The Doctor’s Digital Visit

Limits of (the ban on advertisement of) remote treatment in Germany

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I. Introduction

Since 19 December 2019, the ban of advertisement for so-called remote treatment according to Sec. 9 Heilmittelwetbegesetz (HWG, Advertising of Medicines Act) applies in the following version:

Advertising for the detection or treatment of illnesses, suffering, physical injury or pathological complaints that is not based on personal perception of the person or animal to be treated (remote treatment) is not permitted. Sentence 1 does not apply to advertisement for remote treatment using communication media if, according to generally accepted professional standards, personal medical contact with the person to be treated is not required.¹

In its judgment of 9 July 2020, the Oberlandesgericht München (Munich Higher Regional Court)² ruled that the advertising ban in Sec. 9 s. 1 HWG does not prohibit remote treatment per se, but only the advertisement thereof. With Sec. 9 HWG in its current version, the legislator intended to adhere to its fundamental assessment that advertising for remote treatment is generally prohibited in the interest of avoiding the risks to general health associated with such advertising.³ Only under the conditions explicitly stated in Sec. 9 s. 2 HWG advertisement for remote treatment is permitted.⁴

II. Introducing the case

The Munich Higher Regional Court (in the following: OLG) had to examine and rule on an advertisement of a smartphone app for a “digital doctor’s visit”. The plaintiff is a registered association for the promotion of commercial interests, in particular for combating unfair competition. The defendant O., a holding company and the website operator, advertised this app as a part of a health insurance company’s website, its subsidiary. This advertisement took place via a German-language website with the top level domain “de”. The specific advertisement including this app was directed at patients living in Germany who were insured with the defen-

¹ Text in the version of Article 5 Digital Supply Act (DVG) dated 9 December 2019 BGBl. I p. 2562, which entered into force on 19 December 2019.
² Munich Higher Regional Court, judgment of 9 July 2020, Case No. 6 U 5180/19. The appeal against non-admission is being heard by the Federal Court of Justice (BGH) under Case No. I ZR 146/20.
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The advertisement did not contain more detailed information on the diagnoses, treatment recommendations, and reasons for sick leave referred to, which is consistent with the above reference to “general medical questions” and the “initial assessment.”

According to the OLG, the defendant had advertised in a generalized manner that “for the first time in Germany” complete medical care, namely “diagnoses, therapy recommendations and sick leave,” could be provided online using an app (“Everything via app”). The defendant had also stated in its grounds of appeal that in around 90 per cent of the cases patients visited a doctor, a personal consultation with the doctor was not necessary. The OLG too is content with only an initial assessment.

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cerpts from the advertisement seem to have been taken out of context.

The OLG considers the advertisement not to be legal within the meaning of Sec. 9 HWG and confirms the first-instance ruling. The Landgericht München I (Regional Court, LG Munich I) had ruled on July 16, 201915, that the defendant was ordered at the request of a registered association for the promotion of commercial interests, in particular to combat unfair competition, “to refrain from advertising in commercial dealings in the Federal Republic of Germany for remote medical treatment in the form of a digital doctor’s visit, whereby patients living in Germany who have health insurance with o AG are offered, by means of an app, to obtain diagnoses, therapy recommendations and sick notes from doctors based abroad via their smartphone (…)’.

In December 2020, the defendant advertised the app under a tab called “Physician Video Call”, somewhat modified, as follows:

‘No more dragging yourself to the doctor with a cold. With our doctor video call, you can get diagnoses, prescriptions and sick notes easily and quickly via the app. Of course, you can still go to the doctor of your choice.’

The prospective client can neither download the app from the defendant’s website nor otherwise register directly for use. The only existing button contains the words: ‘Find the right premium’. Clicking this button takes the user to the subpage “/online-rate-calculator” and to a chat with “Isabel”, with whose help the individual insurance premium can be calculated:

‘Curious about your insurance rate? Together we calculate your individual premium. Just a few steps to your no-obligation insurance quote for private health, supplementary dental or supplementary hospital insurance.’

So this is not about an app for remote treatment, but about the conclusion of a contract for private health insurance.

The judgment of the OLG is not yet binding. 18

III. The legal situation before and after

1. Draft law on advertising in the field of medicine of 196419

The predecessor provision to Sec. 9 HWG, the original Sec. 6 para. 2, read:

Remote treatment must not be advertised. Remote treatment is the recognition or treatment of illnesses, ailments, bodily injuries or pathological complaints that are not based on the physician’s own perception of the person or animal to be treated.

The grounds of the draft regulation read as follows:

“Since there are significant health concerns against remote treatment, there are also significant health concerns against the advertising of remote treatment. Remote treatment within the meaning of this Act begins with a diagnosis made on a human being or animal that is not based on the physician’s own perception (paragraph 2).”

Sec. 9 s. 1 HWG is almost 60 years old.

2. Adapting of professional regulations in accordance with therapeutical freedom and patient’s right to self-determination

In the course of digitization, which does not bypass physicians and hospitals, the professional law for physicians has been adapted:

Sec. 7 para. 2 MBO-Ä (model professional regulations for physicians) used to prohibit remote treatment without any personal contact. A preceding direct physician–patient contact was always required. General discussions or consultations were permitted with regard to the remedy of disturbances of well-being or rather general questions concerning diseases of an otherwise healthy patient, which can be treated by self-medication, e.g. in case of a cold.20 The newly worded, current Sec. 7 para. 4 MBO-Ä reads (translated from German):

1 Physicians advise and treat patients in personal contact. 2 They may use communication media to support the treatment. 3 In individual cases, exclusive consultation or treatment via communication media is permitted if this is justifiable from a medical point of view and the necessary medical diligence is observed, in particular by the

15 Regional Court Munich I, judgment of 16 July 2019, Case No. 33 O 4026/18.
16 https://www.ottonova.de/ (the website was visited on 29 December 2020).
17 https://www.ottonova.de/online-beitragsrechner/ (the website was visited on 29 December 2020).
18 Cf. fn. 2 with reference to the non-admission appeal proceedings.
19 BT-Drs. 4/1867, http://dipbt.bundestag.de/doc/btd/04/018/0401867.pdf, p. 9 (see § 6).
20 Fehn in Marx/Marx, Telemedicine, Springer 2021, 24 (31).
way in which the findings are ascertained, consultation, treatment and documentation are carried out, and the patient is informed about the particularities of exclusive remote consultation and treatment using communication media.

Sec. 7 para. 4 MBO-Ä has been adopted almost identically in 14 of 16 professional codes of the federal state medical associations. Schleswig-Holstein has modified the wording considerably, however, the core statement, permission for exclusive remote treatment in individual cases, has been adopted. Only the Brandenburg Medical Association has not adopted Sec. 7 para. 4 MBO-Ä. It still prohibits exclusive remote treatment without exception, as if it had never taken note of the amendment of Sec. 7 para. 4 MBO-Ä.

The changes are intended to offer patients care that is in line with the recognized lege artis of medical knowledge through the further development of telemedicine, digital, diagnostic and other comparable options. Thus, there has been a shift toward the therapeutic freedom of the physician as the cornerstone of medical practice on the one hand, but also toward more patient autonomy as the framework for medical action on the other.

The fact that personal contact is the “gold standard” is not disputed by Sec. 7 para. 4 s. 3 MBO-Ä. It continues to be the rule. Rather, Sec. 7 para. 4 s. 3 MBO-Ä has been approximated to Sec. 630a para. 2 BGB (German Civil Code), the civil law provision on the treatment contract:

Treatment shall be provided in accordance with generally accepted professional standards existing at the time of treatment, unless otherwise agreed.

This means that at the beginning of a proposed remote consultation, the doctor must first check whether the knowledge gained via the remote communication means used is sufficient for a professional diagnosis and therapy. If there are doubts about this, the patient must be advised to visit the physician in person and refuse further remote treatment.

The patient’s right to self-determination within the limits of morality (Sec. 138 BGB, and Sec. 228 of the German Criminal Code, StGB) and the therapist’s freedom to select the appropriate diagnostic or therapeutic method can be mutually agreed and determined by the parties, according to Sec. 630a para. 2 BGB. The content of such deviation agreement includes, for example, the use of unapproved medications and new treatment methods as well as treatments in which generally accepted professional standards are undercut. However, due to the necessity of informing the patient in order to exercise the patient’s right to self-determination, the practitioner alone cannot make deviating standards part of the contract, e.g. through general terms and conditions.

3. The Digital Supply Act (DVG)

On 19 December 2019, the legislator introduced the new Sec. 9 HWG because

“The current regulations of Sec. 9 of Heilmittelwerbege- setz (HWG) impede the widespread introduction of tele- medicine applications. A complete repeal of the regulation of Sec. 9 HWG is opposed by the fact that the need for protection continues to exist even after repeal. This also applies to the advertising of remote treatments offered by persons for whom neither remote treatment nor the advertising of remote treatment are regulated by legally binding professional regulations.”

The legislator’s intention that the new Sec. 9 HWG should modernize medical professional law is thereby expressed, specifically with regard to the physician’s case-by-case decision as to whether remote treatment is compatible with the generally accepted state of medical knowledge:

“The amendment of Sec. 9 HWG implements the adjust- ment of the medical professional law with regard to the

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21 Fehn in Marx/Marx, Telemedicine, Springer 2021, 24 (32); Resolution IV-01 of the 121st German Medical Congress Erfurt May 8-11, 2018, Minutes of the Resolution, pp. 288- 290, http://www.bundesaerztekammer.de (last accessed December 12, 2020); see also Deutsches Ärzteblatt, 15 June 2018, https://doi.org/10.3238/arztebl.2015 mbo_daet2018 (the website was visited on 29 December 2020).

22 Fehn in Marx/Marx, Telemedicine, Springer 2021, 24 (32).

23 Fehn in Marx/Marx, Telemedicine, Springer 2021, 24 (32).

24 Fehn in Marx/Marx, Telemedicine, Springer 2021, 24 (32); Resolution IV-01 of the 121st German Medical Congress Erfurt May 8-11, 2018, Minutes of the Resolution, pp. 288- 290, http://www.bundesaerztekammer.de (the website was visited on 29 December 2020); see also Deutsches Ärzteblatt, June 15, 2018, https://doi.org/10.3238/arztebl.2015 mbo_daet2018 (the website was visited on 29 December 2020).

25 Fehn in Marx/Marx, Telemedicine, Springer 2021, 24 (34).

26 Fehn in Marx/Marx, Telemedicine, Springer 2021, 24 (34).

27 Weidenkaff in Palandt, § 630a, marginal no. 12.

28 Weidenkaff in Palandt, § 630a, marginal no. 12.

29 Weidenkaff in Palandt, § 630a, marginal no. 12.

30 BT-Drs. 19/15438, https://dip21.bundestag.de/dip21/btd/19/134/1913438.pdf p. 77 et seq (the website was visited on 29 December 2020).
The legislator specifically refers to Sec. 7 para. 4 MBO-Ä and to different implementations of Sec. 7 para. 4 MBO-Ä in the professional regulations of the federal states:

“At the same time, the regulation takes into account a further development of telemedical possibilities. The implementation of the adaptation of Sec. 7 para. 4 MBO-Ä has been carried out very differently in the individual professional regulations at state level.”

This is not correct, as has already been pointed out above. Only the Brandenburg Medical Association has not adopted Sec. 7 para. 4 MBO-Ä. Regardless of this rather strange seeming individual case thus the basis of the decision of the legislator is not correct (anymore), which is further explained:

“In contrast to the concrete and individual case-by-case decision provided for by professional law, the regulation of Sec. 9 HWG can furthermore be based on an abstract, generalizing assessment only, since advertising is directed at a large number of individuals and not further individualized persons, irrespective of a concrete treatment situation. In this context, only such remote treatments may be advertised for which compliance with generally accepted professional standards is ensured. This is the case if, according to the generally accepted state of medical knowledge, proper treatment and consultation using communication media is fundamentally possible.”

According to the above legal bases, this representation is contradictory, because advertising is seldomly case-related, i.e. specifically tailored to a person and his or her needs. In the situation described, the “advertiser” is already in a conversation with the potential patient. At this moment, it is less of an advertising but more of a consultation or a preparatory discussion, in which physician and patient clarify the modalities of the treatment and/or the treatment contract in accordance with the medical therapy liberty and the right of self-determination of the patient. With the last sentence, the legislator even disregards the physician’s therapeutic freedom and thus the foundations of his professional practice, i.e. Art. 12 para. 1 of the German Constitution (GG). Overall, it is clear that no clear distinction has been made between the technical possibilities of telemedicine per se, the actual ability and legal right of physicians, and the advertising of remote treatment itself.

4. What is not banned from advertising in accordance with Sec. 9 HWG?

The concept of remote treatment covers diagnosis and therapy, but not prevention and avoidance. The latter are also covered by the broader concept of telemedicine, which is not defined in German law. Remote treatment and telemedicine are therefore not to be understood as synonymous. However, they are used synonymously, but most of all they are not used in a consistent manner. The term telemedicine itself is understood in different ways:

Telemedicine is understood in particular as the third pillar of health telematics alongside teleconsultation and telemonitoring. In this context, telemedicine is the generic term for remote diagnostics and remote therapy and generally describes the provision of medical services for the benefit of patients over spatial distance and/or temporal offset through the use of information and communications technology.

Telemedicine is also used as a generic term for telecooperation, teletherapy and telemonitoring. Here, telecooperation primarily means independent cooperation between professionals, especially within the medical profession (telephone consultation). Telemonitoring describes the permanent accompaniment and observation of a patient without being present in person. This also includes so-called weight or fitness trackers. In this case, teletherapy includes remote diagnostics and remote therapy.

Before a legal assessment of “telemedicine” is made, it is therefore always necessary to find out what is being referred to in the specific case.

IV. The OLG’s ruling and its reasons

The ruling of the OLG is interesting in many respects. Particularly relevant in a digitalized world is the cross-border ad-

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31 BT-Drs. 19/13438, https://dip21.bundestag.de/dip21/btd/19/134/1913438.pdf, p. 77 et seq.
32 BT-Drs. 19/13438, https://dip21.bundestag.de/dip21/btd/19/134/1913438.pdf, p. 77 et seq.
33 Wilke, § 9 HWG, Lrg. 22, July 2020.
34 Recommendable overview of the term descriptions in Fehn in Marx/Marx, Telemedicine, Springer 2021, 3 (6 et seq.).
35 Fehn in Marx/Marx, Telemedicine, Springer 2021, 24 (26).
36 Fehn in Marx/Marx, Telemedicine, Springer 2021, 24 (27).
37 For example, Beckers et al. in Marx/Marx, Telemedicine, Springer 2021, 3 (6).
38 For example, Beckers et al. in Marx/Marx, Telemedicine, Springer 2021, 3 (6).
39 For example, Beckers et al. in Marx/Marx, Telemedicine, Springer 2021, 3 (6).
40 For example, Beckers et al. in Marx/Marx, Telemedicine, Springer 2021, 3 (7).
vertising of remote treatments via app – if such a reference to different states actually exists:

1. Conflict of laws: which law is applicable in case of cross-border services?

The OLG has confirmed the opinion of the LG Munich I that the Rome II Regulation applies in the case of an app offered from Switzerland to German patients. Pursuant to Art. 1 para. 1 s. 1 Rome II Regulation, this regulation applies to non-contractual obligations, again defined in more detail in Art. 2 Rome II Regulation, in civil and commercial matters not excluded under Art. 1 para. 2 Rome II Regulation, which have a connection to the law of different states. Specifically, the OLG ruled that Art. 6 para. 1 Rome II Regulation is applicable. According to this:

The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

Because the advertisement in dispute, which was directed at German patients, was indisputably carried out via a German-language website with the top level domain "de", the courts considered Art. 6 para. 1 Rome II Regulation to be applicable. In the case of advertising measures, the place of market, i.e. the place of the competitive collision of interests, is in principle where the advertising measure affects the customer, even if the subsequent sale is to take place on another market.

In principle, this is correct. However, a closer look at the case reveals that Art. 1 para. 1 s. 1 Rome II Regulation is not applicable because the case actually involves the application of a contractual obligation, specifically the conclusion of a private health insurance policy between two parties domiciled in Germany. Therefore, the case also has no connection to the law of different states. Even the defendant O, with whom a contract of use could possibly come into existence with regard to the app, is located in Germany. According to this opinion, the Rome II Regulation does not apply in this case.

Like the Regional Court, the OLG focuses on a fictitious treatment contract between fictitious German patients, already privately insured with O’s subsidiary, and a fictitious Swiss physician. Only if these circumstances actually existed, the OLG would in principle be in agreement with its statements.

2. Sec. 9 HWG as a market conduct standard

According to the OLG, Sec. 9 HWG is intended to regulate market conduct in the interest of market participants within the meaning of Sec. 5a of the German Fair Trade Practice Act (UWG). Accordingly, anyone is acting unfairly who violates a statutory provision which is also intended to regulate market conduct in the interest of market participants and the violation is likely to have a noticeable adverse effect on the interests of consumers, other market participants or competitors. Because Sec. 9 HWG serves to protect the health of consumers, a violation of this standard is also a noticeable impairment within the meaning of Sec. 3 para. 1 UWG.

The defendant O. would therefore have to be the addressee of a statutory provision with the character of a market conduct regulation, in this case Sec. 9 HWG, and would have had to have acted contrary to it:

a) However, the defendant is not an addressee of Sec. 9 HWG

Since the advertising in the present case is about the conclusion of a contract for private health insurance, the question arises whether the advertising with the app can fall under the HWG at all. It is true that the HWG is directed not only at manufacturers of therapeutic products and physicians, but at all advertisers who advertise their products within the scope of the law. However, the HWG only covers performance-related sales advertising, i.e. product-related advertising. In the present case, the app use is not priced and is not a directly usable service. Rather, the app is intended to support a coherent offer and image of a fully digital private health insurance. The website visitor cannot download the app, but can only check (or have checked) the amount of his potential insurance premium. If a company advertises the entirety of

41 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ2007 L 199/40.
42 Munich Higher Regional Court, judgment of 9 July 2020, Case No. 6 U 5180/19, GRUR-RR 2020, 461 (465).
43 Munich Higher Regional Court, judgment of 9 July 2020, Case No. 6 U 5180/19, GRUR-RR 2020, 461 (465) citing BeckOGK/Poelzig/Windorfer, 1.8.2018, Rome II Regulation Art. 6 para. 78.
44 Munich Higher Regional Court, judgment of 9 July 2020, Case No. 6 U 5180/19, GRUR-RR 2020, 461 (465), para. 50.
45 Munich Higher Regional Court, judgment of 9 July 2020, Case No. 6 U 5180/19, GRUR-RR 2020, 461 (465), para. 38.
46 Otto: The Doctor’s Digital Visit
47 WiKi, § 1 HWG, LG. 12, February 2013, marginal no. 7 with reference to BGH, GRUR 2001, 453.
its services, this is rather a so-called image advertisement, which is not subject to the HWG. Thus, if the advertising is not intended to draw attention to specific products, but rather to the quality and price worthiness of a company’s entire advertised product range, in the opinion of the legislator there is no special risk situation that the HWG aims to counteract by regulating product-related advertising. In the present case – without the addition of fictional facts – nothing else is to be assumed and thus the HWG is not applicable.

b) No infringement of Sec. 9 HWG without applicability of the HWG

If, due to the lack of applicability of the HWG, Sec. 9 HWG cannot be violated, there is also no infringement, and thus no unfair conduct within the meaning of Sec. 3a UWG.

3. Law change

The OLG, which disagrees, further distinguishes between old and new law. The reason is that the facts of the case concern a period in which the old Sec. 9 HWG applied and, since December 19, 2019, the new Sec. 9 HWG. It finds the advertisement inadmissible according to the old Sec. 9 HWG and according to the new Sec. 9 HWG:

a) Inadmissibility pursuant to Sec. 9 HWG (old version)

According to the OLG, remote treatment within the meaning of this provision is to be assumed if a diagnosis is made or a treatment proposal is issued solely on the basis of information provided in writing, by telephone, or at a distance via other media or third parties, without having seen or examined the patient in person. Because the app covered by the defendant’s advertising is supposed to be able to technically enable an online video consultation, the app advertised falls under the advertising ban under the old law, according to the OLG. In fact, however, there is no remote treatment at all, and the OLG accordingly does not name any such treatment that could be subject to legal review. Rather, there is merely a – certainly exaggerated – advertisement based on the assertion of technical possibilities on the part of the defendant. Since the OLG omits the core questions of the admissibility of remote treatment in terms of professional law and treatment contracts, it refers to general principles outside of medical professional law, to which the legislator intended to align the advertising ban:

“The restriction of the freedom to practice a profession (Art. 12 para. 1 GG/Art. 15 para. 1 EU Charter of Fundamental Rights) and of the freedom of opinion (Art. 5 para. 1 GG/Art. 11 para. 1 EU Charter of Fundamental Rights) associated with the advertising ban pursuant to Sec. 9 HWG is constitutionally justified with regard to Art. 2 para. 2 GG/Art. 3 para. 1 EU Charter of Fundamental Rights, because dangers to the health of the patients concerned can generally be caused by the advertising of remote treatment (cf. Senate Judgment of 25 October 2018 – 6 U 61/18).”

Advertising for private health insurance with a digital business model does not cause general risks to the health of the patients concerned. The patient is not yet involved in a remote treatment. In the present case, it is about the acquisition of (new) customers of a private health insurance. Furthermore, there is a considerable difference between an exaggerated choice of words, which is recognizably directed at the (digital) image and not performance-related sales advertising, and a concrete offer of remote treatment in the case of diseases that obviously cannot be recognized or treated digitally.

a) Inadmissibility pursuant to Sec. 9 HWG (new version)

Nevertheless, the OLG is not entirely wrong: the defendant has advertised something that is simply not possible. The author’s view and that of the OLG differ only in the answer to the question of what it is specifically that is not possible:

According to the author’s view, the defendant has advertised something completely different to a remote treatment: insurance contracts. To arrange and thus offer a remote treatment itself is neither possible for the defendant or its subsidiary nor was it ever intended. Accordingly the prospect client may demand insurance services through the app directly from the defendant’s subsidiary but certainly not a remote treatment by Swiss doctors.

The OLG, on the other hand, feigns the Swiss physician of foreign doctors.

“In the case at hand, the defendant advertised a digital primary care model in which physicians based in Switzerland provide diagnoses, therapy recommendations and sick notes to the addressees of the advertisement living in Germany by means of an app, whereby the...
tal doctor’s visit via app’ is advertised as ‘an alternative to the traditional doctor’s visit’ (‘Just stay in bed when you go to the doctor’). It is advertised that ‘for the first time in Germany the complete medical care, namely, diagnoses, therapy recommendation and sick note’, can be carried out online by means of an app (‘Everything by app’). In this regard, the defendants state in their grounds of appeal that in around 90 percent of the cases for which patients visit a doctor, a personal consultation with the doctor is not necessary. However, this unsubstantiated assertion seems hardly comprehensible, since in principle every suspicion of illness according to general professional standards requires a basic examination, as a rule directly by functional tests (for example of breathing, circulation, blood pressure) and inspections, palpation, tapping and listening to the body as well as if necessary the collection of further laboratory values.”

“In contrast, in the case of an exclusive video consultation, as was advertised in the case in dispute, the physician must rely from the outset on an abbreviated perception during anamnesis. In the case of an exclusive remote treatment, the obvious reproach of a neglect of the obligation to ascertain the findings must cause the treating physician in principle to caution and restraint, so that even after the reform of Sec. 7 para. 4 MBO-A or the professional regulations of the state medical associations (which have different new regulations in this respect), a personal examination of the patient will have to be arranged immediately in the event of the slightest doubt.”

The OLG states that it is not verifiable whether a case exists in which “according to generally accepted professional standards, personal medical contact with the person to be treated is not necessary”, cf. Sec. 9 s. 2 HWG. This is not verifiable because the OLG detached the app from its actual purpose, the advertising of a private health insurance with a digital image (‘Everything via App’), and fictitious remote treatment by a doctor, who would first have to check whether remote treatment could be considered in the specific case. As far as one can infer from the press to the advertising of the defendant in 2018, the defendant has offered private health insurance along with an app that “can be practical for general medical questions (…)” and “of course only a first assessment”.

Even if the law were applicable at all, no infringement of Sec. 9 HWG would be discernible. In this respect, it would remain to be judicially examined to what extent isolated statements – even if exaggerated – without practical significance can justify a conviction.

4. Interim result: the judgment is probably erroneous

After assessing the complete facts of the case and the legal situation, the reasons of the judgment of the Higher Regional Court cannot be seconded. In this respect, it remains of interest whether and how the German Federal Court (BGH) will decide.

VII. Sec. 9 HWG should be modified

As shown above, the legislator’s errors in forming its will and inaccuracies led to the new Sec. 9 HWG. Based on an inadequate standard of review, the OLG, also ignoring the actual ability and rights of the physicians themselves, constructs a factual situation that never occurred.

In addition, the average patient will not be able to exercise his or her right to self-determination without general information about the technical possibility of a remote treatment by a physician. Particularly in times of COVID-19, the lack of information about the fundamental technical possibility of remote treatment is likely to have a detrimental effect on patients and physicians. The worst consequence would be that patients will get worse for avoiding contact to a physician out of fear of contact with others. Equally worrisome is the outlook that potential signs of an illness or injury may remain unspoken and overlooked for just the same reason.

A revised Sec. 9 s. 2 HWG must be in line with the medical professional law. The current Sec. 9 s. 2 HWG is not, which can be taken from the judgement of the OLG.

54 Munich Higher Regional Court, Judgment of 9 July 2020, Case No. 6 U 5180/19, GRUR-RR 2020, 461 (462, para. 48) with further citations.

55 Munich Higher Regional Court, Judgment of 9 July 2020, Case No. 6 U 5180/19, GRUR-RR 2020, 461 (462, para. 48) with further citations.

56 Bakir in Stern, “Ottonova: What can the digital health insurance Frank Thelen is promoting?”, 24 July 2018, https://www.stern.de/wirtschaft/versicherung/ottonova--was-kann-die-krankenversicherung-- fuer_die-frank-thelen-wirbt-- 8176564.html (last accessed December 12, 2020).

57 Bakir in Stern, “Ottonova: What can the digital health insurance Frank Thelen is promoting?”, 24 July 2018, https://www.stern.de/wirtschaft/versicherung/ottonova--was-kann-die-krankenversicherung-- fuer_die-frank-thelen-wirbt-- 8176564.html (last accessed 12 December 2020).