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News Media and Digital Platforms – Note by Germany

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/competition-issues-in-news-media-and-digital-platforms.htm>.

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1. Introduction

1. Journalism and media diversity are a cornerstone of our democracy. The value of media diversity goes far beyond its pure economic significance. Digital platforms are playing an increasingly important role in the financing of journalism. They are changing the way journalism is funded and, in part, determine what content end users get to see. On the one hand, digital platforms offer media companies new opportunities – for example, to reach new customers – but at the same time they can also create dependencies: Digital platforms can become gatekeepers without which media companies cannot reach certain user groups. In addition, digital platforms can also have a (negative) impact on the financing of media companies due to their business model, which often involves no direct costs for the end consumers.

2. Press publishers have been trying to receive remuneration for the display of short text previews of their content (so-called snippets) by search engines and other digital platforms for more than a decade.¹ Where concrete claims have been at issue, the reaction of the digital platforms has so far generally been to (announce to), discontinue or reduce the display of the relevant content in order to avoid a possible obligation to pay.² In the last decade, various national competition authorities have opened proceedings to investigate the behaviour of digital platforms vis-à-vis media companies. This includes an investigation by the Bundeskartellamt into Google's behaviour towards press publishers in 2014 (see 2.). In addition, the German legislator has taken measures in recent months and years to strengthen the position of media companies vis-à-vis digital platforms (see 3.). In view of these new laws and the associated new powers, both the Bundeskartellamt and the German State Media Authorities (Landesmedienanstalten) have opened new proceedings against digital platforms (see 4.).

3. This paper provides an overview of the Bundeskartellamt's activities in this context and shows how the German legislator and other actors are trying to take account of the special importance of media diversity.

2. B6-126/14 Google VG Media

4. The Bundeskartellamt's investigation followed a complaint by the collecting society VG Media against Google's conduct in connection with the German ancillary copyright for press publishers introduced in Germany on 1 August 2013.³ The rules of the copyright act provided that publishers could prohibit search engines and similar services from using their press products insofar as the use goes beyond individual words and the smallest text excerpts (snippets). After the law came into force, Google asked publishers to submit a declaration of consent in which they agreed that Google can use their content free

¹ Cf. Bundeskartellamt, 8.09.2015, B6-126/14, para. 44 et seq.

² When a reform of copyright law in Spain introduced a regulation on 1 January, 2015, according to which providers of services such as "Google News" must pay a fee to publishers for the display of any excerpts from press publications, without the publishers being able to waive this fee, Google completely discontinued the "Google News" service in Spain on 16 December, 2014. Cf. <https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html>.

³ Cf. Sections 87f et seq. UrhG (old version).

of charge to the same extent as before. The vast majority of publishers complied with this request. In spring 2014, however, VG Media called on Google to negotiate the conclusion of a licence agreement. When Google refused this, VG Media filed an application to initiate proceedings before the arbitration board of the German Patent and Trademark Office (DPMA) with the aim to determine that the "press publisher tariff" established by it applied to Google products and was appropriate. As a result, Google announced that it would display search results for the websites of the publishers represented by VG Media in the legal dispute only in abbreviated form unless the publishers expressly declared their consent to free use. Google justified this approach with the risk of being held liable for a possible infringement of the German ancillary copyright.

5. The Bundeskartellamt saw this argument as an objective justification for Google's behaviour towards the publishers. The authority argued that even a (presumed) market-dominant company could not be obliged under antitrust law to take a considerable risk of being held liable for damages in the case of an unresolved legal situation. In this respect, in the Bundeskartellamt's view the "opt-in" required by Google was a proportionate instrument which is also not disapproved by the legal system for other reasons. This is because the German ancillary copyright at the time did not establish any obligation to contract, but only gave publishers an instrument by which they could try to monetize their content on the market.

6. Therefore, in its decision of 8 September 2015, the Bundeskartellamt ruled that it saw no reason to take action (Section 32c (1) of the German Competition Act (GWB)). It is important to note that this decision was made against the background of the German ancillary copyright in force at the time which was declared inapplicable by the ECJ in 2019 due to a procedural error in the legislative process. The Bundeskartellamt is therefore not bound by its 2015 decision when the legal or factual circumstances change as it already stated in its 2015 decision.⁴ On 7 June 2021, a revised and restructured ancillary copyright came into force in Germany (see 3.).

3. Legislative measures

7. To prevent or reduce media companies' dependence on digital platforms, the German and European legislators have strengthened the position of media companies vis-à-vis digital platforms in recent years. In Germany, such measures include in particular the newly enacted ancillary copyright, the new ban on discrimination in the German Interstate Media Treaty and the new section 19a GWB.

3.1. German ancillary copyright for press publishers

8. The "Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes" entered into force on 7 June 2021, amending the German Act on Copyright and Related Rights (Urheberrechtsgesetz – UrhG). Among other things, the Act implements the requirements of Article 15 of the "Digital Single Market" Directive of 17 April 2019 (DSM Directive) for an ancillary copyright for press publishers. The ancillary copyright for press publishers was intended to prevent the exploitation of press publishers by business models that use press products in an automated manner for their own value creation.

⁴ Cf. Bundeskartellamt, 8.09.2015, B6-126/14, para. 239 et seq.

9. The law defines the subject matter of the ancillary copyright and against whom it can be asserted, the duration of protection after publication, and the limitations of the right. In addition, the UrhG formulates the participation rights of the author (i.e. writer, photographer, etc.) in any remuneration of the press publisher. It is directed against "information society services providers". This is anyone who offers services that are usually provided for remuneration electronically at a distance and on the individual demand of a recipient. Thus, the German ancillary copyright applies not only to search engines but also to online retailers, video streaming services and internet advertisers.

10. "Individual words and very short excerpts" are excluded from the ancillary copyright, in accordance with the DSM Directive. Also explicitly not protected is the use of the facts contained in a press publication, the private or non-commercial use of a press publication by individual users (such as sharing on Twitter, even if Twitter itself pursues commercial purposes), and the setting of hyperlinks to a press publication. The term of protection is now two years instead of previously one.

11. According to Section 87k (1) UrhG, authors (i.e., writers, photographers, etc.) are to receive at least a one-third share of the revenues generated by the press publisher through the use of its ancillary copyrights. The claim under Section 87k (1) UrhG shall only be enforceable by a collecting society. This is intended to achieve a practicable implementation of the participation of authors and holders of related rights in the revenues of the press publisher.

12. However, it is important to note that the German ancillary copyright does not provide for any compulsory remuneration of the press publisher by the information society service providers: publishers can decide to make their press products available to digital platforms free of charge. This has to be kept in mind when discussing competition law as a possible instrument in this context.

3.2. New prohibition of discrimination in the German Interstate Media Treaty (MStV)

13. The Interstate Media Treaty of November 2020 contains requirements for so-called "media intermediaries" (= search engines, social networks, video portals) to ensure diversity of opinion. According to the MStV, media intermediaries may not discriminate against journalistic and editorial content on whose visibility they have a particularly strong influence.⁵ In addition, media intermediaries must publish criteria that govern the presentation of press content on their platforms.⁶ In this context, the Interstate Media Treaty gives the State Media Authorities the opportunity to conduct a substantive review of access and presentation criteria. In the event of violation of the interstate treaty, the State Media Authorities can take necessary measures, which can include a prohibition.⁷ In addition, a violation of the prohibition of discrimination can be punished with a fine of up to EUR 500,000. First proceedings have already been initiated by the State Media Authorities (see 4.).

14. There is a clear parallel with competition law proceedings, but different objectives are pursued: While the Bundeskartellamt is responsible for safeguarding freedom of

⁵ Cf. Section 94 (1) MStV.

⁶ Cf. Section 93 MStV.

⁷ Cf. Section 109 (1) MStV.

competition, the proceedings of the State Media Authorities are aimed at safeguarding media diversity.

3.3. Section 19a GWB

15. The new Section 19a GWB is directed at companies with paramount significance across markets and gives the Bundeskartellamt the ability to prohibit these companies from engaging in certain types of conduct. To this end, the Bundeskartellamt must first establish that a company has such a position. In a second step - which can also take place in parallel - the Bundeskartellamt can prohibit the company from certain types of conduct. With regard to copyright-protected content, one type of conduct referred to in Section 19a GWB is of particular importance, as is also noted in the explanatory memorandum to the law: According to Section 19a (2) no. 7 GWB the Bundeskartellamt may prohibit companies from demanding benefits for handling the offers of another undertaking which are disproportionate to the reasons for the demand. Two more specific rules are added:

1. The Bundeskartellamt may prohibit companies from demanding the transfer of data or rights that are not absolutely necessary for the purpose of presenting these offers.
2. The Bundeskartellamt may prohibit companies from making the quality in which these offers are presented conditional on the transfer of data or rights which are not reasonably required for this purpose.

16. Unequal treatment and display of press content by digital platforms could fall under these provisions, or requiring free licences for the display of press content if this is a disproportionate requirement. In this context, however, it is necessary to clarify, among other things, what disproportionate requirements are and what a non-discriminatory display of press content could look like.

4. Current enforcement activities in Germany

17. Based on the aforementioned new legal provisions, both the Bundeskartellamt and the State Media Authorities have initiated proceedings against digital platforms in recent months.

4.1. Bundeskartellamt examines Google News Showcase

18. In June 2021 the Bundeskartellamt initiated a proceeding against Google to examine the Google News Showcase service offered by the company. The examination is mainly based on the Bundeskartellamt's above-mentioned new competences. In this respect it follows up on the proceeding against Google which the Bundeskartellamt initiated on 25 May 2021 to determine a paramount significance for competition across markets within the meaning of Section 19a GWB.⁸

19. Google News Showcase is a Google service which offers the possibility to present news content from publishers in a prominent and more detailed way. Google has made the service available to a number of German publishers. On 1 October 2020 Google had announced the launch of its Google News Showcase service in Germany. According to Google, the service presents high-quality journalistic content for which Google pays

⁸ Cf.

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/04_06_2021_Google_Showcase.html?nn=3591568

licensing fees. After 20 media companies initially participated in the service with 50 publications, the service has meanwhile been expanded to cover further content. News Showcase focuses on “story panels” which were initially integrated in the Google News app and can now also be found in Google News on the desktop. Google has announced that it will soon also show the panels in Google’s news feed Discover and the general Google search results. The story panels are showcase boxes in which photos, titles and further content appear in a condensed form under the highlighted 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 in the general listing. For its News Showcase, Google also purchases paywalled articles from individual publishers and offers them to its readers free of charge.

20. Acting upon a complaint from the collecting society Corint Media (former VG Media), the Bundeskartellamt is examining whether the announced integration of the Google News Showcase service into Google’s general search function is likely to constitute self-preferencing or an impediment to the services offered by competing third parties. The authority is also examining whether the relevant contractual conditions include unreasonable conditions to the detriment of the participating publishers and, in particular, make it disproportionately difficult for them to enforce the above-mentioned ancillary copyright for press publishers. It is also important to examine how the conditions for access to Google’s News Showcase service are defined.

4.2. Enforcement activities of the German State Media Authorities

21. The German State Media Authorities have also initiated several proceedings against Google in the relation to Google News Showcase. In addition, the Medienanstalt Hamburg/Schleswig-Holstein initiated a proceeding in relation to a prominent display of the federal government’s health portal in Google Search. In this proceeding, the responsible Commission ZAK (Kommission für Zulassung und Aufsicht der Landesmedienanstalten) has issued a complaint against Google for violating the prohibition of discrimination under Section 94 of the Interstate Media Treaty (MStV). More information can be found on the homepage of the German State Media Authorities under www.die-medienanstalten.de.

5. Conclusion

22. Digital platforms are becoming increasingly important for journalistic offerings: They offer media companies new opportunities, but at the same time they also influence their financing, which can lead to dependencies. Against this background, the European and German legislators have strengthened the position of media companies vis-à-vis digital platforms in recent years.

23. Competition law is only one of several available instruments in this regard, to which the legislator has recently made adjustments. The Bundeskartellamt has investigated and continues to investigate complaints from media companies against digital platforms. It should be noted, however, that the Bundeskartellamt is required to weigh the various interests involved in its assessment: The Bundeskartellamt must consider both the interests of media companies and those of digital platforms. It can therefore only evaluate the relationship between digital platforms and media companies on a case-by-case basis. To generally strengthen the position of media companies vis-à-vis digital platforms, other instruments, such as clear legal requirements (e.g. compulsory remuneration), are likely to be more suitable.