



## FAQs relating to the “Google News Showcase” proceeding

21 December 2022

### **What implications does the Bundeskartellamt’s proceeding have for the future of the “Google News Showcase” service?**

The Bundeskartellamt’s proceeding was not aimed at collaboration projects relating to “Google News Showcase” and Google’s displaying of publishers’ content in so-called story panels as such. Under competition law, it may, however, be problematic if Google uses such content to establish its own news product which is given preferential treatment in Google’s existing services or creates the risk of driving out the news services provided by the publishers. For this reason, the authority had concerns about the integration of Showcase content into Google’s search results, which, however, the company no longer plans to do. In the Bundeskartellamt’s view, the integration of Showcase content into the Google Discover and News services does not pose a similar risk at present.

### **How are the participation in “Google News Showcase” and the negotiations regarding the press publishers’ ancillary copyright fees related?**

Following Google’s adjustments to the agreements, the participation in “Google News Showcase” is clearly separated from the negotiations on ancillary copyright fees for content used outside Showcase. Under the Showcase agreements, Google is now granted a licence only for the content which the publishers have selected, edited and sent to Google for the story panels. For the purpose of otherwise displaying press content in Google products which was not provided by the publishers but gathered based on Google’s web crawling activities, Google concludes separate ENP agreements (“Extended News Previews”). This also means that the publishers can participate in “Google News Showcase” and at the same time engage a copyright collecting society to otherwise enforce their ancillary copyright.

## **Are publishers that have opted for the collective enforcement of their ancillary copyright at a disadvantage since they are not yet remunerated by Google?**

Taking into account the changes made by Google during the proceeding, it was not possible to ascertain that publishers which have opted for the collective enforcement of their ancillary copyright are disadvantaged in terms of competition law. First, such publishers can also participate in “Google News Showcase” and demand a fee for this. Second, these publishers are not yet remunerated for press content otherwise displayed in Google products because Google and the copyright collecting society Corint Media have not yet reached an agreement. However, Google has offered Corint Media remuneration, also in the form of an interim payment,<sup>1</sup> which in terms of how it is calculated and in terms of its amount is comparable to the fees Google pays individual publishers under the ENP agreements.

## **How does the Bundeskartellamt’s proceeding relate to the *Land* media authorities’ assessment of the “Google News Showcase” service?**

The *Land* media authorities are assessing the “Google News Showcase” service with regard to its compliance with the rules under the new German State Media Treaty. In November 2021, the media authorities’ Commission on Licensing and Supervision (ZAK) agreed to classify the “Google News Showcase” service as a media platform and user interface under media law.<sup>2</sup> 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. ZAK already dealt with complaints raised by regional publishers due to alleged discriminatory practices in granting access but rejected these complaints due to formal reasons in June 2021.<sup>3</sup> Google’s statements on granting access to “Google News Showcase” made in the context of the authority’s proceeding do not exclude the possibility that further changes or specifications may be necessary as a result of an assessment under media law.

## **Which publishers were heard in the proceeding?**

In addition to Corint Media and publishers which hold shares in Corint Media, a number of well-known German publishers which have a contractual relationship or are in negotiations with Google and which in terms of their digital strategy and title portfolio cover different market segments (newspapers/magazines, regional offers/national offers) were also heard. These publishers were selected by the Bundeskartellamt to provide the authority with the broadest possible picture for the assessment of Google’s practices. Other publishers

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<sup>1</sup> See Corint Media press release of 3 March 2022, available at: <https://www.corint-media.com/en/3-2-million-euros-for-press-rights/>

<sup>2</sup> See ZAK press release of 25 November 2021, available in German at: <https://www.die-medienanstalten.de/ser-vice/pressemitteilungen/meldung/zak-qualifiziert-google-news-showcase-als-medienplattform-und-be-nutzeroberflaeche>.

<sup>3</sup> See ZAK press release of 16 June 2021, available in German at: <https://www.die-medienanstalten.de/ser-vice/pressemitteilungen/meldung/neue-vorschriften-zur-diskriminierungsfreiheit-zak-entscheidet-die-ersten-faelle>.

contacted the Bundeskartellamt on their own initiative and pointed out aspects which they considered important. In addition, the associations BDZV, MVFP and VDL were admitted to the proceeding and provided extensive statements.

**To what extent can the situation in Germany regarding the display of and remuneration for press content by Google be compared with the situation in other countries?**

Google has introduced the “Google News Showcase” service in numerous countries around the world. At the same time, the display of and remuneration for press content by digital companies such as Google and Meta is widely discussed in many legal systems. However, the regulatory approaches taken and proceedings conducted in this context differ.

In Australia, the “News Media and Digital Platforms Mandatory Bargaining Code” was passed in early 2021, which is intended to address imbalances in negotiating power between providers of news products and digital platforms.<sup>4</sup> This special legal framework does not provide for an ancillary copyright but proposes compulsory final offer arbitration. So far, the Code has not yet been applied since no platform has been designated as norm addressee. Instead, Google and Meta have concluded commercial agreements outside the Code with a large number of Australian publishers. In Google’s case, these agreements also include participation in and remuneration for the “Google News Showcase” service.

Rules comparable to Australia’s approach are being discussed in Canada (“Online News Act”) while the discussion in the USA has so far focused on a possible exemption from the prohibition of anti-competitive agreements to allow publishers to negotiate collectively (draft bill “Journalism Competition and Preservation Act”). In the UK, the authorities Ofcom and CMA presented a report in November 2021 which proposes a code of conduct to govern the relationship between large digital platforms and content providers, especially publishers.<sup>5</sup>

In the EU new copyright rules were created with Directive (EU) 2019/790 of 17 April 2019, which are aimed at more broadly protecting press publications with regard to their online use by providers of information society services. Under Article 15(1) of this directive, Member States have to establish provisions providing publishers with the right to permit others to reproduce their publications and make them publicly available for such use or to prohibit them from doing so. Implementing this directive, the reformed Copyright Act came into force in Germany on 7 June 2021, introducing a new ancillary copyright for press publishers.<sup>6</sup> This grants press publishers the exclusive right to make their press publications publicly available and reproduce them,

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<sup>4</sup> See report of 1 December 2022 on the Code’s first year of operation, available at: <https://treasury.gov.au/publication/p2022-343549>

<sup>5</sup> Available at: <https://www.gov.uk/government/publications/advice-to-dcms-on-how-a-code-of-conduct-could-apply-to-platforms-and-content-providers>.

<sup>6</sup> 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.

in full or in part, for online use by providers of information society services (Section 87g 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, among other things. In other Member States, the directive was implemented adding further provisions (e.g. on remuneration or the enforcement of the right). Many Member States have failed to transpose the directive into national law by the end of the deadline.<sup>7</sup>

### **How does the Bundeskartellamt's proceeding relate to the proceeding conducted by the French competition authority (Autorité de la Concurrence)?**

With the Act n°2019-775 of 24 July 2019, which entered into force on 24 October 2019, the European ancillary copyright was transposed into French law long before the expiry of the deadline to do so. Google had previously announced that it would no longer display parts of articles, photos or videos without the publishers' express consent. At the same time, Google had clarified that if publishers provided their consent, no financial compensation would be paid. The majority of publishers then agreed to Google displaying protected content without remuneration. Some publishers which had, at least initially, not agreed to this saw their content displayed in reduced form and their user traffic mediated by Google decreased. In response to several complaints, the Autorité de la Concurrence initiated a proceeding and in its decision of 9 April 2020 imposed interim measures on Google obliging the company to take up negotiations with the publishers in good faith to determine an adequate remuneration for the display of protected content in the search results. At the same time, Google was obliged to adhere, until further notice, to the way in which the publishers wanted to display their content and to ensure that the negotiations had no effect on the protected contents' indexation, ranking or display or on any other economic relations between Google and the publishers. The appeal lodged by Google against this decision was rejected by the Cour d'Appel de Paris in its decision of 8 October 2020. The main proceeding was then concluded with a commitment decision in June 2022.<sup>8</sup> In this decision, Google undertook to create a framework for negotiations, share information relevant to remuneration and establish a dispute settlement mechanism all under the supervision of a trustee.

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

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<sup>7</sup> See press release of the European Commission of 19 May 2022, available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_2692](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2692)

<sup>8</sup> See press release of the Autorité de la Concurrence of 21 June 2022, available at: <https://www.autoritedelaconcurrence.fr/en/press-release/related-rights-autorite-accepts-googles-commitments>.

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 made 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. The Bundeskartellamt nevertheless determined the fees agreed in France and drew up a first rough comparison with the offer presented by Google in Germany. In France, Google used the same initial method of calculation. 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 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.

**Why has the Bundeskartellamt not issued a formal decision and how is it ensured that Google will comply in the future?**

In the Bundeskartellamt's view, it was preferable in the present case to end the antitrust assessment without a formal decision declaring the commitments binding (Section 32b of the German Competition Act, GWB), which would have a stronger binding effect on Google but also on the Bundeskartellamt. In this context, it was relevant that Google had already changed its conduct in many aspects and intended to implement still outstanding measures and to issue clarifications in a timely manner. Terminating the proceeding without a formal decision also provides greater flexibility should circumstances change or new findings arise in the future. In addition, possible changes to the way in which Showcase content is displayed or Google grants access to "Google News Showcase" will not stay hidden for long due to their very nature. This is additionally ensured by Google's obligation to report to the Bundeskartellamt.

**Which role did the new provisions for digital corporations (Section 19a GWB) play in this proceeding?**

The examination was largely based on the Bundeskartellamt's new powers. In December 2021, the authority had determined that Google was of "paramount significance for competition across markets" (see press release of 5 January 2022) and thus subject to special abuse control under Section 19a(2) GWB. In this connection, it was particularly important that addressees of Section 19a GWB can be prohibited from favouring their

own offers over the offers of their competitors when mediating access to supply and sales markets (Section 19a(2) sentence 1 no. 1 GWB). In addition, the provision under Section 19a(2) sentence 1 no. 7 GWB was also relevant, which makes it possible to take up a case if a company demands benefits for handling the offers of another undertaking which are disproportionate to the reasons for the demand.

If criteria under Section 19a(2) GWB are fulfilled, the question arises as to the objective justification of the relevant conduct. In this regard, the burden of demonstration and proof lies with the company that has been found to be of paramount significance for competition across markets. Based on the facts as demonstrated or otherwise known, the interests at stake have to be weighed up in detail in light of the law's purpose of ensuring freedom of competition. In this assessment, the interests of the publishers which had decided to participate in Google News Showcase also had to be taken into account in the present case.

### **Did the Bundeskartellamt's proceeding also deal with the amount of fees paid by Google for displaying press content?**

The Bundeskartellamt's proceeding did not directly deal with the amount of fees paid by Google under the so-called "ENP" agreements for displaying press content. The question as to whether the press publishers are adequately remunerated for their ancillary copyright is mainly a copyright issue, which should be clarified by the bodies competent to do so. In disputes between copyright collecting societies and users, this initially is the board of arbitration at the German Patent and Trade Mark Office, which can be seized by both sides. Corint Media and Google have already made use of this possibility.<sup>9</sup>

Making use of arbitration proceedings was also seen in other legal systems as the preferred way for solving disputes over the adequate amount of remuneration: In Australia, compulsory final offer arbitration is a core component of the "News Media and Digital Platforms Mandatory Bargaining Code". In France, the negotiations which Google has undertaken to conduct are ensured by the possibility of initiating arbitration proceedings. The considerations on establishing a code of conduct presented by Ofcom and the CMA also include the initiation of dispute resolution as a possible enforcement method.

In contrast, controlling the price level under competition law would result in the problem that, due to the novelty of the ancillary copyright, there are no competitive markets suitable for a comparative analysis and also the costs and proceeds associated with the display of press content for Google and the publishers can hardly be determined with the accuracy required by antitrust case law.

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<sup>9</sup> 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/>