

Europe

Breaching Merger Remedies May be an Abuse of Dominance: Turkish Competition Authority's *EssilorLuxottica* Decision

By Neyzar Ünübol | Kolcuoğlu Demirkan Koçaklı



Edited by Anna Tzanaki & Juan Delgado

Breaching Merger Remedies May be an Abuse of Dominance: Turkish Competition Authority's *EssilorLuxottica* Decision

By Neyzar Ünübol¹

In a recent decision, the Turkish Competition Authority (“TCA”) announced its final decision regarding an investigation into allegations that EssilorLuxottica S.A. (“EssilorLuxottica”) had restricted competition in the ophthalmic lenses market by abusing its dominant position (“Decision”).² The TCA assessed whether EssilorLuxottica’s practice to offer ophthalmic lenses together with ophthalmic devices constitutes an abuse of dominant position (i.e., a violation of Article 6 of the Law on the Protection of Competition (“Competition Law”). At the end of the investigation, the TCA imposed a fine amounting to TRY 492 million (approx. EUR 28.3 million³) on EssilorLuxottica. The Decision deserves attention since the TCA concluded that the same conduct constitutes two different types of competition law infringements: an abuse of dominance and a breach of merger remedies.

The Background of the Decision

The TCA conditionally cleared the merger between Essilor Optica International Holding (“Essilor”) and Luxottica Group SPA (“Luxottica”) in October 2018 (“Clearance Decision”).⁴ During the review process, to eliminate the concerns related to the merger’s horizontal and conglomerate effects raised by the TCA, the parties proposed a remedy package including structural and behavioral remedies. The TCA decided that the proposed remedy package was suitable to overcome the anticompetitive effects of the merger and made them binding on EssilorLuxottica. Within the accepted remedy package, Essilor and Luxottica proposed that the merged entity will not enter into *de jure* or *de facto* exclusive agreements with ophthalmologists that limit their ability to purchase competing products and will

not bundle its products (sunglasses, optical frames and ophthalmic lenses) for three years after closing. The TCA’s Clearance Decision specifically states that EssilorLuxottica’s behavioral commitments would be monitored for three years.

In November 2021, the TCA began a full-fledged investigation upon allegations that EssilorLuxottica abused its dominance by bundling its ophthalmic lenses with ophthalmic devices.⁵ With the Decision, the TCA concluded that EssilorLuxottica’s conduct to offer ophthalmic lenses together with ophthalmic devices resulted in *de facto* exclusivity and disincentivized ophthalmologists from purchasing competing ophthalmic lenses. According to the Decision, the same conduct also breached the behavioral remedies accepted in 2018.

The TCA’s Assessment

The TCA decided that EssilorLuxottica’s conduct is exclusionary and constitutes an abuse of its dominant position in the ophthalmic lenses market. The Decision considered that EssilorLuxottica’s practice is closely related to the merger cleared with remedies and therefore, EssilorLuxottica’s conduct also constitutes a breach of the remedies accepted by the TCA in its Clearance Decision.

The TCA therefore concluded that EssilorLuxottica’s sole conduct resulted in two different competition law infringements: (i) a breach of the behavioral merger remedies by the bundling of its products; and (ii) an abuse of its dominant position. While the TCA established that EssilorLuxottica was responsible for these violations, it only imposed a monetary fine for having breached merger

¹ Competition Law Counsel, Kolcuoğlu Demirkan Koçaklı, nunubol@kolcuoglu.av.tr.

² Competition Board’s decision dated 17 August 2023 and numbered 23-39/749-259.

³ The TRY equivalent is calculated based on the applicable exchange rate of EUR 1/TRY 17.38, which is the 2022 average buying rate announced by the Turkish Central Bank.

⁴ Competition Board’s decision dated 1 October 2018 and numbered 18-36/585-286.

⁵ Competition Board’s decision dated 21 October 2021 and numbered 21-51/709-M.

remedies and did not impose an additional fine for the abuse of dominant position charge. The TCA made its decision to impose a single fine because both infringements resulted from the same conduct and thus, the *ne bis in idem* principle prevented the TCA from imposing two different fines for the same conduct.

The reasoning behind the TCA's preference to impose a fine on EssilorLuxottica for breach of merger remedies but not for abuse of dominance is not clarified in the short-form Decision announced on the TCA's website. However, some clues can be found in the methodology used to calculate the fines for each type of violation. According to the Competition Law, if an undertaking abuses its dominant position, the TCA may impose, at its discretion, a fine of up to 10 percent of its annual turnover and in practice, the TCA never reached the 10 percent upper limit. On the other hand, the fine for not complying with commitments is a daily fine of 0.05 percent of the undertaking's annual turnover, for each day of non-compliance. The daily fine imposed on EssilorLuxottica started from the date of Essilor and Luxottica's merger closing, and the duration of non-compliance

amounted to more than 1500 days. Therefore, the total amount of daily monetary fine for breaching the merger remedies possibly exceeded the amount of fine anticipated for Essilor Luxottica's abuse of dominance. Therefore, we may conclude that the TCA chose to impose the highest amount of fine.

Conclusion

The Decision establishes that not complying with the merger remedies (and specifically in this case, behavioral remedies) made binding by TCA can constitute an abuse of dominance. The key take-away is that behavioral merger remedies should be construed very diligently and strategically to avoid any future risk of non-compliance. During the merger review process, behavioral remedies may seem to be an efficient way to get the deal through, however, the price of non-compliance with behavioral remedies may be high. It should also be noted that, although the TCA refrains from imposing two different fines for the same conduct, it may opt for imposing the highest possible fine.