.

Google and Corint Media have meanwhile also embarked on this path.¹⁰ In March 2023 the board of arbitration proposed a remuneration based on an annual amount of 3.2 million euros as an interim measure.¹¹ The Bundeskartellamt reserves the right to participate in the arbitration proceeding pursuant to Section 100 VGG.

Against the backdrop that the French competition authority (Autorité de la Concurrence) also conducted a proceeding against Google relating to the ancillary copyright,¹² the Bundeskartellamt took the situation in France into account. The subject of the proceeding before the Autorité de la Concurrence differs from the present case. The case in France was about Google's refusal to properly negotiate with the publishers themselves (represented by their associations) with regard to the enforcement of the ancillary copyright while the current proceeding deals with possible impeding and discriminating effects to the detriment of a copyright collecting society, which can be caused by the Google News Showcase service. Important points which were achieved in the proceeding conducted by the Autorité de la Concurrence do not have to be further clarified in Germany. In particular, licensing agreements are already concluded with publishers in Germany, and in February 2022 the complainant received a licensing offer specifying a monetary fee. The case in Germany was therefore not about Google refusing to negotiate but about the adequacy of the remuneration. In addition, Google's commitments in France to share information with the publishers are not equally relevant in the present proceeding since and as far as the complainant, being a copyright collecting society, refuses to calculate the remuneration based on such information on specific advertising revenues. The possibility of initiating arbitration proceedings offered by Google in France is not equally significant in the German proceeding since the German Collecting Societies Act already provides for arbitration proceedings in which questions about remuneration can be clarified.

The remuneration amount ultimately offered by Google was not directly part of the French proceeding. However, the Bundeskartellamt determined the fees agreed in France and drew up a first rough comparison with the offer presented by Google in Germany. In France, the same initial method of calculation is used. The results do not differ to an extent which would have warranted the continuation of the Bundeskartellamt's proceeding in Germany, especially since other differences and uncertainties would have

¹⁰ See Corint Media press release of 22 July 2022, available in German at: <https://www.corint-media.com/corint-media-bitte-schiedsstelle-googles-verguetungshoehe-festzustellen/>.

¹¹ See Corint Media press release of 17 March 2023, available in German at: <https://www.corint-media.com/google-muss-im-ersten-schritt-58-mio-euro-an-corint-media-zahlen/>.

¹² See press release of the Autorité de la Concurrence of 21 June 2022, available at: <https://www.autoritedelaconcurrency.fr/en/article/related-rights-autorite-accepts-googles-commitments>.

had to be taken into account, such as the different legal implementation of the ancillary copyright in France or the representation quota disputed between the parties.