

Certified Copy

Regional Court of Munich I

Case reference: 37 O 15720/20

/coat of arms/
IN THE NAME OF THE PEOPLE

In the lawsuit of

NetDoktor.de GmbH, [...] -
- Petitioner Seeking the Injunction -

Attorney of record:
Hausfeld Rechtsanwälte LLP (attorneys), Walter-Benjamin-Platz 6, 10629 Berlin

versus

Google Ireland Limited, [...] -
- Respondent Opposing the Injunction -

Attorney authorized for proceedings:
[...]

based on provisional injunction

the Regional Court of Munich I - 37th Civil Chamber - through the Presiding Judge at the Regional Court [REDACTED], the Judge at the Regional Court [REDACTED] and the Judge at the Regional Court [REDACTED], on the basis of the oral hearing on 1/20/2021, issues the following as follows

Final Judgment

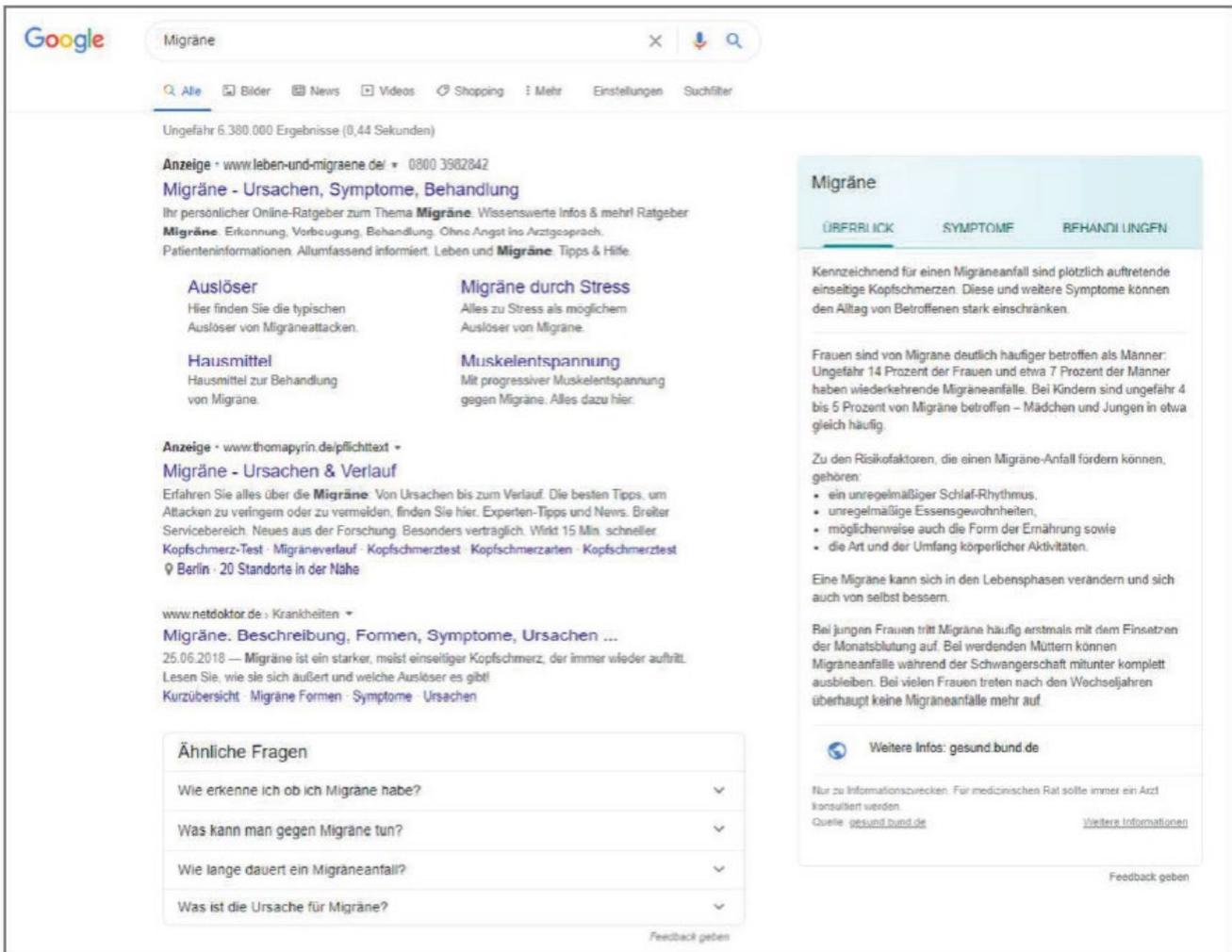
1. By way of a provisional injunction, under the threat of an administrative fine of up to two hundred and fifty thousand euros or administrative detention of up to six months to be enforced on one of the managing directors - administrative detention also in the event that the administrative fine cannot be recovered - for each infringement, the Respondent Opposing the Injunction is

prohibited

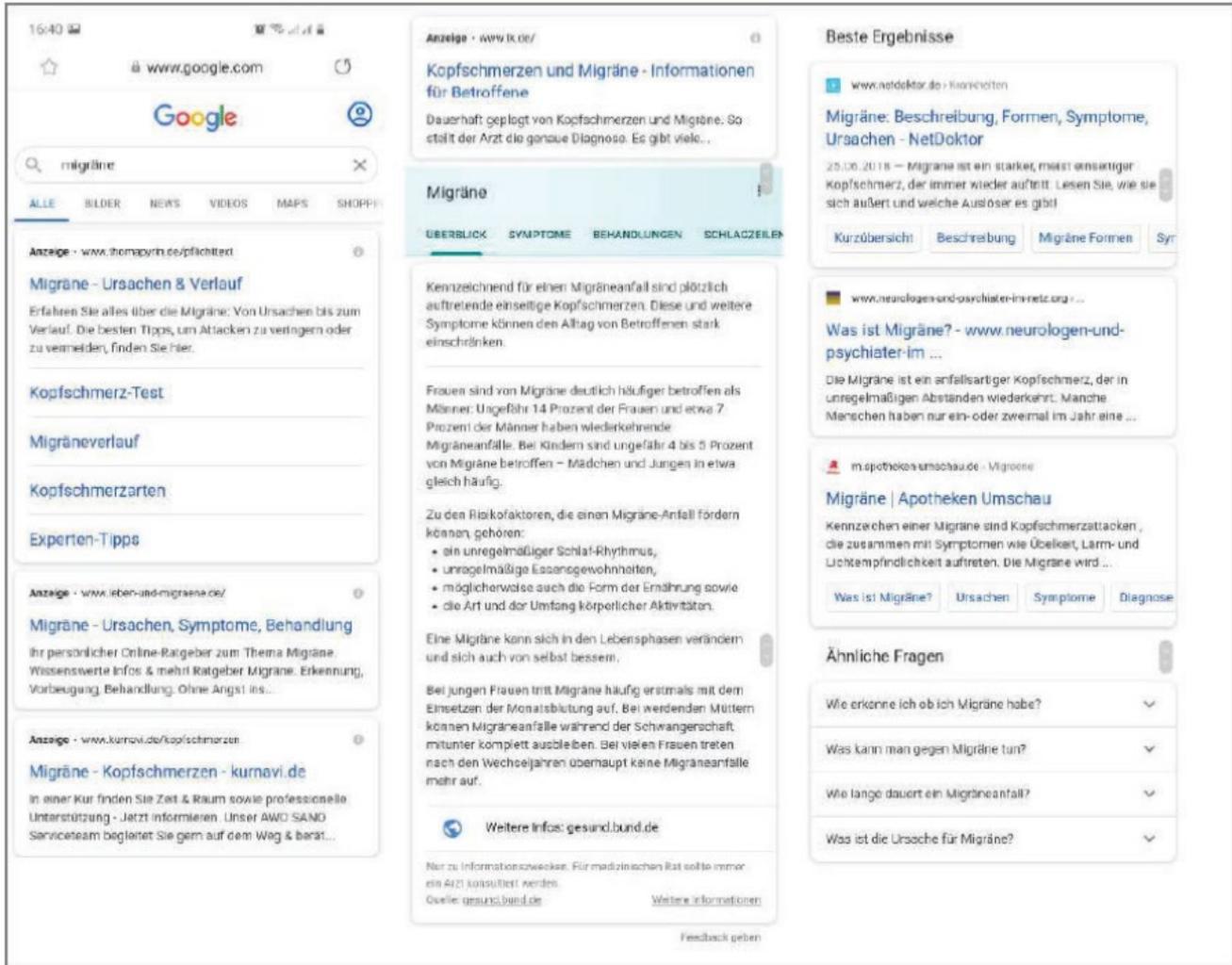
from displaying the content of the gesund.bund.de portal in knowledge panels with health information,

if this takes place on the basis of previous coordination by displaying knowledge panels with health information reserved for the content of the website of the Federal Ministry of Health (<https://gesund.bund.de>) and a link, as exemplified in the following screenshots of 11/24/2020:

Desktop devices:



Mobile devices:



In all other respects, the application is rejected.

2. The Respondent Opposing the Injunction shall bear 3/4, and the Petitioner Seeking the Injunction shall bear 1/4, of the costs of the legal dispute.
3. The Judgment is provisionally enforceable for the Respondent Opposing the Injunction in paragraph 2. The Petitioner Seeking the Injunction may avert enforcement of the Respondent Opposing the Injunction by providing security in the amount of 110% of the amount enforceable on the basis of the Judgment, unless the Respondent Opposing the Injunction provides security in the amount of 110% of the amount to be enforced prior to enforcement.

Facts

The parties dispute the permissibility of cooperation between the Respondent Opposing the Injunction and the Federal Government, according to which, in Google searches for certain diseases, content of the "National Health Portal" of the Federal Ministry of Health is prominently highlighted in special information boxes next to or before the general search results.

For more than 20 years, the Petitioner Seeking the Injunction, a group company of [...], has been operating an advertising-financed online portal on the subject of health under the domain www.netdokter.de, which presents medical information on diseases, symptoms, medications, treatment methods and laboratory values according to scientific standards, but at the same time in a manner that is understandable to laypersons. The declared objective of the Petitioner Seeking the Injunction is to make the user a responsible interlocutor in the dialog with his or her doctor or provider. With approximately 1 million page impressions per day, the Petitioner Seeking the Injunction is currently the market leader in the German and German-language market for health portals, ahead of the second-placed portal ([...]) and other providers. Approximately 76% of the accesses to the portal of the Petitioner Seeking the Injunction take place via mobile devices, the remaining part via desktop devices.

As part of the Google corporate group, the Respondent Opposing the Injunction, which has its registered office in Ireland, offers the Google search engine for Europe, including the service directed at Germany ("Google Search"). This central service can be accessed at the domain www.google.de, among other sites. To answer search queries, Google Search derives the user-specific information requirements from the respective search query and displays the information that is most helpful and relevant from its point of view. Such so-called "generic search results," also called organic or natural search results, are traditionally presented with a title designed as a link, web address and a short excerpt from the website containing the search terms ("snippet"). The linked websites are displayed in the search results in a list ("search results list") ordered by their rank ("ranking").

The Petitioner Seeking the Injunction has a high degree of visibility in the general Google Search and is displayed here for the predominant number of relevant search terms ("keywords") from the health sector on the first search results page, often in first place, which is due, among other things, to considerable investment in the quality of its content and in search engine optimization. On average, 88% of the total user traffic on the health portal of the Petitioner Seeking the Injunction was generated via the generic search results of Google Search in the past two years. For accesses via mobile devices, this figure was 90%.

Google Search, to the extent that a search query is directed to brief, specific and factual information, does not merely provide a search results list. Rather, if the search query suggests a purely factual answer, it also immediately presents key information intended to provide the most direct answers possible to the user's query. Such search results are displayed in highlighted form in addition to the search results list. The information is either displayed directly, in which case Google Search uses information that website operators (for example, with cinema operators, their programs) provide for this purpose. Or, if

users are not looking for individual pieces of information, but rather a group of people, places or things (for example, actors of a certain TV show), these are displayed collectively in so-called "rich lists". Finally, in appropriate cases, infoboxes, so-called "knowledge panels," are displayed with relevant information (for example, height of the Eiffel Tower). The content for such infoboxes usually comes from the Knowledge Graph, an internal Google Search database that collects facts on all kinds of topics. Other search engines also offer detached search results in a similar form.

In Germany, the Google corporate group has had a continuous market share of over 90% in the Internet search services market for more than ten years.

Since Sept. 1, 2020, the German Federal Ministry of Health (*Bundesministerium für Gesundheit*, "BMG") has been operating the National Health Portal (NGP), which also provides health information, at <https://gesund.bund.de>. The declared objective of the German government's health portal is to provide quality-assured, independent and generally understandable health information on the Internet. In addition to a directory of diseases, which are explained and presented individually in corresponding articles, the NGP includes sections such as "Healthy living," "Care" and "Health digital." Under the heading "Healthy living," for example, there are articles with explanatory comments and recommendations on the topics of "Nutrition and exercise," "Healthy at work," "Growing up healthy," "Healthy in old age," "Psyche and well-being," "Pregnancy and birth," "Coping with addiction" and "Prevention and early detection." The articles are illustrated with graphics and photos, and some contain video content and audio files. Controversial issues such as vaccinations or mammographies, or information on areas such as homeopathy or alternative medicine, are deliberately omitted.

On Nov. 10, 2020, the Respondent Opposing the Injunction and the BMG announced at a joint press conference (see USB stick in the Exhibits of the Petitioner Seeking the Injunction) the start of their cooperation on search queries on health topics. Such collaboration is intended to make it easier to find reliable information on health topics on the Internet (see BMG press release dated 11/10/2020, Set of Exhibits K29). For this purpose, the Google search engine presents the NGP's answers in a prominently highlighted infobox or knowledge panel when a keyword search for disease terms is performed. A link within the infoboxes takes users directly to the relevant article on the gesund.bund.de site. The boxes appear to the right of the list of ads and generic search results when searching on the desktop. For mobile devices, the infoboxes are displayed immediately after the ads but before the general search results. They each have three tabs between which navigation can take place - Overview, Symptoms and Treatments. In the mobile version, a fourth tab, "Headlines," links to current press articles that match the search query.

To date, such infoboxes are available for around 160 clinical pictures. The texts comprise content that has been written by BMG specifically for immediate provision by search engines and provided with markups. Via an open interface, the infoboxes obtain such information from the NGP. In principle, this interface is also available to other search engines.

The Google corporate group also offers infoboxes on health topics in other countries, including the U.S. and the U.K. Again, the content is obtained from third-party, not necessarily

government, sources.

At the joint press conference, Federal Minister of Health Jens Spahn said, among other things:

"People who Google health should land on our federal portal and find the information they need there. Gesund.bund.de is to become the central point of contact for reliable health information on the Internet. What could be more obvious than to work directly with Germany's most popular search engine, namely Google. In the future, a medical keyword search there will present answers from the [NGP] in a prominent, highlighted infobox. [...] I am certain that the collaboration with Google will give the [NGP] a huge boost in visibility, and this collaboration will ensure that the portal can become one of the most important points of contact for citizens on the Internet for health information."

He further stated:

"If we have an interest in conveying objective, well-founded, evidence-based information, then it will not do me any good if we turned up in Google's 783,000 position."

The total traffic generated by Google Search to the website of the Petitioner Seeking the Injunction has remained largely the same since the introduction of the infoboxes, at just over 4 million clicks per week. In this respect, the growth in traffic is also consistent with the traffic in the comparable period of 2019 and corresponds to the growth in traffic in Austria, where the Respondent Opposing the Injunction does not display any infoboxes on health topics in Google searches. In the period between November 10 and December 9, 2020, *gesund.bund.de* received 283,256 clicks on Google Search from users in Germany, while the Petitioner Seeking the Injunction received 17.674 million clicks - about sixty times as many. The number of clicks on such links was 0.06% of all clicks on the health portals linked in the search results page.

For individual disease terms, however, both the number of hits and the so-called "click-through rate" decreased in the first half of November. The click-through rate is the number of page views per impression, i.e. per display of the website of the Petitioner Seeking the Injunction in the generic search results. With a fundamental increase in user traffic via Google search queries in 2020, between Nov. 9 and Nov. 16, 2020, the Petitioner Seeking the Injunction lost 5% of user traffic on 19 very high-traffic disease terms in the desktop area, and 10% in the mobile area. For selected so-called "basic search terms," that is, according to the submission of the Petitioner Seeking the Injunction, keywords that have a high search volume and are important for the marketing environment (arthrosis, cystitis, bronchitis, depression, epilepsy, erysipelas, gallstones, gastritis, prostate cancer, hypothyroidism, typhoid fever, erysipelas and neurodermatitis), the click-through rate fell by about 32.5% from 11/5 to 11/14/2020 - this with otherwise stable visibility parameters (that is, a permanent display in the upper positions of the first search results pages) and an overall positive trend. Further analysis by the Petitioner Seeking the Injunction showed that page views to the website for the search terms of "white skin cancer" fell by a total of -10.9% (on mobile devices -13.9%) and "cystitis" by -17.3% (mobile views -19.02%). Although the average ranking of such pages remained constant or even increased slightly, the click-through rate fell

by -23% between November 2 and November 16, 2020. In a later analysis, the Petitioner Seeking the Injunction found that, for four top-selling medical conditions, the average click-through rate on mobile devices declined by -37.1% (cystitis), -31.1% (irritable bowel syndrome), -15.6% (hemorrhoids) and -31.8% (lactose intolerance) in the period from Oct. 26, 2020 to Jan. 3, 2021. For further analyses, reference is made to the written statements of the Petitioner Seeking the Injunction.

The Petitioner Seeking the Injunction attributes these latter developments - which are undisputed in the matter - to the prominently placed infoboxes with the content related to the NGP, and asserts claims for injunctive relief under cartel law and competition law against the Respondent Opposing the Injunction.

The Petitioner Seeking the Injunction derives its claim for injunctive relief asserted with the application at no. 1 firstly from § 33 (1) of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, "GWB") in conjunction with § 1 GWB, Art. 101 (1) TFEU.

In this regard, it believes that the cooperation between the Respondent Opposing the Injunction and the BMG is based on an agreement that restricts competition. This follows from the joint press conference of the Respondent Opposing the Injunction with the Federal Minister of Health. The joint intention of the Respondent Opposing the Injunction and the BMG is expressed in providing the presentation of content of the NGP exclusively in a display format intended only for this purpose - the infoboxes - within Google Search, in order to, on the one hand, make Google Search purportedly more attractive for users and to, on the other hand, disseminate the content of the NGP more widely than would be possible without such cooperation. This was sufficient for the assumption of an agreement. The BMG would be acting as an undertaking in this regard, as it would be competing with private-sector providers with the NGP health portal.

The cooperation has the object and effect of appreciably restricting competition. Given the great dependence of all health portals on the mediation service of Google Search, competition in this market would probably be significantly or even completely eliminated by the vertical coupling of search service and infoboxes. This is precisely the aim of the agreement, as the parties are expressly aiming to make the NGP the central point of contact for health information on the Internet to the detriment of other providers.

In order to establish the restriction of competition, the Petitioner Seeking the Injunction refers to the fact that the Respondent Opposing the Injunction directs the user's attention to the prominently placed infoboxes. In doing so, the Petitioner Seeking the Injunction relies on explanations of behavioral economics of the European Commission in the "Google Search (Shopping)" proceedings. The health-specific information needs of users are thus already satisfied within the search results pages. This is also the purpose of the Respondent Opposing the Injunction, because this is precisely where it sees product innovation, based on its multiple statements. Even if a need for information remains, according to the Petitioner Seeking the Injunction, users are more likely to click on the link in the infoboxes than to search for further information in the generic search results. On mobile devices, this effect is particularly pronounced, because the generic search results have slid far down the list, due to the infoboxes.

This redirection and loss of visibility is empirically proven by the decrease in traffic flows

and click-through rates. The only plausible reason for this is the reduced visibility of the generic search result of NetDoktor.de due to the NGP box. Contrary to the opinion of the Respondent Opposing the Injunction, it is irrelevant how the total traffic on the website of the Petitioner Seeking the Injunction has developed nominally. A relevant statement, on the other hand, was the sudden "gap" between the number of impressions and the number of clicks, which was reflected in the click-through rate.

The Petitioner Seeking the Injunction is also suffering ongoing losses in quality as a result. Due to the negative development, the Petitioner Seeking the Injunction had to resort to compensation mechanisms because of the coverage commitments already made to advertising customers and the declining page views, which are continuously reducing the quality of its advertising service. Advertisements would then have to be placed for less relevant subpages. The closeness to the topic is therefore lost, and there is a loss of coverage.

At the same time, the federal NGP recorded a sharp increase in visibility, which on Nov. 13, 2020, for example, was more than 200% higher than the previous day. In the meantime, the NGP had risen even further in the generic search results. For the search query "white skin cancer", for example, the NGP has already been listed in position 4 on the first search results page from the beginning of January 2021. This means that the NGP is currently in direct competition for the position held by the long-established, high-quality health portal [...].

Secondary effects are responsible for this. By users clicking on the links to the NGP placed within the infoboxes, relevance signals would be generated, which would be translated into better rankings by Google's learning algorithm. The long-term consequence will be that the NGP will eventually also appear as the first generic and thus purportedly most relevant search result. When the Respondent Opposing the Injunction argues that the mere placement of the infobox and the click on the link have no influence on the Google algorithm, it ignores the fact that an increase in page views, regardless of the source, has a positive effect on the ranking - the latter is undisputed.

In this context, the Respondent Opposing the Injunction does not consider the content of the Petitioner Seeking the Injunction as less relevant; rather, the better ranking and thus the competitive advantage of the NGP is achieved by circumventing the general relevance algorithms. It argues that it is extremely difficult to counter ranking losses with effective countermeasures, which is why, as it argues, it will not be possible to revive the competition at some point, even if the infoboxes are turned off. Compensation for diverted search traffic through use of Google Ads text ads or mobile apps is said to be not financially feasible for ad-supported health portals. It argues that the lack of user traffic will lead to a downward spiral in programmatic ads and keyword targeting by advertisers of independent health portals, thus jeopardizing their financing. It argues that it is already the case that the Petitioner Seeking the Injunction must take into account the decreasing user traffic for the advertising contracts entered into for 2021 by including the negative trend in the calculation of the number of ad placements owed by it to its advertising customers.

According to the Respondent Opposing the Injunction, it is thereby creating a competitive advantage for itself. Substitution competition is said to exist between search engine advertising and online advertising - as advertising-financed platforms, the Petitioner Seeking the Injunction and the Respondent Opposing the Injunction compete for the same advertising customers and budgets in the health sector. By integrating the infoboxes,

the Respondent Opposing the Injunction once again gained significantly in attractiveness as an advertising channel compared to health portals. Some of the major advertisers of the Petitioner Seeking the Injunction had already informed it that they could, or even had, to shift budgets to Google Ads text ads.

In the opinion of the Petitioner Seeking the Injunction, an exemption of the agreement pursuant to § 2 GWB and Art. 101 (3) TFEU cannot be considered. Any efficiency gains have not been sufficiently substantiated by the Respondent Opposing the Injunction. This is not the case, because the content of the infoboxes is no more reliable than the health information that is already quickly and easily accessible on the Internet. Moreover, the restrictions would not be indispensable in any case. Among other things, a less detailed presentation of content would have sufficed for the purportedly desired effect of merely providing a first reliable impression of a certain clinical picture, with which a complete satisfaction of the users' need for information would be less likely. Linking (exclusively) to the NGP would also not be necessary for this purpose.

The Petitioner Seeking the Injunction also invokes a claim for injunctive relief under § 8 (1), § 3, § 4 (4) UWG. It believes that the Respondent Opposing the Injunction is unfairly obstructing the Petitioner Seeking the Injunction by means of the infoboxes.

The claim for injunctive relief pursuant to no. 2) of the application is based on § 33 (1) GWB in conjunction with § 19 GWB, Art. 102 TFEU. The Respondent Opposing the Injunction is said to be abusing its dominant position on the search engine market by discriminating against the Petitioner Seeking the Injunction and other competing portals, through self-favoritism and through the impermissible technical coupling of search service and infoboxes as two different products, thus creating the risk of anti-competitive effects, particularly on the market for health portals. There was no objective justification for this.

Secondly, the Petitioner Seeking the Injunction is asserting a claim for injunctive relief under § 8 (1), § 3a UWG in conjunction with § 94 of the State Media Treaty (*Medienstaatsvertrag*, "MStV"). In this respect, it believes that the prominent placement of the NGP box violates the prohibition of discrimination under § 94 MStV. Pursuant to § 8 (1), § 3a UWG in conjunction with Art. 5 (1) of the Basic Law (*Grundgesetz*), a claim for injunctive relief also follows from the fact that, by displaying the infoboxes, the Respondent Opposing the Injunction is said to be promoting the BMG's infringement of the requirement that the press be independent of the state.

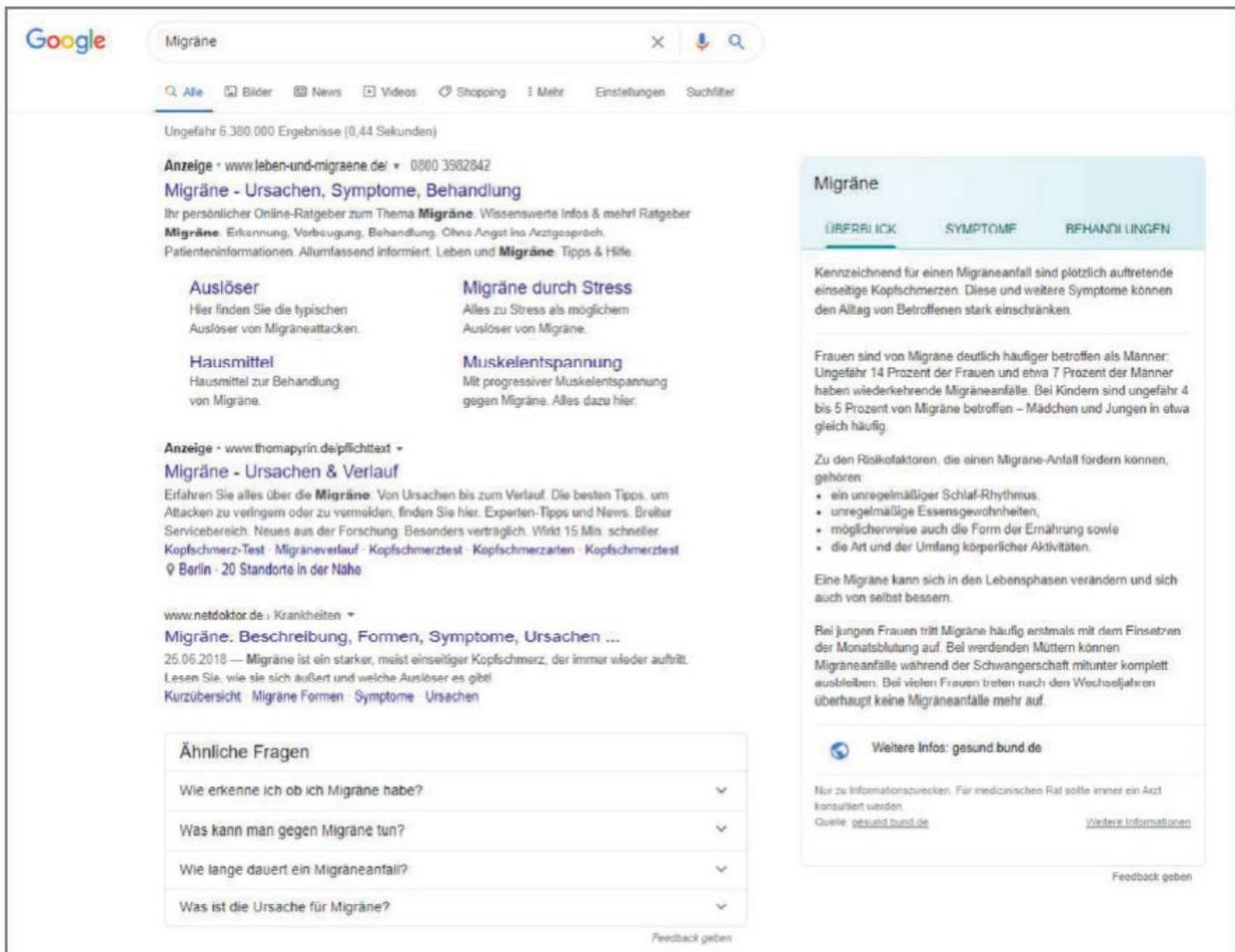
The Petitioner Seeking the Injunction had initially announced in writing the following application at 1):

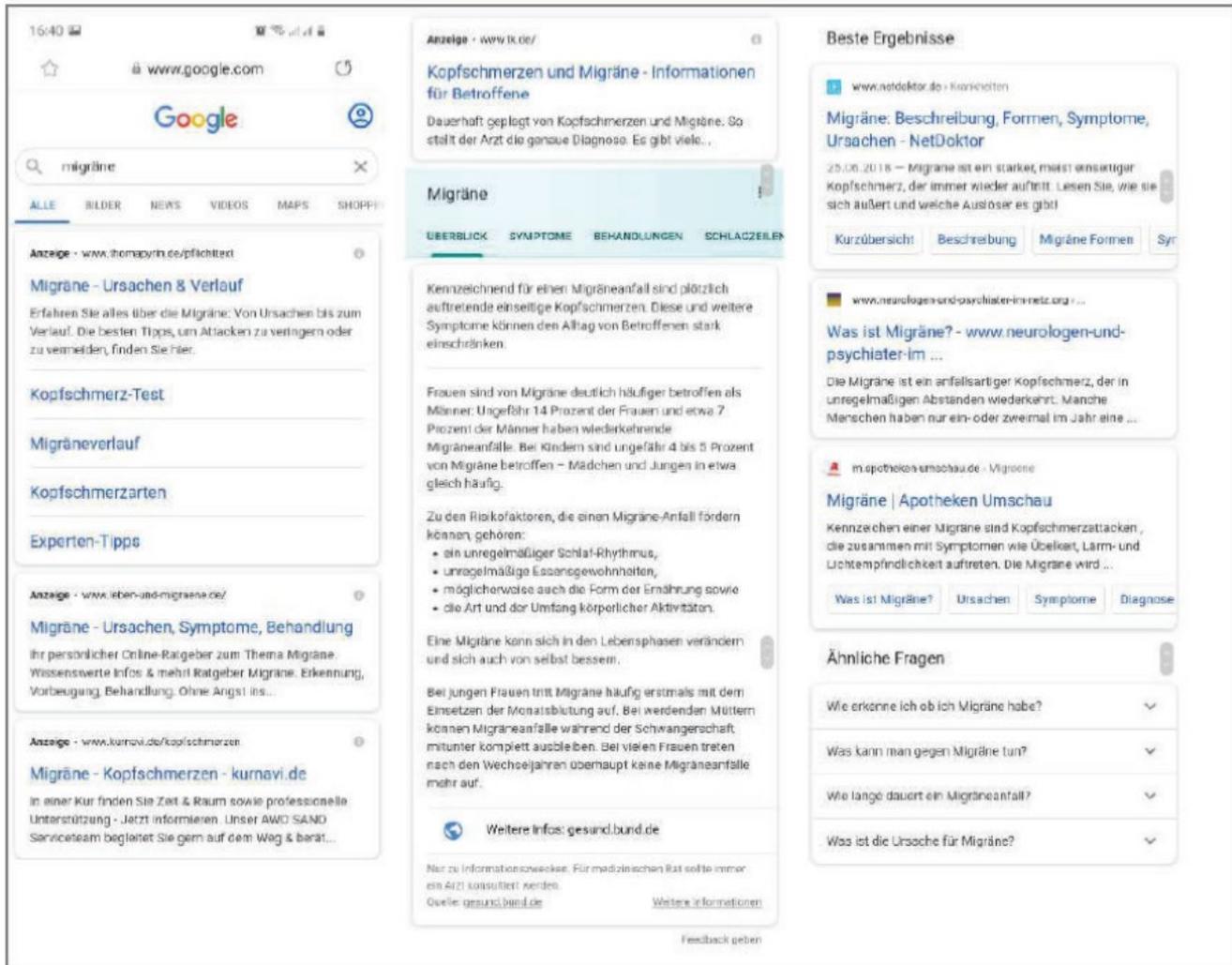
The Respondent Opposing the Injunction must refrain from implementing an agreement or other cooperation with the Federal Ministry of Health ("BMG"), according to which the Respondent Opposing the Injunction uses different processes in the search results pages of its general search service for the positioning and presentation of content of the website provided by the BMG under <https://gesund.bund.de> provided by the BMG or when linking to it, as they are applied to content on the website of the Petitioner Seeking the Injunction (www.netdokter.de) or when linking to it, in particular if this is done by displaying knowledge panels with health information reserved for the content of the BMG's website (<https://gesund.bund.de>) and linking to it, as exemplified in screenshots below dated 11/24/2020 ... [the screenshots printed below under no.1 follow].

As a precaution, it partially withdrew this application at the oral hearing on 1/20/2021 and now requests the following:

1. The Respondent Opposing the Injunction must refrain from displaying the content of the portal gesund.bund.de in knowledge panels with health information if this is done by displaying knowledge panels with health information reserved for the content of the website of the BMG (<https://gesund.bund.de>) and linking, as exemplified in the following screenshots dated 11/24/2020:

Desktop devices:



Mobile devices:

2. The Respondent Opposing the Injunction must refrain from using processes and methods for the positioning and presentation of content of the BMG's website (<https://gesund.bund.de>) or links thereto in the general search results pages of the Respondent Opposing the Injunction other than those used for content of the website of the Petitioner Seeking the Injunction (www.netdoktor.de) or links thereto, in particular if this is done by displaying knowledge panels with health information reserved for the content of the BMG's website (<https://gesund.bund.de>) and linking thereto, as exemplified in the screenshots of 11/24/2020 shown in number 1.
3. The Respondent Opposing the Injunction is threatened with an administrative fine of up to EUR 250,000 for each infringement of the obligations set out in numbers 1 to 2 and, in the event that this cannot be recovered, administrative detention, or administrative detention of up to 6 months, can be assessed.

The Respondent Opposing the Injunction requests that the application be rejected.

It consents to a possible partial withdrawal of the complaint, which could lie in the application filed by the Petitioner Seeking the Injunction at the hearing, but objects to a possible amendment or extension of the complaint in the new version.

The Respondent Opposing the Injunction objects to the vagueness of the applications, including the newly composed application, and the unclear relationship of applications 1) and 2) with each other.

It is of the opinion that the BMG is not acting as an undertaking in operating the health portal *gesund.bund.de*, but is fulfilling a government task in the area of preventive health care. According to it, the BMG does not operate economically and does not pursue any commercial interests. The lack of consideration for the state's conduct is said to be a strong indication that there was no entrepreneurial connection. The fact that private persons could also disseminate the same information is said to not change the nature of the state's information activity. It is said to certainly not be sufficient evidence of entrepreneurial activity on the part of the state. Rather, according to the case law of the ECJ, it states that clear indications are always required if, by way of exception, an entrepreneurial connection of state action is to be justified.

Furthermore, the Respondent Opposing the Injunction claims that there is no contractual relationship between it and the BMG, in particular no obligation to cooperate exclusively or to pay any remuneration. Rather, the cooperation is said to be limited to the fact that the Respondent Opposing the Injunction takes over certain content from the topic area of "diseases" of the portal *gesund.bund.de*. In addition, any possible - disputed - disadvantages for the Petitioner Seeking the Injunction would result at most from the upstream unilateral decision of general principle of the Respondent Opposing the Injunction to display infoboxes for certain diseases in the German Google Search, but not from the decision to select a specific source. Which source the Respondent Opposing the Injunction uses is said to not be relevant to the question of the visibility of other search results. Therefore, there also is said to be a lack of a causal link between the purported agreement and the purported disadvantages.

The Respondent Opposing the Injunction stated that it had coordinated with the BMG and the agency it had engaged only in order to implement the decision of the Respondent Opposing the Injunction for the portal *gesund.bund.de*. The pre-selection of a specific source was said to be technically necessary, since the infoboxes did not use the full text of the source and the excerpts used for the infoboxes had to be marked at the source (in the source code), in such a manner that the parts of the text relevant for Google Search could be automatically recognized and transmitted in the query process. The pre-selection is said to also ensure that the website operator agrees to deliver text parts to the Respondent Opposing the Injunction. In addition, the Respondent Opposing the Injunction states that it has to check whether the content from the portal met its criteria in terms of language and content. However, the coordination is said to also be limited to these items.

The Respondent Opposing the Injunction is of the opinion that the agreement with the BMG - which is disputed in any case - neither has the purpose nor the effect of restricting competition. In this regard, the decisive connecting factor of an obligation of conduct between the Respondent Opposing the Injunction and the BMG is said to be simply lacking. In any case, the only effect of the cooperation with the BMG is said to be the immediate provision of reliable health information for the benefit of users of Google Search. This is said to promote competition, as the Regional Court

of Hamburg (Decision dated 3/4/2013 - 408 HKO 36/13) is said to also have found when examining the provision of weather information on the basis of unilateral conduct. According to the Respondent Opposing the Injunction, this is neither a restriction of competition by object nor by effect. Nor was there any unilateral abusive conduct on the part of the Respondent Opposing the Injunction, according to it.

The Respondent Opposing the Injunction disputes the adverse effects on the order of search results asserted by the Petitioner.

To the extent that the Petitioner Seeking the Injunction claims a decline in traffic for 19 selected search terms in the week from November 9 to 16, 2020, in 18 of 19 cases (the only exception: "Alzheimer's"), according to the Respondent Opposing the Injunction, this was simply due to the fact that users had entered the specific clinical picture (for example, cystitis or hypothyroidism) as a search term less frequently in this week in particular. Thus, the already minimal decrease in clicks on the website of the Petitioner Seeking the Injunction in such individual examples is said to be due to a decrease in demand and is said to have nothing to do with the display of infoboxes. In this respect, according to it, there was no correlation between the so-called "click-through rate" to the portal of the Petitioner Seeking the Injunction and the introduction of the infoboxes.

According to the Respondent Opposing the Injunction, the claim of the Petitioner Seeking the Injunction that the display of infoboxes gave the BMG a sustainable and irretrievable competitive advantage is also groundless. This is said to be already evident from the low number of clicks on the link in the infoboxes and the fact that the Petitioner Seeking the Injunction still nominally has many times the number of users of the NGP. According to it, any increase in the visibility of *gesund.bund.de* as a whole could be explained less by the infoboxes than by the public attention surrounding the BMG press conference.

The Respondent Opposing the Injunction is of the opinion that the Petitioner Seeking the Injunction must assert specific revenue losses. According to it, it was not sufficient to base the application for injunctive relief on hints and apprehension. The decisive factor is said to be that the traffic from clicks on search results in the Google Search results list to the portal of the Petitioner Seeking the Injunction had not decreased even after the introduction of the infoboxes. This realization is said to have solidified since December 2020. According to it, this is also shown by the comparison with the development in Austria, where infoboxes for diseases are not yet used.

Moreover, potential adverse effects of the infoboxes on competition are also said to be not discernible. In this connection, the Respondent Opposing the Injunction claims that there is no risk of the petitioner's portal slipping in the ranking of the list of search results. It claims that the algorithm used to determine the order of search results ignores clicks on the link to the *gesund.bund.de* page within the infoboxes. Moreover, the fact that an infobox is displayed in search queries is said to be not a factor for the algorithm that determines the ranking of search results within the search results list.

The Respondent Opposing the Injunction claims that the infoboxes with the content of the portal *gesund.bund.de* are structurally and functionally fundamentally different from health portals such as that of the Petitioner Seeking the Injunction. Google's special infoboxes on diseases are said to have not replaced the services offered by health portals. They provided an informational starting point with brief, factual basic information. In the sense of a control and support function, they were to help the user

navigate through the most diverse, far-reaching and detailed information. On the other hand, they were not intended to provide full information, as shown by the clearly visible reference to "further information." The Respondent Opposing the Injunction states that it only takes the information on diseases from the NGP. According to it, these do not comprise journalistically prepared texts, but purely factual information. This is said not to be the case with the portal of the Petitioner Seeking the Injunction.

According to the Respondent Opposing the Injunction, the display of direct health information in infoboxes also has nothing to do with self-benefit and is therefore fundamentally different from the "Google Search (Shopping)" decision cited by the Petitioner Seeking the Injunction (European Commission, Decision dated 6/27/2017, Case AT.39740, Summary Exhibit K6). In contrast to the present case, the purported preferential treatment of another independent service of the Respondent Opposing the Injunction on the results pages of the general Internet search is said to be at issue there. The infoboxes are said to not constitute an independent service of the Respondent Opposing the Injunction.

The display of infoboxes is also said to not be an additional (advertising) source of income for the Respondent Opposing the Injunction, which leads to the redirection of advertising budgets, since the Respondent Opposing the Injunction only generates income through the display of advertisements in Google searches. Payments from advertisers were only made when users clicked on ads. The Petitioner Seeking the Injunction and the Respondent Opposing the Injunction are said to not compete directly or indirectly for the same advertising customers or advertising budgets. Rather, they are said to also be active in this respect on different markets for online advertising.

The Respondent Opposing the Injunction believes that the agreement with the BMG - which, in its opinion, is simply non-existent and, moreover, does not restrict competition - should in any case be exempted pursuant to Art. 101 (3) TFEU, § 2 (1) GWB. The display of infoboxes is said to be an innovative product enhancement for users because it saves time and is practical. It is said to be a new innovative form of search results and thus a qualitative improvement in efficiency in the form of a new feature that directly benefited consumers. Consumers are said to be immediately presented with reliable and authoritative basic information on their searches for specific diseases in a processed and consistent form. As a result, the Respondent Opposing the Injunction states that it offers its users a reference that can serve as an orientation and evaluation aid in order to assess and rank their conventional search results for other health information. In this manner, the Respondent Opposing the Injunction is said to create added value for its search service.

The Respondent Opposing the Injunction claims that studies by the Bertelsmann Foundation and the AOK (Exhibits AG 15 and AG 16) have shown that, in Germany, there is a need among users for reliable information on the Internet. They are also said to show that 57% of users who are familiar with the health portal of the Petitioner Seeking the Injunction do not consider it to be trustworthy. Since no algorithm is suitable for verifying the reliability of the health information with which the infoboxes are filled, but the Respondent Opposing the Injunction first verifies it by medical professionals to ensure Google's own standards and checks it for comprehensibility, the source would have to be determined in advance.

The Petitioner Seeking the Injunction is said to have selected the portal of the BMG as a source of reliable health information, since all information from the topic area of "diseases" was based on the

findings of evidence-based medicine (EBM) and corresponded to the current scientific status. This information is said to have been conclusively and substantively reviewed and professionally confirmed by experts. It is said to be free from commercial and political interests. According to a study by Google Surveys, an online market research service, 80% of the users surveyed were to have also indicated that they placed greater trust in the information provided by the BMG on *gesund.bund.de* than in information on a portal such as *NetDoktor.de*. The journalistically prepared texts on the portal of the Petitioner Seeking the Injunction are said to have been provided with large advertising banners. Some of the advertising is said to also appear to be editorial. According to the Respondent Opposing the Injunction, the portal would not have to be measured against any standards and would not be independent; moreover, the business could be sold at any time.

Finally, filling the infoboxes by the source of the BMG would also not eliminate competition in the segment for health portals. As presented, there is said to be not even a threat of restriction of competition. Significant shifts in traffic are said to have not yet occurred and are said to not be expected in the future, if only because the infoboxes and health portals meet different information needs from the consumer's point of view.

According to the Respondent Opposing the Injunction, the Petitioner Seeking the Injunction cannot assert claims under unfair competition law, as it is not a competitor of the Respondent Opposing the Injunction. The factual prerequisites are said to be just as insufficiently present as those of the provisions of media law. The Respondent Opposing the Injunction, which is based in Ireland, is said to not be an addressee of the MStV. § 94 of the MStV is said to also not be a market conduct rule and is said to be enforced exclusively by the *Land* media authorities.

According to the Respondent Opposing the Injunction, the weighing of interests to be carried out in the context of the examination of urgency must be to the disadvantage of the Petitioner Seeking the Injunction. The latter is said to have had not sufficiently plausibly demonstrated adverse effects (see above). For claims under cartel law, such disadvantages would even have to reach the threshold of a situation endangering the existence of the company, which is also to not be shown. However, in the event of a prohibition by way of a provisional injunction, the Respondent Opposing the Injunction would be prevented from carrying out an important product innovation. The general public's interest in access to reliable health information should be given high priority, according to it.

Reference is made to the further statements of the parties in the mutual pleadings, including exhibits, as well as to the record of the oral proceedings of 1/20/2021. The pleadings of the party representatives dated 1/22/2021 and 1/26/2021, which were filed out of time, did not give rise to the reopening of the oral proceedings, § 156 of the Code of Civil Procedure (*Zivilprozessordnung*, "ZPO"). Legal opinions have been recognized.

Grounds for the Decision

The applications of the Petitioner Seeking the Injunction at nos. 1) and 3) are admissible and have merit. A claim for injunctive relief and grounds for injunctive relief exist. As such, the Petitioner Seeking the Injunction has a claim to injunctive relief in the extent specified in the operative part under § 33 (1) GWB in conjunction with § 1 GWB, Art. 101 (1) TFEU.

The application at no. 2) is inadmissible and therefore had to be rejected.

I.

1. The applications of the Petitioner Seeking the Injunction at nos. 1) and 3) are admissible; in particular, the application at no. 1) in the form last filed is sufficiently specific. The concerns of the Respondent Opposing the Injunction raised in this respect have already been partially eliminated by the new version. To the extent that the Respondent Opposing the Injunction has expressed doubts as to which forms of collusion are to be prevented, this can be left aside as long as, as assumed in the new application, the object of the collusion is the reservation of the highlighted display in the infoboxes. Since the application at no. 2) was not raised in the alternative, it must be assumed that the applications are side by side.

The amendment of the application at no. 1) was not an amendment of the complaint, but a limitation of the application initially filed to the specific act of infringement, § 264 (2) ZPO, combined with a permissible partial withdrawal of the complaint in all other respects, § 269 (1) ZPO. The Respondent Opposing the Injunction has given its consent to the partial withdrawal of the complaint, but a withdrawal would have been permissible in any event (see Higher Regional Court of Düsseldorf, decision dated 7/13/1982 - 2 U 54/82 - NJW 1982, 2452).

In the light of the grounds for the claim, the application at no. 1) had to be substantiated to the effect that the Petitioner Seeking the Injunction is seeking to prohibit an infringing act that is based on prior coordination between the Respondent Opposing the Injunction and the BMG. It is true that the Petitioner Seeking the Injunction has just omitted this reference in the new version of the application, which could indicate that it no longer wants the agreement to be covered. However, in the grounds, it clearly and exclusively bases its application at no. 1) on Art. 101 TFEU or § 1 GWB and the agreement reached between the Respondent Opposing the Injunction and the BMG, not on unilateral conduct by the Respondent Opposing the Injunction. The coordination of conduct was therefore to be included as the core of the infringing act in the operative part as well.

2. The application at no. 2) is inadmissible, since it is not sufficiently specific. There is a lack of clarity as to which processes and methods the Petitioner Seeking the Injunction is referring to, and whether this is to be limited to the display of infoboxes or also covers, for example, the general search results. The use of the term "in particular" speaks against a restriction. However, without a limitation to the specific infringing act, the limits of the application formulated in this manner are not discernible.

II.

The Petitioner Seeking the Injunction has a claim against the Respondent Opposing the Injunction to cease and desist from cooperating with the BMG to the effect that the content of the gesund.bund.de portal is displayed in infoboxes reserved for the BMG with health information, and that these are linked to the NGP, § 33 (1) GWB in conjunction with § 1 GWB, Art. 101 (1) TFEU. Such claim to injunctive relief also includes the removal of the condition created by the previous agreement in the form of the contested infoboxes.

1. The cooperation of the Respondent Opposing the Injunction with the BMG constitutes an agreement between undertakings that has the effect of restricting competition, Art. 101 (1) TFEU, § 1 GWB.
 - a. The Respondent Opposing the Injunction entered into an agreement with the BMG with the content that the infoboxes on health topics planned by the Respondent Opposing the Injunction will be filled exclusively with content from the BMG's health portal and a link to the portal gesund.bund.de for the long term.
 - (1) An agreement is already entered into when a fundamental agreement of intent between two parties is reached. Neither a governing of all details nor a concurrence of interests of the parties involved is required (Immenga/Mestmäcker/Zimmer, 6th ed. 2019, TFEU Art. 101, para. 68).

The characteristic of agreement is unproblematically fulfilled by contracts under civil law, that is, in the case of a binding of two parties by concurring declarations of intent. However, it is also sufficient, in particular according to the case law of the European courts, that the parties express their common intent to behave in a certain manner on the market, even without feeling legally, actually or morally obligated to do so (Immenga/Mestmäcker/Zimmer, 6th ed. 2019, TFEU Art. 101, para. 71 with further references).

- (2) Supported by such a common intent, the Respondent Opposing the Injunction and the Federal Minister of Health clearly indicated at the joint press conference of 11/10/2020 that they intended to cooperate exclusively in the future in the creation of infoboxes on health topics on the search results page of the Respondent Opposing the Injunction. The representative of the Respondent Opposing the Injunction and the Federal Minister of Health have explicitly spoken of their cooperation on several occasions. According to the identical presentation of the two parties, the object of this cooperation was to ensure that, in the future, answers from the NGP would be presented in a prominently highlighted information box on the Google Search results page when searching for medical keywords. The Federal Minister of Health has also repeatedly clearly expressed its gratitude for this cooperation and for the future prominent presentation of the information of the NGP and the link to the Respondent Opposing the Injunction.

The claim of the Respondent Opposing the Injunction that there is no agreement between the BMG and the Respondent Opposing the Injunction that goes beyond the

coordination of technical details cannot in any way be reconciled with these statements. Even if one wants to assume that the top management of Google and the Respondent Opposing the Injunction expressed themselves in a promotional or non-technical manner here, this does not explain what the cooperation announced with media attention was supposed to be based on, if not on an agreement between the parties involved. Simply the joint press appearance presupposes that the parties have agreed that and what they will announce jointly. The result was not the announcement of agreed technical details, the format of the provided texts or the specifics of the created interface. Rather, the mutual joy was expressed that the two parties involved will, quite fundamentally, work together to ensure that the content of the NGP - and only such content - is provided in the infoboxes and that they link to the *gesund.bund.de* website.

The exclusivity of such cooperation is also expressed in the press conference - a comparable cooperation of the Respondent Opposing the Injunction with other health portals has not been announced. In principle, the Respondent Opposing the Injunction does not dispute this exclusivity. Rather, in contrast to the infoboxes provided by the search engine Bing on health topics with content from changing databases, it even refers to the fact that the cooperation must be fundamentally exclusive to the extent that a provider has to be selected in advance for the content, and the content must be checked for its suitability and reliability.

However, the Respondent Opposing the Injunction argues that there is a lack of temporal commitment between the Respondent Opposing the Injunction and the BMG. Rather, the Respondent Opposing the Injunction had not bound itself at all, but could at any time commission another health portal to provide content for the infoboxes. However, this claim is diametrically opposed to the nature of the cooperation, which was announced at the press conference. It appears correct that no specific duration was agreed. Undoubtedly, however, the cooperation was intended for the long term.

According to the uncontradicted statement of the Federal Minister of Health, the clearly articulated purpose of the cooperation was, at least for such person, to establish the NGP as the authoritative point of contact for health information on the Internet. Thereby, the BMG assumes - in a manner also recognizable to its contractual partner - that the cooperation will provide the NGP with this position; that is, that it will last at least until the NGP has gained a significant advantage over other, private providers in the competition for visibility on the Internet. After all, the Federal Minister of Health made a slip of the tongue regarding the cooperation: "Anyone Googling health should land on our federal portal" and "Gesundheit.bund.de should become the one-stop shop for reliable health information on the Internet." Consequently, the BMG did not understand the cooperation in this way at all - and this is also not evident from the statements of the representative of the Respondent Opposing the Injunction, [...] - that the cooperation should only be of short duration. This is also contradicted

by the not entirely insignificant effort that the Ministry has made in creating separate texts and digital markups, in order to enable the transfer of the content in the infoboxes. Both parties to the agreement also agreed that they would initially start with 160 disease terms and intended to expand this further. There is nothing to suggest that the cooperation is only short-term or medium-term.

- b. The BMG is to be classified as an undertaking in connection with the operation of the gesund.bund.de portal.
- (1) Thereby, a functional concept of an undertaking is to be assumed, the content of which is to be determined from the context of the norm and the purposes of the competition provisions. Accordingly, any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed, is deemed to be an undertaking within the meaning of cartel law (ECJ 4/23/1991, Case C-41/90, ECR 1991, I-1979, para. 21 "Höfner and Elser"; ECJ 9/10/2009, Case C-97/08 P, ECR 2009, I-8237, para. 54 "Akzo Nobel"; Immenga/Mestmäcker/Zimmer, 6th ed. 2019, TFEU Art. 101, para. 9).

In principle, any self-employed activity consisting of offering goods or services on a specific market in return for payment constitutes economic activity (see Higher Regional Court of Düsseldorf, NZKart 2017, 247 250 with further references). The decisive point in this context is not whether the undertaking whose capacity as an addressee of the norm is to be assessed charges a fee; the decisive factor is whether, in the relevant geographic and factual market affected by a restriction of competition, the service in question is usually offered against payment - in this case, the provider of a free service is also an undertaking and thus an addressee of the norm of Art. 101 (1) TFEU (Bechtold/Bosch/Brinker/Bechtold/Bosch/Brinker, 3rd ed. 2014, TFEU Art. 101, para. 14).

By contrast, activities carried out in the exercise of sovereign powers do not have an economic nature that would justify the application of cartel law (see ECJ, Judgments dated January 19, 1994 - C-364/92, ECR 1994, I-43 - SAT-Fluggesellschaft; Higher Regional Court of Düsseldorf, NZKart 2017, 247, 250 with further references, beck-online). However, to the extent that a public entity engages in an economic activity that can be detached from the exercise of its sovereign powers, it is acting as an undertaking with respect to such activity (see ECJ, Judgments dated March 26, 2009 - C-113/07, ECR 2009, I-2207, para. 71 *et seq.* - Selex Sistemi Integrati v. Commission; v. 12 July 2012 - C-138/11, WuW/E EU-R 2472, para. 38 - Compass-Datenbank; Higher Regional Court of Düsseldorf, *loc.cit.*)

- (2) The operation of health portals is a business activity consisting of providing a service, specifically the provision of information on health issues, to users on the Internet. The indisputably considerable demand for this service is currently being met and has been met in the past by a large number of private providers, such as the Petitioner Seeking the Injunction, through

portals that are generally financed by advertising. Apart from the type of financing, which is irrelevant in this context, the National Health Portal is also such a health portal. It does not matter that the NGP may use a simpler language and a particularly clear form compared to other services on the Internet. In this respect, it may be a special competitive feature that sets the BMG's service apart from others. Moreover, the NGP articles may be less detailed than those of other portals. Whether there is greater neutrality in ignoring controversies, such as vaccination, is probably already questionable. In any case, these special features do not go so far as to override the similarities between the portals and make the NGP something fundamentally different. Rather, the similarities between the portals clearly outweigh the differences - like other health portals, the NGP offers editorially prepared information on health issues of all kinds, presents diseases and provides recommendations for a healthy lifestyle. Despite the differences in the presentation and the fact that advertising is shown on the portal of the Petitioner Seeking the Injunction, from the point of view of the opposing market party (consumers searching for health information on the Internet), a functional interchangeability of the portals can be assumed in view of the largely similar content and the matching declared objective of the portals. This was also the assumption of the BMG in awarding the contract, when it stated that, with the NGP, it wanted to "close a significant gap in the market for digital health information on the German-language Internet, which has so far been primarily commercial" (see Exhibit K19, p.7). Last but not least, the fact that both portals are offered to users in Google Search as alternatives for satisfying the same information need speaks for their functional interchangeability.

In the past, health portals have not been operated exclusively by public institutions, nor do they generally necessarily have to be operated by such institutions (see ECJ Judgment dated 4/23/1991 - Case C-41/90 - para.22).

The use of health portals is generally free of charge for the user, even in the case of private portals financed by advertising. However, in this case, the acceptance of advertising is to be understood as remuneration, such that an economic activity exists in this respect.

The Respondent Opposing the Injunction relies unsuccessfully on the fact that the BMG performs public duties in operating the health portal gesund.bund.de, specifically the provision of health education. Participation in general business transactions by a holder of sovereign authority does not lose the nature of a business activity subject to the obligations of cartel law merely because it is also intended to fulfill public tasks or satisfy public interests. If a public authority - as in this case - resorts to the means provided by the private law system in the performance of its duties, it is subject to the same restrictions as any other participant in the

market organized under private law and must, in particular, observe the limits imposed by competition law on such activity (Federal Court of Justice, WuW/E DE-R 289, 293 - Lottospielgemeinschaft).

- c. With their cooperation, the Respondent Opposing the Injunction and the BMG have the effect of restricting competition on the market for providers of health information on the Internet.
- (1) Contrary to the opinion of the Petitioner Seeking the Injunction, an intended restriction of competition is not to be assumed. The ECJ applies an objective standard to the question of whether there is a restriction of competition by object. Accordingly, it is not the intention of the contracting parties that is important (although this can be taken as an indication of the likelihood of the agreement to restrict competition), rather, an objective restrictive tendency of the measure to be assessed is important. For an anticompetitive purpose to be established, the very nature of the coordination must be harmful to competition. For this purpose, it must in itself indicate a sufficient impairment of competition, such that an assessment of the effects becomes unnecessary (Immenga/Mestmäcker/Zimmer, 6th ed. 2019, TFEU Art. 101, para. 130).

Such an objectively harmful tendency, which has been assumed, for example, in the case of horizontal price agreements, territorial divisions or vertical resale price maintenance, is not inherent in the agreement between the Respondent Opposing the Injunction and the BMG.

- (2) The exclusive arrangement must therefore be assessed on the basis of its specific effects. Based on the potential and actual effects submitted and plausibly demonstrated by the Petitioner Seeking the Injunction and the stated objective of the contracting parties, it must be assumed that the agreement between the Respondent Opposing the Injunction and the BMG does in fact appreciably impair competition on the relevant market.
- (a) In the case that a restriction of competition has been brought about, the focus is on the actual effects, that is, the objective consequences of the agreement on the market. Restrictive effects on competition exist if the agreement leads to a restriction of competition in the sense of a limitation of the options of action and selection of third market participants (MüKo WettbR/Säcker/Zorn, 3rd ed. 2020, Art. 101 TFEU, para. 274).

In order to determine the objective consequences, the causal relationship between the agreement and the current competitive situation must be examined. The agreement must be at least hypothetically causal for the prevailing competitive situation. According to established case law, a counterfactual analysis, that is, a comparison of the current competitive situation with the hypothetical situation that would prevail if the agreement had not been implemented, must be carried out. In doing so, not only the actual effects on

competition - but also the potential effects - must be taken into account, at least in situations where an agreement has not yet been practiced at all and in such situations where an agreement has been practiced but the effects, the occurrence of which is very likely, cannot yet be determined. This takes into account the preventive nature of the prohibition (MüKo WettbR/Säcker/Zorn, 3rd ed. 2020, TFEU Art. 101, paras. 275, 277).

- (b) The options for action and selection of the Petitioner Seeking the Injunction are significantly restricted by the agreement between the Respondent Opposing the Injunction and the BMG, because the content of the NGP is permanently reserved for the best possible position on the Google Search results page, specifically the newly created, prominently highlighted position of "0" in the infobox, which is thus not available to competitors from the outset.

In this case, the relevant market is that for the service of health portals on the Internet, on which the Petitioner Seeking the Injunction and the BMG are active as providers of substantially similar health portals (see above). With a market share of 90%, the Respondent Opposing the Injunction is the dominant provider on the upstream market for the provision of general search services in Germany. According to the uncontested submission of the Petitioner Seeking the Injunction, in the vast majority of cases (88-90%), users find their way to the health portals via a Google search. The operators of health portals are therefore particularly dependent on achieving good visibility on the search results page of the Respondent Opposing the Injunction, in order to be targeted by users and thus generate user traffic, which they can in turn monetize by entering into advertising contracts. Up until now, portal operators had the option of using competitive means to achieve this, specifically either by creating particularly relevant content and further optimization measures in terms of ranking in the generic search results, or - at least in theory - by buying ad spaces at the top of the search results page. Now, in a prominent position next to or in front of the generic search results, there is an infobox reserved solely for the content of the NGP, to which the BMG's competitors on the market for health portals will not have access for the foreseeable future.

It is obvious that the Petitioner Seeking the Injunction must fear considerable competitive disadvantages as a result. A central marketing instrument is withdrawn from competition, and the BMG is granted a competitive advantage through a fixed "pole position" for which there can be no compensation in any other manner. The fact that users primarily take note of the top results on the search results page has been sufficiently plausibly demonstrated by the Petitioner Seeking the Injunction, on the one hand, through the statements with reference to the European Commission's explanations of behavioral economics in the "Google Search (Shopping)" proceedings. On the other hand, it is general life experience that consumers are more inclined to go to the top results of a search query. Last but not least, it is the declared objective of the contractual

partners to draw the attention of users to the content of the NGP through the prominently highlighted infoboxes. According to their statements at the press conference, the Respondent Opposing the Injunction and the BMG also assume that users are more likely to take note of these than the rest of the content of the search results page.

To the extent that the Respondent Opposing the Injunction claims that the infoboxes merely provide basic information that gives an initial overview, but do not replace the information offered by the Petitioner Seeking the Injunction, this argument is, on the one hand, contradictory. This is because the Respondent Opposing the Injunction itself emphasizes elsewhere that the infoboxes provide immediate answers to search queries and thus meet the demand for health information on the Internet in a time-saving and targeted manner. On the other hand, this claim can neither be reconciled with the actual content of the infoboxes, which provides quite sufficient answers for some information seekers, nor with the actual effects, as plausibly demonstrated by the Petitioner Seeking the Injunction.

It may be that users make little use of the link to the NGP, as the Respondent Opposing the Injunction argues. However, the declining click-through rate on the website of the Petitioner Seeking the Injunction indicates that a large number of users stop their search due to the infoboxes, because their need for information is already satisfied by this. The causality of the infoboxes for the - as such undisputed - decline in the click-through rate for certain health terms - which is disputed with reference to fluctuations in the number of hits that also occur elsewhere - has been sufficiently plausibly demonstrated. Thus, the Petitioner Seeking the Injunction selected health terms for which the ranking in the general search results was consistent during the study period, such that a decline in click-through rate can only be attributable to a decline in visibility. Moreover, the even more pronounced drop in click-through rate on mobile devices, where the arrangement of ads, infoboxes, and generic results makes it necessary to scroll down even further to get to the search results that are last mentioned, shows that there is a correlation between the degree of loss of visibility and the drop in the click-through rate.

The Respondent Opposing the Injunction did not provide a different explanation for the declining click-through rate, but merely referred again and again - in the most recent comparison with Austria as well - to the fact that the total traffic on the website of the Petitioner Seeking the Injunction, which in its opinion was the only decisive factor because it could be monetized, had remained constant. However, it is not clear why nominal traffic should be a better indicator of the competitive effects of the agreement at issue than the click-through rate. The nominal development of traffic says nothing about how it would have developed without the agreement at issue, which is, however, decisive for the assessment of the competitive effects (see above). However, the click-through rate at least approximates

this relationship by measuring the development of clicks on a website while the ranking and number of impressions remain constant. If search results of the Petitioner Seeking the Injunction are shown with the same frequency and at the same rank, but experience less clicks, and such effect occurs at the same time as the infoboxes are displayed, this is a clear indication that even a (consistently) well-placed generic search result has lost attention due to the infoboxes.

It may well be the case that the analyses of the Petitioner Seeking the Injunction are of a rather exemplary nature, and also that no concrete losses in sales suffered can be designated. However, here, the Petitioner Seeking the Injunction can also rely decisively on the potential effects of the agreement described above, because, in view of the short duration of the placement of the infoboxes, restrictive effects on competition could in all likelihood not yet have their full effect. Against this background, the secondary effects to be feared according to the submission of the Petitioner Seeking the Injunction, which may lead to fears of slipping in the ranking due to the increased access to the NGP website through the infoboxes and their influence on the Google Search algorithm, are irrelevant.

The adverse effects result in the Petitioner Seeking the Injunction being able to make its content available to fewer users than would be the case without the agreement restricting competition. Thereby, the placement of costly advertisements to maintain visibility is not an economically equivalent alternative to which the Petitioner Seeking the Injunction could or would have to refer. As a result, the Petitioner Seeking the Injunction can generate less income from advertising measures and thus has less scope for investment in improving its service than would be possible without the placement of the eye-catching infoboxes.

To the extent that the Respondent Opposing the Injunction challenges the causality of the agreement for the restrictions of competition by emphasizing that the installation of the infoboxes was based on its unilateral decision and at most required the implementation of a coordination with the BMG, the present case does not differ from any other case of a vertical agreement. Every transaction that an undertaking enters into is preceded by a unilateral decision by a representative of such undertaking to enter into such a transaction. The situation is no different here. The effects on competition do not stem from the basic business decision to want to introduce infoboxes, but from the agreement with which this is put into practice, specifically the agreement with the BMG to cooperate exclusively on the content filling and linking, and their execution.

- (3) An exemption of the agreement pursuant to Art. 101 (3) TFEU or § 2 GWB cannot be considered. The agreement does not contribute to the improvement of the

production or distribution of goods or to the promotion of technical or economic progress.

Agreements that create efficiencies are exempted under Art. 101 (3) TFEU. Thereby, a distinction is made between quantitative and qualitative efficiency improvements. In doing so, the agreement must result in objective advantages that are likely to provide compensation for the disadvantages associated with the restriction of competition. In accordance with the established case law of the ECJ, this requires that the advantages resulting from an agreement restricting competition must lead to an increase in the welfare of society as a whole (Immenga/Mestmäcker/Ellger, 6th ed. 2019, TFEU Art. 101 (3), para. 134).

When an objective advantage exists must be determined in light of the public interest of the Union. It is not enough for the parties to, by means of an agreement, merely improve their own planning security and make their sales organization more efficient. Rather, a market effect in the interest of the Union must be demonstrated (MüKo WettbR/Wolf, 3rd ed. 2020, TFEU Art. 101, paras. 1083, 1084).

To this end, the undertakings involved must present a comprehensible assessment of the extent of the expected advantages, which could be set against the disadvantages inherent in the restriction of competition (see Immenga/Mestmäcker/Ellger, 6th ed. 2019, TFEU Art. 101 (3), para. 138).

- (4) The Respondent Opposing the Injunction, who has the duty to provide evidence in this respect, has not submitted any such compensatory efficiency gains and has not plausibly demonstrated them.

The Respondent Opposing the Injunction invokes a qualitative improvement of its own product, since consumers are immediately shown reliable and authoritative information on certain diseases. In this manner, the Respondent Opposing the Injunction is said to create added value for its search service.

- (a) It already appears questionable whether the integration of syndicated content constitutes an improvement of a search engine, since it is ultimately less an improvement of the search engine service than a shift of the activity of the Respondent Opposing the Injunction to another market, specifically that of a publisher or other provider of content - be it lexical or journalistic, but in any case not completely free of opinion simply due to the deliberate reduction of content. Thus, the Respondent Opposing the Injunction is going beyond its basic function as a search platform on the Internet to bring together people looking for products or services (for example, information) and their providers, but also beyond directly answering factual search queries (for example, weather, height of the Eiffel Tower). Ultimately, the Respondent Opposing the Injunction has left the market of the pure search engine in the sense of an intermediary of products to users and has become a provider of such product itself. Thereby, it is true that bringing about product changes and improvements is in line with the performance notion of competition. However, when the Respondent Opposing the Injunction permanently places an infobox with the

content of the NGP in front of the generic search results, it is, on the one hand, evaluating the various sources available on the Internet to answer a search query by prominently highlighting one of them in advance as the authoritative answer. In this way, it is making a content-based pre-selection that is detached from the Google algorithm. On the one hand, this is not necessarily transparent for the user; on the other hand, an evaluation of the content is being made here and thus ultimately a contribution is being made to the formation of public opinion. Whether this is an improvement of a search engine seems at least doubtful objectively.

- (b) However, even if one assumes with the Respondent Opposing the Injunction that its offer is made more attractive by the integration of the infoboxes with directly visible health information (see Regional Court of Hamburg, Decision dated 4/4/2013 - 408 HKI 36/13), this does not constitute an efficiency gain within the meaning of the exemption provision of Art.101 (3) TFEU.

Increasing the attractiveness of an individual market participant's product does not constitute an increase in the welfare of society as a whole, nor has the Respondent plausibly demonstrated a market effect that is in the Union's interest. Nor is such to be expected. This is because the more attractive design of a single supplier's product for consumers cannot outweigh the disadvantages caused here by the restriction of competition for all other market participants.

This is especially true when - as in this case - a dominant undertaking acts as a gatekeeper on the upstream search engine market and, to the detriment of the private competitors dependent on it, permanently gives the state's tax-funded service a "pole position" in the battle for the attention of users, in order to enhance the attractiveness or visibility of its own products. In this case, two actors are intervening in the relevant market, who themselves are taking a low economic risk and are making it more difficult for existing market participants to access their users, which in the case of the specifically affected market also entails an interference with the diversity of media and opinions.

How, in such a case, the expected advantages are supposed to outweigh the disadvantages has neither been comprehensibly explained by the Respondent Opposing the Injunction, nor is it evident.

- (c) To the extent that the Respondent Opposing the Injunction is implicitly citing the improvement of health education of the population as a gain in welfare, a comprehensible explanation and weighting of this advantage is also lacking in this respect. The extent to which the infoboxes are actually making a contribution in this regard has not been demonstrated. In any case, when weighing the aforementioned overall circumstances, this advantage does not appear to be so overriding that it justifies the risk of driving other reputable providers of health information out of the market. On the contrary, this threatens a loss of the existing diversity of high-quality health portals and thus also of the availability of

medical "second opinions."

2. The issuance or execution of the preliminary injunction was not to be made dependent on the provision of security pursuant to § 935, § 936, § 921 (2) ZPO, as the Respondent Opposing the Injunction had alternatively requested. The Respondent Opposing the Injunction has not substantiated its application in this respect; in particular, it has not explained and quantified possible damages, nor is a reason for the order apparent.

III.

The Petitioner Seeking the Injunction has also plausibly demonstrated the existence of grounds for the injunction.

Grounds for an injunction exist if there is an objectively justified risk that, by changing the status quo, the legal realization of the applicant by means of the judgment obtained in the main action, including its enforcement, could be thwarted or made more difficult. Thereby, the applicant does not have to be referred to a claim for compensation (MüKoZPO/Drescher, 6th ed. 2020, ZPO § 935, para. 15).

As stated above, the Petitioner Seeking the Injunction has plausibly shown that it is in danger of losing traffic due to the loss of visibility in Google Search caused by the infoboxes, which has already been realized in a decline in click-through rates for individual disease terms, and that user traffic is decisive for the conclusion of advantageous contracts with advertisers. It must be feared that the decline will be reflected in concrete losses of income until the conclusion of main proceedings, especially since the Petitioner Seeking the Injunction has plausibly demonstrated the fact that, due to keyword targeting as its central marketing instrument, even a reduction in visibility on narrowly themed subject areas severely impairs monetization opportunities (see Exhibit K36, p.2). The Petitioner Seeking the Injunction does not have to wait for this loss of income, nor does it have to plausibly demonstrate that its livelihood is in jeopardy for the issuance of a preliminary injunction, especially since the Petitioner Seeking the Injunction is not applying for an order to perform (*Leistungsverfügung*).

The Petitioner Seeking the Injunction has not refuted the urgency resulting from such circumstances by not having done everything in its power to obtain the issuance of the preliminary injunction as soon as possible (see Higher Regional Court of Düsseldorf, Judgment dated 9/7/2020 - VI-U (Kart) 4/20 - NZKart 2020, 545, 546). Thus, it filed the application with the court on 11/27/2020, that is, within one month of the start of the cooperation between the Respondent Opposing the Injunction and the BMG.

The threatened loss of rights is also not offset by any interests of the Respondent Opposing the Injunction that are to be given priority. A sustained loss of reputation of the Respondent Opposing the Injunction is just as little to be expected from the withdrawal of a service, which has only recently been introduced, as an impairment of the general interest in public health.

IV.

The decision on costs is made in accordance with § 92 (1)(1), § 269 (3)(2) ZPO. The content of the rejected application at no. 2) is largely the same as that of the application at no. 1), which was granted.

To the extent that the content of the application at no. 2), like the withdrawn part of the application at no. 1), went beyond the injunction awarded, this was not so significant that the Petitioner Seeking the Injunction would have had to bear a total cost burden of more than one quarter.

The decision on provisional enforceability is made with regard to the claim for reimbursement of costs of the Respondent Opposing the Injunction pursuant to § 708 (6), § 711 ZPO.

/s/

█
Chief Judge
at the Regional Court

█
Judge
at the Regional Court

█
Judge
at the Regional Court

Pronounced on 2/10/2021

/s/
█, Court Employee
Authenticating Official of the Office

/seal: BAVARIA *
REGIONAL COURT/

For the conformity of the copy
Munich, 2/10/2021

█, Court Employee
Authenticating Official of the Office