

Google Removes Display of Its Shopping Unit in Turkey After the Remedy Phase of the Turkish Competition Authority's (TCA) Google Shopping Decision Gets Stuck

Kluwer Competition Law Blog
September 17, 2020

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Please refer to this post as: Bahadır Balki, Erdem Aktekin, "Google Removes Display of Its Shopping Unit in Turkey After the Remedy Phase of the Turkish Competition Authority's (TCA) Google Shopping Decision Gets Stuck", Kluwer Competition Law Blog, September 17, 2020, <http://competitionlawblog.kluwercompetitionlaw.com/2020/09/17/google-removes-display-of-its-shopping-unit-in-turkey-after-the-remedy-phase-of-the-turkish-competition-authoritys-tca-google-shopping-decision-gets-stuck/>

On 29th of July, Google announced^[1] that starting from 10th of August, it will be removing shopping ads (or "the Shopping Unit" as referred by the TCA as well as by the EU Commission) from its search pages in Turkey. According to the tech giant, the decision was taken because of the uncertainties surrounding the fate of the remedy package that it has proposed to comply with the TCA's Shopping Decision^[2]. This is not the first time Google clashes with the TCA on the possible design of remedies; as back in 2019 for a short time it had stopped licensing its mobile operating system, Android, for devices to be sold in Turkey. Similarly, the action was also triggered by a TCA decision^[3] which concluded that Google's proposed commitments did not fully comply in time with its Android Prohibition Decision^[4]; as a result, imposed a daily periodic penalty payment on Google^[5]. These unexpected reactions by Google to decisions on similar issues it had faced in the EU, raise the question whether the much-articulated concern of lack of a unified code of competition law for digital markets has some merit here. In this respect, this article aims to go into specifics of the shopping decisions of the EU Commission and the TCA and compare them in an attempt to understand the reasons behind the deadlock that emerged after the TCA's shopping decision.

On 27.06.2007 the European Commission decided that Google had abused its dominant position by positioning and displaying its own on-line comparison shopping service (CSS) more favourably compared to the competing CSSs. The commission also found that Google's own product was not subject to the algorithms used by its search engine, while the competing CSSs were. Due to the characteristics of these competing websites (having most of their content from other websites, i.e. merchants'), the algorithms pushed the CSSs further down in the results bringing in substantial losses of user traffic. These two acts resulted in a fine by the Commission including a cease and desist order. In addition, the Commission Decision stated that "Any measure chosen by Google and Alphabet should, however, ensure that Google treats competing comparison shopping services no less favourably than its own comparison shopping service within its general search results pages;" and therefore left the burden solely on Google to craft the required remedy package. At this point, it should be beneficial to note that, unlike the decision of the TCA, the Commission decision did not object to the way that Google displays or organises its search results pages including display of the shopping unit itself^[6].

From a statement of Commissioner Vestager later made on the case, it can be inferred that Google chose to give access to the rival CSSs to its shopping unit by conducting a bidding mechanism for the available space. Google coupled the bidding system with a feature enabling users to choose whether the links in the shopping unit go directly to the merchants or CSS's websites. Citing improvements on data showing how much of the shopping unit had been occupied by Google's rivals and number of clicks these services had got, the developments were considered positive by the Commissioner^[7].

With respect to similar allegations, an investigation had been started by the TCA on 18.07.2018 and concluded with a fining decision on 13.02.2020^[8]. The most striking conclusion of the decision is the part where, unlike the Commission, TCA asserts that the first page of the Google's general search results as "vital" for any website that aims to generate user traffic and thus finds it unacceptable on the grounds of competition law that Google has unlimited discretion in this area while generating advertising revenue^[9]. This striking perspective of the TCA seems to have had defining influence on labelling certain actions of the Google as abusive and is perhaps the main reason why the parties cannot agree on a workable remedy. These points will be discussed successively.

According to TCA's decision, the abuse comprised of Google putting the rival CSS in a disadvantageous position by favouring its own CSS and thus in this way using its dominant position in the general search market to distort competition in the CSS market.

The decision lists four different conducts as forming the elements of the abuse: (i) placing the shopping unit usually on top of the search results page or a place where it puts competing services in a competitive disadvantage (ii) preventing rival CSSs to access the shopping unit on equal terms with Google (iii) creating ambiguity regarding the fact that the shopping unit is actually an advertising space and (iv) placing the shopping unit on top of the results page even on queries specifying rival CSSs' names^[10]. Unlike the Commission Decision, a direct conduct resulting in the demotion of rival CSSs in the search results has not been found in the Turkish case^[11]. The main conducts of abuse creating the disadvantage and constituting the core part of the abuse are understood to be the conducts (i) and (iv).

Although the former also formed one of the two pillars of the abuse identified by the Commission, an attempt made by Google to remedy this by proposing a similar bidding mechanism, the decision indicates that this proposal was shut down by the TCA. The arguments raised by the decision against such a bidding mechanism clearly shows that TCA has a wider understanding about the notion of "unequal treatment" than the Commission, even though both decisions share similar arguments.

In this respect, it is understood from the decision that TCA has two concerns against the applicability of the EU remedy. First in the opinion of the TCA, having a place in the shopping unit would not give rival CSSs an equal footing with the Google. According to the TCA this is because while Google would still be able to continue to offer comparisons among different alternatives through the shopping unit, the rivals would only have one or two product links and thus will not be able to offer a similar service. What this seems to suggest is that the TCA desires a model where there are multiple shopping units simultaneously displayed and thus in competition with each other. TCA also does not look to be fully convinced that the spaces in the shopping unit will be auctioned on equal terms, as it seems concerned about Google capturing most of the space^[12]. Considering both points, the TCA did not share the view that the bidding mechanism will make the shopping unit a neutral zone available for competing CSSs on equal terms with Google.

The second issue raised by the TCA on the applicability of the EU Remedies, which is somewhat connected to the last point, is about the payments to be made by the CSSs to the Google as a result of the bidding process. TCA is of the opinion that requiring payments from the CSSs to Google will put them in a disadvantageous position vis-à-vis Google and also will be harmful for the system in the long run as it creates a dependency to the tech giant^[13]. This conclusion is highly controversial as with this statement the TCA puts itself in a position where it looks like it is aiming to demonetize the top portion of the search results which is one of the main revenue sources of Google. This approach is confirmed by the responses of Google cited in the decision. Google describes the expectation of the TCA that the shopping unit shall be open to rival CSSs without a fee as "unreasonable"^[14]. It is not hard to see that this approach of the TCA is possibly the main reason behind why parties cannot agree on an applicable remedy. Google would never give its most valuable advertising space for free.

The decision does not provide any legal reasoning behind such a request but in our view, it has roots in the TCA's view of the first page of Google results similar to an essential facility. This approach is at odds with the Commission Decision which does not challenge the fact that Google generates revenue through shopping unit but rather challenged its preferential placement which rival CSSs would never get.

The other core conduct of Google identified as a part of the abuse is the placement of the shopping unit on top in results pages generated on queries which includes product names coupled with rival CSSs' names. TCA finds this conduct unreasonable and considers it another way of Google directing traffic to its shopping unit^[15]. It can be stipulated that designing a remedy to remove concerns of the TCA in this regard would require Google to alter its search algorithm and the way the results are displayed. At the same time similar to the situation described above it would also result in a state where the top of the page is being reserved for rival CSSs for no charge on certain queries which would not be acceptable from the side of Google.

To conclude, it can be deduced from the decision that Google offered the remedies it had implemented to comply with the Commission Decision. However, as TCA argued that any payment made by the CSSs in order to access to the shopping unit would put them unequal footing with respect to Google, this package did not find the chance to get implemented. Under these circumstances, it would be exciting to see the design of the prospective remedy if the parties ever agree on one. Until then it looks like the e-commerce merchants are left to make it do with plain, text advertisements.

[1] <https://turkiye.googleblog.com/2020/07/google-alisveris-reklamlari-ile-ilgili29.html>.

[2] TCA's decision dated 13.02.2020 and numbered 20-10/119-69.

[3] TCA's decision dated 07.11.2019 and numbered 19-38/577-245.

[4] TCA's decision dated 19.09.2018 and numbered 18-33/555-273.

[5] The halt on distribution of Android licences was short lived as on 25.12.2019 the TCA had accepted a revised remedy package submitted by Google, albeit objections from the case team.

[6] "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service - Factsheet," 6/27/2017, http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm.

[7] https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_1774.

[8] TCA's decision dated 13.02.2020 and numbered 20-10/119-69. (TCA Shopping Decision)

[9] TCA Shopping Decision, para. 308.

[10] TCA Shopping Decision, para. 296 and paras. 400-401.

[11] TCA Shopping Decision, para. 235.

[12] TCA Shopping Decision, para. 298.

[13] TCA Shopping Decision, para. 307.

[14] TCA Shopping Decision, para. 311.

[15] TCA Shopping Decision, para. 216.