

From the Presidency of the Competition Authority

DECISION OF THE COMPETITION BOARD

File number: 2020-5-025

(Exemption)

Decision Number: 20-38/526-234

Decision Date: 20.08.2020

A. MEMBERS IN ATTENDANCE

Chairman: Birol KÜLE

Members: Arslan NARİN (Deputy Chairman), Şükran KODALAK,
Ahmet ALGAN, Hasan Hüseyin ÜNLÜ, Ayşe ERGEZEN

B. RAPPORTEURS: Nazlı VAROL, Arın Özge HİMMETOĞLU, Osman AYAR

C. NOTIFYING PARTY: Turkish Ceramics Federation

Representatives: Atty. Prof. İ. Yılmaz ASLAN, Atty. Orhan
ASLAN Gazi Umur Paşa Sok. Bimar Plaza No:38/8
Balmumcu Beşiktaş/İstanbul

- (1) **D. SUBJECT OF THE FILE:** The request that a negative clearance/exemption be granted to the collection of certain information about the activities of Ceramic Sanitary Ware Manufacturers Association and Ceramic Tile Manufacturers Association members by Rekabet Danışmanlık A.Ş. and sharing of those with the participating members and the public according to the board of directors decision taken by Turkish Ceramics Federation.
- (2) **E. PHASES OF THE FILE:** Exemption/Negative Clearance Report dated 07.08.2020 and no 2020-5-025/MM, which was prepared upon the notification saved in the records of the Competition Authority (the Authority) on 21.05.2020 with the number 4757, was discussed and concluded.
- (3) **F. RAPPORTEUR OPINION:** In the relevant report, it is stated that
 - A negative clearance certificate cannot be granted within the framework of article 8 of the Act no 4054 on the Protection of Competition because the data to be shared will not lose its strategic nature since they will not be aggregated and aged enough, taking into account the market structure.
 - Individual exemption cannot be given to the practice in question within the scope of article 5 of the same Act either.
- (4) One of the rapporteurs, Osman AYAR, stated in his dissenting opinion that as a result of the assessment made regarding the practice that is the subject of negative clearance/exemption application, he concludes that there will not be coordination between competitors or market foreclosure, taking into account the conditions of the relevant market, therefore negative clearance certificate can be granted to the practice in question.

G. EXAMINATION AND ASSESSMENT

G.1. Information about the Parties

G.1.1. Turkish Ceramics Federation (SERFED)

- (5) SERFED was first founded in 1986 in Ankara under the title "Ceramics and Refractory Manufacturers Union". Currently, SERFED has seven members that operate in ceramic tile, sanitary ware, refractory and raw materials. These members are:

Ceramic Tile Manufacturers Association (SERKAP), Ceramic Sanitary Ware Manufacturers Association (SERSA), Ceramics, Glass and Cement Raw Materials Association (SERHAM), Ceramics and Refractories Manufacturers Association (SEREF), Plumbing and Building Materials Suppliers Association (TİMDER), Eskişehir Bilecik Kütahya Ceramic Business Cluster Association (EBK) and Turkish Ceramics Society (TSD)

G.1.2. Ceramic Tile Manufacturers Association (SERKAP)

- (6) SERKAP was established in 1996. It has 18 members, which operate in the area of manufacturing floor tiles, wall tiles and porcelain tiles, known as ceramic tiles. They represent 75% of the sector in terms of capacity.

G.1.3. Ceramic Sanitary Ware Manufacturers Association (SERSA)

- (7) SERSA was established in 1996. It has 22 members, which operate in the area of manufacturing washbasins, toilet bowls, sinks, shower trays, etc. known as ceramic sanitary ware. They represent nearly 75% of the sector in terms of capacity and nearly 90% in terms of export.

G.1.4. Rekabet Danışmanlık A.Ş.

- (8) Founded on 03.12.2007, Rekabet Danışmanlık A.Ş. provides consultancy services to companies in areas such as competition law, consumer law, protection of personal data law, energy law, commercial law, litigation and settlement of disputes. The single person authorized to represent Rekabet Danışmanlık A.Ş. is Prof. İsmail Yılmaz ASLAN, who has (.....) % shares in the company at the same time.

G.2. Information about the Sector¹

- (9) The ceramics sector is basically divided into two categories as “general ceramics” and “technical ceramics”. General ceramics are made by mixing inorganic raw materials such as clay, kaolin, quartz and calcite, which include metal oxides, in specific amounts, and shaping and firing them at high temperatures. Technical ceramics are made by mixing non-oxide and silicate materials such as carbide, nitride, etc. in specific amounts in addition to the oxides used in the manufacturing of general ceramics and shaping and firing them.
- (10) According to the “Tenth Development Plan Ceramics Working Group Report” published by the Ministry of Development of the Republic of Türkiye, the sector can be divided into sub-sectors such as ceramic tiles, ceramic sanitary ware, refractory, ceramic tableware and ornaments, technical ceramics, bricks and roof tiles. Product groups covered by the sub-sectors of the ceramics sector as well as the market shares of eight undertakings with the highest market shares in those sub-sectors are given below.

¹ Tenth Development Plan Ceramics Working Group Report of the Ministry of Development of the Republic of Türkiye and Economy and Strategy Consultancy Services Ceramics Sector Macro Market Study were referred to while writing this section.

Table -1: Product Groups Covered by Ceramics Sub-sectors

| Product groups | | | | | |
|--|---|--|-------------------------|-------------------|---------------------------------|
| Ceramic tiles | Ceramic sanitary ware | Tableware and ornaments | Refractory ² | Bricks-roof tiles | Technical ceramics ³ |
| Wall tiles, floor tiles, porcelain tiles | Washbasin, shower tray, toilet bowl, urinal, squat pan etc. | Plate, bowl, cup, vase, trinket, sculpture, etc. | | | |

Source: Tenth Development Plan Ceramics Working Group Report of the Ministry of Development of the Republic of Türkiye

Table -2: Market shares of eight undertakings with the highest market shares in ceramic tiles (CT) (%)

| Undertaking | 2017 | 2018 | 2019 |
|--|---------|---------|---------|
| Kaleseramik Çanakkale Kalebodur Seramik San. A.Ş. (KALE SERAMİK) | (.....) | (.....) | (.....) |
| NG Kütahya Seramik Porselen Turizm A.Ş. (NG KÜTAHYA) | (.....) | (.....) | (.....) |
| Bien Yapı Ürünleri Sanayi Turizm ve Tic. A.Ş. (BIEN) | (.....) | (.....) | (.....) |
| Seramiksan Turgutlu Seramik San. Tic. A.Ş. (SERAMİKSAN) | (.....) | (.....) | (.....) |
| Yurtbay Seramik San. ve Tic. A.Ş. (YURTBAY) | (.....) | (.....) | (.....) |
| Ege Seramik San. ve Tic. A.Ş. (EGE SERAMİK) | (.....) | (.....) | (.....) |
| Vitra Karo San. Tic. A.Ş. (VİTRA) | (.....) | (.....) | (.....) |
| Uşak Seramik Sanayi A.Ş. (UŞAK SERAMİK) | (.....) | (.....) | (.....) |

Source: SERFED

Table-3: Market shares of eight undertakings with the highest market shares in ceramic sanitary ware (SCW) (%)

| Undertaking | 2017 | 2018 | 2019 |
|---|---------|---------|---------|
| Eczacıbaşı Yapı Gereçleri San. ve Tic. A.Ş. (ECZACIBAŞI) ⁴ | (.....) | (.....) | (.....) |
| Turkuaz Seramik A.Ş. (TURKUAZ) | (.....) | (.....) | (.....) |
| KALE SERAMİK | (.....) | (.....) | (.....) |
| Matel Hammadde San. Tic. A.Ş. (MATEL) | (.....) | (.....) | (.....) |
| Çanakçılar Seramik San. ve Tic. A.Ş. (ÇANAKÇILAR) | (.....) | (.....) | (.....) |
| Bartın Seramik San. ve Tic. A.Ş. (BARTIN SERAMİK) | (.....) | (.....) | (.....) |
| Heriş Seramik ve Turizm San. A.Ş. (GÜRALVİT) | (.....) | (.....) | (.....) |
| EGE SERAMİK | (.....) | (.....) | (.....) |

Source: SERFED

- (11) Started manufacturing in 1950s, Turkish ceramics sector has grown due to not only the growth in the construction sector but also the increase in the use of ceramics, reaching to a significant consumption and production volume especially in the developed countries.
- (12) Ceramics is one of the sectors which uses local sources mostly in export and its dependence on import products is low. It is also one of the leading sectors in our country in terms of added value. Türkiye is one of the leading countries in the production of ceramic tiles and ceramic sanitary ware. It is among the first ten exporting countries at the global level⁵.

² Refractory is defined as the materials that can resist to high heat for a long time and used mostly in the iron-steel sector.

³ Technical ceramics are defined as ceramic materials that have optical, electrical, magnetic and thermal properties and are used in special areas.

⁴ ECZACIBAŞI and VİTRA are under Eczacıbaşı Construction Group's umbrella.

⁵ Board Decision dated 14.11.2019 and numbered 19-40/663-284.

G.3. Relevant Market

G.3.1. Relevant Product Market

- (13) Within the scope of the notified practice, certain data related to wall tile, floor tile and porcelain tile, named as tiles, as well as washbasin, shower tray, toilet bowl, urinal, squat pan, etc., named as ceramic sanitary ware, will be collected and shared.
- (14) CT is classified as floor and wall tile according to its area of use. Wall tiles are called glazed tile. They have generally low surface hardness and endurance whereas their water absorption value is high. They are usually used in indoor areas. On the other hand, floor tiles have relatively low water absorption value but high endurance. They are preferred for both outside and inside areas. Another classification regarding ceramics tiles is made on the basis of hardness, scratch, water absorption, thickness and thinness. According to the classification based on water absorption, the type of ceramics with less than 0.5% water absorption ratio is called granite⁶.
- (15) CSW consists of materials made of ceramics and used generally in bathrooms and toilets. According to the information given by the notifying party, CSW is classified under two main groups being *Vitreous China*" (VC) and *Fine Fire Clay*" (FFC) based on the type of the mud they are made from. FFC mud is generally used for the production of large and durable products such as washbasin, toilet bowl, worktop, and shower tray whereas VC mud is used for the production of other CSW such as smaller washbasins and toilet bowls. There are differences between FFC and VC muds in terms of properties such as cost, undergoing pyroplastic deformation while firing and water absorption ratio. Since VC mud has lower water absorption and porosity ratio, it is preferred more in CSW production in terms of hygiene and endurance. FFC mud is 30% more costly than VC mud⁷. Preparing FFC requires a new production line because the preparation phase and the raw materials used are different from VC, which means additional facility and labor costs for the manufacturer.
- (16) Although CT and CSW cover different products based on their intended use and those products address different consumer groups according to criteria such as quality, endurance and visual quality, considering the "Tenth Development Plan Ceramics Working Group Report" published by the Ministry of Development of the Republic of Türkiye in 2015 and Board decisions regarding the sector⁸, the relevant product markets in the ceramics sector can be divided into sub-markets as ceramic tiles, ceramic sanitary ware, tableware and ornaments, refractory, bricks-roof tiles and technical ceramics.
- (17) Accordingly, the relevant product markets are defined as "ceramic tiles" and "ceramic sanitary ware" within the scope of the file.

⁶ Board Decision dated 26.12.2019 and numbered 19-46/772-333.

⁷ Tunçel, D, Y., (2012), *Seramik Sağlık Gereçleri Bünyelerinin Piroplastik Deformasyonunun Azaltılması*, PhD Thesis, Anadolu University, Eskişehir, Türkiye.

⁸ Board Decisions dated 24.04.2006 and no 06-29/355-87, dated 20.06.2007 and no 07-53/581-192, dated 20.06.2008 and no 08-40/527-195, dated 13.03.2013 and no 13-14/201-103, dated 03.04.2014 and no 14-13/236-102, dated 01.06.2016 and no 16-19/318-145, dated 14.11.2019 and no 19-40/663-284.

G.3.2. Relevant Geographic Market

- (18) The notified practice covers CT and CSW producers operating throughout Türkiye and representing nearly 75% of the market, thus the relevant market is defined as “Türkiye”.

G.4. The Scope of the Notified Practice

- (19) The notified practice is the periodical collection of certain data related to production and marketing activities of totally 40 members consisting of 22 SERSA members and 18 SERKAP members, and sharing those after a certain period of time with the participating members as well as with the public over SERFED official website according to the board of directors decision taken by SERFED on 14.02.2020.
- (20) The said board of directors decision explains the aim of this practice as “providing predictability for ceramic tile and ceramic sanitary ware sectors and the necessary information to public authorities if required ...” The content of the data set is listed as follows:

1. *Number of Personnel*
2. *Capacity(m²/number/Ton)*
3. *Production: (i) in CSW FFC, VC, Total (ii) in CT Porcelain tile, Floor Tile, Wall Tile, Total (m²/Number/Ton)*
4. *Sales: Domestic and Foreign Market (m²/Number)*
5. *Power (Natural gas m³)*
6. *Electricity power (Kwh)*
7. *Total power (Kwh/Net Ton)*
8. *Carbon emission (Kg/Ton)*

- (21) The Application Form explains where, how often and how the data will be collected as “From the members of our federation...”, “by a third party independent consultancy firm once in three months...” It is stated that the collection of data is not obligatory but voluntary and which undertakings will participate in the information exchange are not known exactly.
- (22) According to the notification form, the expression in the board of directors decision “*members under our Federation’s umbrella*” covers totally 40 members of SERSA and SERKAP under SERFED’s umbrella. It is also stated that “*third party independent consultancy firm*” to be assigned for the collection of data is Rekabet Danışmanlık A.Ş. A contract of service with confidentiality provisions was made with Rekabet Danışmanlık A.Ş.
- (23) The single person authorized to represent Rekabet Danışmanlık A.Ş. is Prof. İsmail Yılmaz ASLAN, who has (.....)% shares in the firm. Prof. İsmail Yılmaz ASLAN is also the founder of Aslan Hukuk Bürosu, which has made this application on behalf of SERFED. Prof. İsmail Yılmaz ASLAN is also the attorney of Eczacıbaşı Holding A.Ş. He sometimes provides legal consultancy services to and takes charge in legal processes for Eczacıbaşı Yapı Gereçleri San. ve Tic. A.Ş., one of SERSA members and VİTRA, one of SERKAP members as they are Eczacıbaşı Holding A.Ş.’s group companies.

- (24) It is stated that CT and CSW production data will be collected from all SERSA and SERKAP members, regardless of the union which they are a member of, on a voluntary basis.
- (25) Regarding the last phase of the practice in question, which is how the data collected quarterly will be used, it is suggested *“the data will be published after aging for two months and in an aggregated form so that members could not reach the individual data of each other.”* The application form gives an example situation: the data pertaining to January, February and March will be collected and kept for two months. After the time period has expired, the data will be shared with members at the beginning of June. The data that are published quarterly will cover the total data of three months, not monthly data. In addition, the information to be shared concerning the number of the personnel, capacity, energy consumption and carbon emission does not include a breakdown. The output data will be requested under two categories as FFC and VC for CSW and as wall tile, floor tile and porcelain tile for CT. The sales data will be requested as domestic and foreign sales.
- (26) The application also states that unless there are at least five participants in the data pool, the data will not be collected and shared. According to the response letter sent to the Authority, minimum five-participant requirement will be applied for not only CSW and CT but also the product sub-groups FFC and VC in CSW and floor tile, wall tile and porcelain tile in CT each. To explain the situation with an example, if we assume that all five participants provide data for FFC but only four of them provide data for VC, minimum five participant requirement is met for FFC, thus data can be shared for this product group while the data will not be shared in VC product group since minimum participant requirement is not met for it.

G.5. Assessment

G.5.1. Assessment of the Nature of the Notified Practice

- (27) The first paragraph of article 4 of the Act no 4054 includes the provision *“agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited.”* The ground for article 4 of the Act no 4054 states that in order to deal with their common problems, undertakings form associations among themselves that may or may not have a legal personality. These associations can take decisions that serve to generate more earnings for their members by preventing competition between the members. Such decisions are also against the competition system and are prohibited. The concept of association of undertakings is defined in article 3 of the Act no 4054 titled definitions as *“any kind of associations with or without a legal personality, which are formed by undertakings to accomplish particular goals.”*
- (28) Accordingly, in previous Board decisions⁹ professional unions are considered associations of undertakings and assessed under article 4 of the Act. SERFED has totally seven union members including SERKAP and SERSA, which have lots of members operating in ceramics sector. SERFED is an association of undertakings under article 4 of the Act no 4054. According to the board of directors decision taken by SERFED, certain information about the activities of SERSA and SERKAP members will be collected and shared with the participating members as well as with the public. This decision is regarded as a decision of an association of undertakings.

⁹ Board decisions dated 27.04.2017 and no 17-14/196-82, dated 16.12.2015 and no 15-44/729-265, dated 09.07.2015 and no 15-29/428-124, dated 18.03.2015 and no 15-12/166-78.

- (29) The said board of directors decision states that *“Data to be obtained from members under our Federation’s umbrella about the issues below will be collected by an independent consultancy firm once every three months and published after aging for two months in an aggregated way so that members could not reach each other’s individual data.”* At the end of the decision, the information to be collected is listed as follows: the number of the personnel, capacity, total output (FFC and VC in CSW and wall tile, floor tile and porcelain tile in CT), total sales (domestic and foreign) power (natural gas), electricity power, total power and carbon emission. As a result, the notified practice is regarded as information exchange between undertakings in the context of competition law.

G.5.2. Assessment of the Information Exchange

- (30) The Guidelines on Horizontal Cooperation Agreements emphasizes that although information exchange may restrict competition, it can also facilitate efficient decision making for undertakings and consumers. Information exchange between undertakings may generate efficiency gains. For instance, information exchange may eliminate problems of information asymmetries between parties. Moreover, it may allow undertakings to benchmark themselves against their competitors, thereby improving their efficiency. In addition, sharing of information may also help undertakings reduce their inventories, ensure quicker delivery of perishable products to consumers, or lower their costs caused by unstable demand. This may result in direct benefits for the consumers whose search costs are reduced and choices are increased.
- (31) However, the exchange of information may also lead to restrictions of competition, in particular in situations where it enables undertakings to be aware of market strategies of their competitors. Such information exchange reduces uncertainty in the market, increases the predictability and in the end facilitates anti-competitive cooperation between competitors. Moreover, information exchange between competitors may be regarded as an evidence of agreements for price fixing and output limitation if used as a tool to control each other’s activities¹⁰
- (32) Paragraph 58 of the Guidelines states that the potential effects of information exchange on competition must be analyzed on a case by case basis¹¹. For restrictive effects on competition to exist within the scope of article 4 of the Act no 4054, information exchange must have, or likely to have, an appreciable adverse impact on at least one of the parameters of competition in the market, such as price, output, product quality, product variety or innovation. The effect of information exchange depends on elements related to the structure of the market, such as the degree of concentration, transparency, stability of the market and the similarity of the undertakings in it as well as on the nature of the information exchanged since it can render the market more liable to coordination between competitors¹².
- (33) Considering transparency of the market, information exchange may increase transparency and lessen uncertainties for competitively sensitive factors such as price,

¹⁰ Board decisions dated 08.02.2002 and no 02-07/57-26, dated 06.09.2002 and no 02-53/685-278, dated 24.02.2004 and no 04-16/123-26.

¹¹ As mentioned in paragraph 56 and following paragraphs in the Guidelines, in assessing whether an information exchange constitutes a restriction of competition by object, whether the information exchange would lead to a restriction of competition by nature is considered. An information exchange concerning future plans is more likely to lead to restriction of competition by object as compared to the exchange of current data. Within this context, the exchange of competitively sensitive information among competitors such as future prices, outputs or sale amounts are normally considered cartels, since they generally aim to fix prices or quantities.

¹² The Guidelines paragraph 43

output, demand and costs. Collusive outcomes are easier for undertakings in sufficiently transparent markets. The lower the level of transparency in the market before the information exchange, the higher the anti-competitive effect of the information exchange will be. An information exchange that contributes little to rendering the market transparent is less likely to restrict competition than an information exchange that significantly increases transparency in the market. Therefore, the level of transparency in the market both before and after the information exchange, and how the information exchange changes that level, is the determining factors for the likelihood that an information exchange will have restrictive effects on competition. The key element at this point is to identify to what extent the undertakings can use the available information to determine the actions of their competitors.

- (34) Another important element related to market structure is the degree of concentration of the market. Collusive outcomes are more likely in tight oligopolies, since it is easier for fewer undertakings to agree on the terms of coordination and to monitor deviations from the agreement. Therefore, exchanges of information in tight oligopolies are more likely to cause restrictive effects on competition than in other oligopolies.
- (35) However, it is harder for undertakings to achieve a collusive outcome in a complex market structure. Collusive outcomes are more likely in markets where the demand and supply conditions are relatively less volatile, in other words where they are stable. When undertakings are similar in terms of their costs, demand, market shares, product range, capacities etc., information exchange increases the possibility of coordination among undertakings because their competitive incentives would be similar as well.
- (36) In terms of the nature of the information, assessing whether the exchanged information is competitively sensitive is important. It is more likely for an exchange between competitors of strategic data that reduces uncertainty in the market to be caught by article 4 than exchanges of other types of information. Information related to prices, output, customers, costs, turnovers, sales, purchases, capacities, product characteristics, marketing plans, risks, investments, technologies, R&D programs and similar information are considered competition sensitive. Sharing of these types of data can give rise to restrictive effects on competition by reducing competitive incentives of the parties.
- (37) The strategic importance of data depends on factors such as the frequency of the information exchange and its market coverage as well as their age and whether the data are aggregated. If the information is not a trade secret but has a public nature, is aggregated rather than individual, and based on past data rather than future data, its competition restrictive effects are limited. Frequent exchanges of information make it easier for undertakings to change their behavior according to the information thus the frequency of the information exchange is also considered. The important point is how competitors' estimations about each other's future activities are affected. Sharing of the data that are sufficiently aggregated to make it difficult to identify any individual data is less likely to create restrictive effects on competition compared to exchange of undertaking-based data. Suppliers and customers may benefit from collection and aggregated publication of data such as sales, capacity, input or component costs via a professional association or market survey company as it may shed light on the economic conditions in the sector. Undertakings can make choices depending on information and adapt their strategies efficiently to market conditions by means of such collection and publication of data. Generally, exchange of aggregated data is less likely to create effects restrictive of competition if there is not a concentrated oligopoly.
- (38) The age of data is an important factor with respect to restrictive effects on competition.

The exchange of historic data is more unlikely to lead to a restriction of competition than the exchange of current or future data. There is no predetermined threshold for how old the data must be not to pose a risk of distorting competition. This threshold depends on characteristics such as the nature of the data, whether it is aggregated, the frequency of the information exchange, and stability and transparency of the relevant market. Frequent exchanges of information make it easier for undertakings to come to a common understanding in the market and monitor deviations from the agreement, thereby increasing the risks of a collusive outcome. However, the frequency at which data needs to be exchanged to result in a collusive outcome depends on the nature of the data, its age and whether it is aggregated.

- (39) When assessing the restrictive effects of information exchange on competition, the market coverage degree of the undertakings exchanging information should be taken into account. If the information exchange covers most of the undertakings in the market, the possibility of the risks mentioned above are higher. Besides, the potential of undertakings not party to the information exchange to restrict anticompetitive behavior of the parties to the information exchange decreases.
- (40) Another element to be considered with respect to information exchange mentioned in the Guidelines is whether the exchanged information is public or non-public. Exchanges of genuinely public information are not expected to constitute an infringement under article 4 of the Act no 4054. Genuinely public information is information that is equally accessible to all competitors and customers in terms of costs of access. On the other hand, genuinely public information exchange may lessen the likelihood of competition distortions in the market to the extent that cooperative effects of the information exchange are restricted by other undertakings, potential competitors and customers.
- (41) Federal Trade Commission (FTC)¹³ of the United States of America (USA) in its Competition Collaboration Guidelines (FTC Guidelines) states that the competitive concern in information exchange/sharing between competitors depends on the nature of the information shared; the sharing of current information relating to price, output, costs, or strategic planning may restrict competition however sharing aggregated data that does not permit the identification of individual firm data do not create concerns. FTC states that thanks to the transparency caused by reasonable information exchange, companies can compete more effectively, which can be good for consumers, making more and better goods and services available to them at lower prices¹⁴. For the definition of reasonable information exchange, it is stated that if the data are more than three months old, are aggregated in a way that at least five participants provide the data and no single undertaking's data contribute more than 25% of the total data, and the exchange is managed by a third party, like a trade association the information exchange is not deemed strategic. Non-strategic information covering technical knowledge does not restrict competition. Sharing of information between competitors should not aim or lead to fixing prices or outputs.
- (42) In the European Commission's Guidelines on Horizontal Agreements dated 2011, it is stated that there are agreements where the main objective is the exchange of information itself. Prices, discounts, increases and reductions, customer lists, production/sales quantities, turnovers, capacities, qualities, plans, risks, and R&D programs and their results constitute strategic information, about which the information exchange may create negative effects on competition. Information related to prices

¹³ https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf (Accessed: 23.07.2020).

¹⁴ <https://www.ftc.gov/news-events/blogs/competition-matters/2014/12/information-exchange-be-reasonable> (Accessed: 23.07.2020).

and quantities is the most strategic, however the data loses their strategic usefulness depending on its aggregation and age, as well as the frequency of the exchange. Within this scope, the following will be evaluated:

- Market coverage of the agreement,
- Aggregation of the data (unless it takes place in a tight oligopoly, the exchange of aggregated data will not give rise to problems)
- The age of the data (for instance data younger than one year are regarded as current, Commission decisions no IV/31.370 and no IV/36.069)
- The frequency of the information exchange
- Whether the information is public.

(43) There are many Board decisions involving information exchange. Some of those decisions that are thought to provide guidance for this file are given below.

(44) The letter no 1054 sent by the Authority on 15.05.1998 to Turkish Cement Manufacturers' Association explains the conditions to be fulfilled for a negative clearance certificate. The letter lists the procedures and the principles of collection and sharing data:

1. *The tables showing quantitative data (output, sale, inventory, export, etc.) should be prepared in a way not to disclose such data on the basis of an undertaking or undertaking groups constituting an economic unity. Therefore tables should cover only total output, sales, import, export and inventory information for each geographic region. If the number of undertakings or undertaking groups constituting an economic unity is less than three, the data regarding that region should be combined (aggregated) with the data of neighboring regions so that they cannot be calculated individually.*
2. *Tables should not be prepared in such a way that undertakings can benchmark themselves against other undertakings depending on a certain type of data group.*
3. *Statistical data in the tables should not be discussed in meetings of the representatives of undertakings.*
4. *No comment, analysis or recommendation that can affect competitive behavior of undertakings may be given in addition to the statistics distributed.*
5. *The tables showing the output in a certain time for each product type should be prepared in compliance with the principles for not disclosing individual information in this list. To this end, product groups should be divided into three groups at most in regional totals.*
6. *There should not be estimations about future prices, production, sales and capacity use.*
7. *Associations of undertakings should ensure that the persons in charge of collecting and aggregating data keep competitively sensitive data (especially individual quantity information collected from undertakings) confidential from Association members and third parties.*
8. *If it is likely that competitively sensitive information belonging to a certain undertaking can be identified, even summaries and total amounts should not be published.*
9. *Tables on monthly data should not be distributed before two months as of the end of the relevant month.*
10. *The relations with public institutions which demand statistical information*

(State Statistics Institution, State Planning Organization) can be maintained in the same way.

- (45) The decision of the Board dated 08.08.2002 and no 02-47/586-M on the Association of Fertilizer Manufacturers (GÜD) is as follows: "It has been decided that GÜD should comply with these principles:

"In order to prevent potential competition infringements and to establish a competitive market structure in the fertilizer sector, while collecting and sharing information,

The tables showing quantitative data (capacity, production, sale, export, import) and capacity use rates should be prepared in a way not to disclose such data on the basis of an undertaking or undertaking groups constituting an economic unity. Moreover, fertilizer manufacturers should send the data in total amounts instead of detailed data (for instance dealer's shipping summaries on a city basis) to GÜD.

No comment, analysis or recommendation that can affect competitive behavior of undertakings may be given in addition to the statistics distributed.

The tables showing the output in a certain time for each product type should be prepared in compliance with the principles for not disclosing individual information in this list.

Information about future prices, production, sales and capacity use should not be published.

GÜD should ensure that the persons in charge of collecting and aggregating data keep competitively sensitive data (especially individual quantity information collected from undertakings) confidential from GÜD members and third parties.

Tables showing data should not be distributed before two months as of the period the data are related to.

- (46) The Board decision dated 15.04.2004 and no 04-26/287-65 concerning the publication of the data which Automotive Distributors Association (ODD) collects from its members evaluates the practices of publishing certain information the Association of undertakings collects from its members and decides that a negative clearance certificate shall be granted on the following grounds: the data to be published on the relevant website do not cover detailed information about sales price and amount or market shares of the brands in different product segments; the data are aggregated on a countrywide basis without city or region-based details and depending on the market nature, the sharing of information in question is unlikely to create cooperation of competitive conduct.
- (47) According to the decision dated 14.07.2011 and no 11-43/916-285, sharing of information regarding the number of personnel, authorized sellers and services in brands' network at various times shall be granted negative clearance certificate. However, neither the sharing of information regarding quarterly data showing the distribution of total passenger and commercial vehicle sales according to cities nor the collection of information to be published quarterly concerning draft launching studies for new models, the share of brands in the sales made to the buyer groups classified as the state, rental companies, leasing and special sale in fleet sales of passenger and light commercial vehicles can be granted negative clearance certificate. On the other hand, the decision of the association of undertakings for sharing information shall be granted individual exemption on condition that the city-based data will not include separation of brand, model and breakdown; sharing of information about

launching should not include information that will lead to coordinating effects such as information on sales strategy, objectives and supply amounts. Fleet sales figures should not include information about buyers' titles while categorizing buyer groups.

- (48) With the decision dated 20.09.2012 and numbered 12-44/1350-455, the following practices are granted negative clearance: sharing of the information including future market size estimations in the agricultural tractors market; sharing of the information regarding export figures on the basis of value and number, once a month under certain breakdowns without naming the companies in the key industry and subsidiary industry; the sharing of monthly brand-based export data; depending on ISO Türkiye 500 Biggest Industrial Organization report, sharing of undertakings' net sales, total assets, profit or loss for the financial year, the average number of wage-earning workers, equity capital, employment and added value information; publication of automotive industry investment amounts annually without indicating the firms; firm-based automotive industry employment data and Subsidiary Industry Catalog, Raw Materials Cost Index, ACEA and OICA reports, petroleum products civil consumption data, surface condition length and motor vehicle tax rates published in the Official Gazette; sharing of capacity and capacity use rates under light commercial vehicles (car, van and minibus), truck, bus, midibus and tractor categories monthly, sharing of factory sales and foreign sales numbers as well as output data to be published in News and Press Bulletin without indicating firms and models under light commercial vehicles (car, van and minibus), truck, bus, midibus and tractor categories. On the other hand, sharing the information concerning monthly output on the basis of each sub-model, payments to raw materials and subsidiary industry as well as the tax and wages paid are not granted negative clearance certificate because the exchange of such information includes trade secrets and may lead to coordination between undertakings. In addition, it is decided that sharing of firm and model-based output data, payments made by automotive industry firms to subsidiary industry and raw materials and sharing of taxes and wages paid on a firm basis cannot be granted individual exemption since the conditions in article 5 of the Act no 4054 are not fulfilled.
- (49) Another Board decision concerning an association of undertaking is Petroleum Industry Association (PETDER) decision dated 20.09.2007 and numbered 07-76/907-345. The information to be shared is specifically the monthly sales of undertakings operating in fuel, mineral oil and LPG fields. It is stated that the sales will be published within the month following the month when the sales are made actually as the total of the nationwide sales and on an undertaking-basis on PETDER website or online. The decision of the association of undertakings is granted negative clearance certificate on the grounds that the part of the data is already being published by EMRA; the data is not about price; taking into account the features of the market, "knowing historic sales amounts is not a favorable tool for short term coordination".
- (50) The decision dated 22.09.2011 and numbered 11-48/1215-428 emphasizes how much the collecting certain information including sales data in fuel and LPG market weekly or monthly by PETDER or an independent research organization in a non-aggregated way and sharing those with the public with assessments will increase transparency in the market. It is concluded that the relevant markets are too much transparent because of EMRA's regulations and obligations imposed by the legislation. Access to information in those markets is very easy and costless. Therefore, the practice in question will not restrict competition.
- (51) The third Board decision concerning PETDER dated 21.11.2013 and numbered 13-64/904-384 is about whether the negative clearance certificate granted to the association of undertakings with the decision dated 20.09.2007 and numbered 07-

76/907-345 should be withdrawn. The decision in question includes the following evaluations: *“It is not necessary to withdraw the negative clearance certificate granted with the Board decision dated 20.09.2007 and numbered 07- 76/907-345 to the collection and sharing of certain information in fuel and LPG markets through PETDER. Taking into account the opinions and suggestions submitted by the association of undertakings, it is decided that the scope of the negative clearance will be defined as follows: the data will be published on a product basis on condition that the data are aggregated and do not include information specific to one undertaking. The individual sales data and market shares will be published in parallel with those published by EMRA. Detailed individual sales data and market shares including product breakdowns should be published in an aggregated way quarterly. The assessment about the method of data sharing in the decision is notable: “Considering de facto practices within the framework of the negative clearance decision, regarding the data to be shared as genuinely public information becomes doubtful because of the date they are shared. Individual data are shared in just the following month within the scope of the information exchange under PETDER’s umbrella whereas similar data are published by EMRA after at least two or three months have passed. Moreover the undertaking-based data published by EMRA do not cover detailed information about product breakdown and domestic sales or transit trade classification.”* It is decided that the scope of the negative clearance certificate is defined as the collection of monthly sales data and market share under the same conditions and publication of those in parallel with the data and details published by EMRA under categories “petroleum, diesel, fuel-oil types and other” and after the same delay as EMRA.

- (52) The Board decision dated 04.07.2012 and numbered 12-36/1042-330 about Türkiye LPG Producers Association (TLPGD) covers the following: Within the framework of the request that is the subject of negative clearance/exemption, the total sales data of the undertakings operating in LPG sector for bottled, bulk and autogas categories will be collected monthly. Accordingly, production and sales information pertaining to the previous month will be collected and shared with other institutions in the sector upon request and with the public, if necessary, within the following month. The decision also points out the following issues: The information to be collected by TLPGD is in fact collected and published quarterly by EMRA. As of 2011 EMRA has been publishing the said information monthly. Consequently, the information in question is published by the regulatory authority and public. In addition, the decision also concludes that both bottled and bulk LPG markets are highly concentrated whereas the concentration rate is relatively lower in autogas LPG market. The decision also makes the following assessments in terms of article 4 of the Act no 4054:

“The above mentioned bottled, bulk and auto LPG markets have structures liable to restrictive effects on competition to be created by the information exchange. On the other hand, the information to be collected and shared are monthly production and sales data, which are strategic; those data will be shared on an undertaking basis without being aggregated; the data in question are very recent and will be shared monthly; it is not possible to regard them as genuinely public data considering the planned date of sharing; sharing and dissemination of information will be carried out frequently within the body of the association of undertakings; it is difficult to regard the information exchange as sharing genuinely public information, taking into account the abovementioned factors, the information exchange to be made within the scope of the notified practice by TLPGD may create restrictive effects on competition in the relevant markets by means of distorting strategical uncertainty in markets and parties’ incentives to act independently, and facilitating coordination and collusion between competing

undertakings.”

- (53) It is also concluded that individual (firm-based) information exchange will unduly restrict competition in the relevant market, therefore, the notification in question cannot be granted individual exemption. In this regard, the decision includes the following evaluations:

“Thanks to the information exchange in question, undertakings will have information about total demand levels in the market, the size of the industry and their positions in the market. In this way, they may improve their plans for production, sales and distribution, creating efficiency gains. However, to provide such efficiency gains, sharing market-wide aggregated data is sufficient. Therefore, sharing recent, individual production and sales data among undertakings is not indispensable for providing the expected efficiency. Moreover the data will be collected and compiled by TLPGD, instead of an independent third party, which may negatively affect competition. Taking into account the structure of the relevant market, the nature of the information to be shared and the method of sharing it, the notified conduct may restrict competition more than necessary in the relevant market to obtain the benefits listed in subparagraphs (a) and (b) of article 5 of the Act no 4054.”

- (54) One of the recent decisions taken by the Board related to information exchange is Port Operators Association of Türkiye (TÜRKLİM) decision dated 14.11.2019 and numbered 19-40/655-280. It is stated in the decision that there should be a classification while evaluating the elements of information exchange. One of the elements of information exchange consists of quantitative data that can be regarded riskier in respect of competition (handling amounts on the basis of load) whereas the other one is composed of potentially less risky areas such as ship acceptance numbers and the number of personnel. According to the decision, sharing the number of personnel, which consists of only the number of persons employed in the port without including any details about personnel costs will not create competitive concerns and negative clearance certificate can be granted for this information. Ship acceptance numbers on a port basis may also be granted negative clearance certificate because there are not any data that will lead to the coordination of competitive conduct between ports compared to quantity and price data. Landing activities are one of the main service areas of ports. The amount of the load handled corresponds to sales amount related to landing activities in a sense in terms of ports. Therefore, they are on the focus of the notified information exchange. The evaluations about this data set are as follows:

“...The amount of load handled on a port basis corresponds to amount of sales. This can be regarded as competitively sensitive (strategic) data for each port operator. In addition, if these data are known on the basis of each competing undertaking, competing ports located in the same relevant geographic market and providing services in the same product market may coordinate their competitive behavior. For instance, when one of the few ports in the same geographical region learns that the other(s) uses the most part of their capacity thanks to this information exchange, it may adopt its prices and consequently port service prices may increase. Although its structure is different from other products and services, sharing the amount of the load handled in such a way may serve for monitoring whether an agreement for sharing quotas or customers is implemented between competing ports. Due to the reasons mentioned above, sharing the amount of the load handled on the basis of ports in other words on the basis of undertakings cannot be granted negative clearance certificate.”

G.5.3. Assessment under Article 4 of the Act

- (55) SERFED's board of directors decision dated 14.02.2020 and no 2002/06 constitute the subject of the application. Therefore, the assessment whether negative clearance certificate can be granted per article 8 of the Act no 4054 and if not whether individual exemption can be granted per article 5 of the same act is made in terms of the said board of directors decision.
- (56) It is stated in paragraphs 56 and 57 of the Guidelines that whether the information exchange would lead to a restriction of competition by nature should be evaluated. An exchange of information concerning prices, outputs or sale amounts related to future plans is more likely to lead to restriction of competition by object as compared to the exchange of current data and it generally aims to fix prices or quantities.
- (57) The said board of directors decision explains the aim of the notified practice as *"predictability for ceramic tile and ceramic sanitary ware sectors and provision of the necessary information to public authorities if required ..."* The data to be exchanged will be composed of information such as output, sales amount, capacity, the number of employees, total energy consumption and carbon emission. The data will be collected once every three months in an aggregated form and will be aged for two months.
- (58) According to the previous Board decisions, individual data cannot be understood from aggregated data and exchange of historic information (two or three months old in light of the decisions) is not considered sharing of strategically important data. The Guidelines show a similar approach. However, the Guidelines also notes that effects restricting competition may occur even in this case, in markets with high concentration. Therefore, an assessment is made about the concentration in the relevant markets. The table below shows undertakings' market shares in CT and CSW markets in 2017, 2018 and 2019 as well as market concentration ratios in 2019:

Table -4: Market shares of eight undertakings with the highest market shares in ceramic tiles (CT) (%) and Concentration Ratio (2019)

| Undertaking CT | 2019 |
|--|---------|
| KALE SERAMIK | (.....) |
| NG KÜTAHYA | (.....) |
| BIEN | (.....) |
| SERAMIKSAN | (.....) |
| YURTBAY | (.....) |
| EGE SERAMIK | (.....) |
| VİTRA | (.....) |
| UŞAK SERAMİK | (.....) |
| Other | (.....) |
| Total | 100.00 |
| CR4 CT | (.....) |
| CR5 CT | (.....) |
| The share of the undertaking with the highest market share among the first five undertakings | (.....) |

Source: SERFED and calculations made by the rapporteurs

20-38/526-234

Table -5: Market shares of eight undertakings with the highest market shares in ceramic sanitary ware (SCW) (%) and Concentration Ratio (2019)

| Undertaking SCW | 2019 |
|--|---------|
| ECZACIBAŞI | (.....) |
| TURKUAZ | (.....) |
| KALE SERAMİK | (.....) |
| MATEL | (.....) |
| ÇANAKÇILAR | (.....) |
| BARTIN SERAMİK | (.....) |
| GÜRALVİT | (.....) |
| EGE SERAMİK | (.....) |
| Other | (.....) |
| Total | 100.00 |
| CR4 CSW | (.....) |
| CR5 CSW | (.....) |
| The share of the undertaking with the highest market share among the first five undertakings | (.....) |

Source: SERFED and calculations made by the rapporteurs

- (59) At this point, it should be noted that the undertakings listed in the table above are members of either SERSA or SERKAP. As seen from the tables, the undertaking with the highest market share in CT market has (.....)% market share and its CR4 value is (.....). The undertaking with the highest market share in CSW market has (.....)% market share and its CR4 value is (.....). CT and CSW markets are similarly between (.....) CR4 range. This range is defined as moderate oligopoly or monopolist competition.
- (60) As stated above, the participation of five undertakings in aggregated data sharing is required not only for CSW and CT but also for their breakdowns. It is stated in the notification form that a large part of the manufacturers use both FFC and VC mud types in CSW and manufacture floor tiles, wall tiles and porcelain tiles simultaneously in CT. It is expected that there will not be a huge difference between the number of participants according to quarterly breakdowns. The table below shows the market shares of the undertakings with the highest market shares in terms of the breakdowns in CT in 2017, 2018 and 2019.

Table -6: Market shares of eight undertakings with the highest market shares in terms of floor, wall and porcelain tiles in CT market in 2017-2018-2019 (%)

| Undertaking | Floor tile | | | Undertaking | Wall tile | | | Undertaking | Porcelain tile | | |
|------------------------------|------------|---------|---------|--|-----------|---------|---------|--------------|----------------|---------|---------|
| | 2017 | 2018 | 2019 | | 2017 | 2018 | 2019 | | 2017 | 2018 | 2019 |
| KALE SERAMİK | (.....) | (.....) | (.....) | KALE SERAMİK | (.....) | (.....) | (.....) | KALE SERAMİK | (.....) | (.....) | (.....) |
| NG KÜTAHYA | (.....) | (.....) | (.....) | NG KÜTAHYA | (.....) | (.....) | (.....) | BİEN | (.....) | (.....) | (.....) |
| BİEN | (.....) | (.....) | (.....) | BİEN | (.....) | (.....) | (.....) | NG KÜTAHYA | (.....) | (.....) | (.....) |
| SERAMİKSAN | (.....) | (.....) | (.....) | Anka Toprak Ürünleri San. ve Tic. A.Ş. | (.....) | (.....) | (.....) | SERAMİK SAN | (.....) | (.....) | (.....) |
| YURTBAY | (.....) | (.....) | (.....) | YURTBAY | (.....) | (.....) | (.....) | VİTRA | (.....) | (.....) | (.....) |
| EGE SERAMİK | (.....) | (.....) | (.....) | SERAMİKSAN | (.....) | (.....) | (.....) | UŞAK SERAMİK | (.....) | (.....) | (.....) |
| VİTRA | (.....) | (.....) | (.....) | EGE SERAMİK | (.....) | (.....) | (.....) | EGE SERAMİK | (.....) | (.....) | (.....) |
| Söğütsen Seramik Sanayi A.Ş. | (.....) | (.....) | (.....) | VİTRA | (.....) | (.....) | (.....) | YURTBAY | (.....) | (.....) | (.....) |

Source: SERFED

- (61) On the other hand, in the response letter submitted to the Authority, SERFED states that it is not possible to make a calculation for breakdowns in CSW market. There is not a single final product manufactured with FFC and VC mud types. There are

different product types such as washbasin, shower tray, workbench, urinal, etc. In order to identify the undertakings with the highest market shares in terms of breakdowns, information related to all types of products made from FFC and VC mud should be known but SERFED does not have such information.

- (62) After it is concluded that the concentration level in the relevant markets are defined as tight oligopoly, the conditions of the information exchange should be assessed in order to decide whether the information exchange in the decision of the association of undertakings is restrictive of competition. It is stated that the information to be shared within the scope of the decision of the association of undertakings is as follows:

1. *Number of Employees*
2. *Capacity(m²/number/Ton)*
3. *Production: (i) in CSW FFC, VC, Total (ii) in CT Porcelain tile, .floor Tile, Wall Tile, Total (m²/Number/Ton)*
4. *Sale: Domestic and Foreign Market (m²/Number)*
5. *Power (Natural gas m³)*
6. *Electricity power (Kwh)*
7. *Total power (Kwh/Net Ton)*
8. *Carbon emission*

- (63) Electricity power and total power are strategic information as they can serve for the calculation of capacity, production, sales and costs. The Guidelines state that if the strategic information is aggregated, historic and processed by a third party, it is no longer regarded as strategic information that restricts competition. On the other hand, the Board and the Commission consider information exchange with more than five participants as aggregated in markets that are not tight monopolies. According to FTC guidelines, in cases where there are at least five participants and the weight of no single undertakings' data in total data exceeds 25%, the data is regarded as aggregated. It is stated in the application that the data will not be shared unless the data of at least five undertakings are collected in each data set. Sharing the data of five undertakings in CSW and CT markets that are not tight monopolies can be regarded as aggregating. However, from FTC's perspective, if the data of only the five undertakings with the highest market shares in the markets where the data will be shared are aggregated, the undertaking with the highest market share alone will correspond to (.....)% in CT market, and (.....)% in CSW market of the total data. Thus, the data are not sufficiently aggregated. However, it should be noted that in most of the markets, 25% threshold is not fulfilled when the data are shared with five undertakings. For instance in case of a symmetric market, if the largest undertaking has 7% and others have 5% market shares and five undertakings share information, 25% threshold is exceeded. At this point, data sharing may serve for detecting an undertaking that deviates from an anticompetitive agreement or monitor compliance. In the Board decision dated 24.04.2006 and numbered 06-29/355-87 regarding CT and CSW markets, it is decided that

- *Graniser Granit Seramik Sanayi ve Ticaret A.Ş., Kütahya Porselen Sanayi A.Ş., Seranit Granit Seramik Sanayi ve Ticaret A.Ş., Söğütseren Seramik Sanayi İnşaat Madencilik İth. İhr. A.Ş., Yıldız Yapı Malzemeleri Depolama Dağıtım Sanayi San. Tic. Ltd. Şti. violated article 4 of the Act no 4054 by means of horizontal agreements and concerted practices starting from 14.12.1994, including "determining sales prices and conditions, controlling supply, market sharing, sharing competitively sensitive information" in CT market,*

- *Ege Seramik Sanayi ve Ticaret A.Ş., Toprak Seramik ve Gıda San. ve Tic. A.Ş. violated article 4 of the Act no 4054 by means of horizontal agreements and concerted practices starting from 14.12.1994, including “determining sales prices and conditions, controlling supply, market sharing and sharing competitively sensitive information” in CT market,*
- *Ege Vitrifiye Sağlık Gereçleri San. ve Tic. A.Ş. ile Toprak Seramik ve Gıda San. ve Tic. A.Ş. violated article 4 of the Act no 4054 by means of horizontal agreements and concerted practices starting from 14.12.1994, including “determining sales prices and conditions and sharing competitively sensitive information” in CSW market.*

thus administrative fines are imposed.

- (64) As understood from the decision concerning horizontal agreement restricting competition, CSW and CT markets have experienced coordination between competitors. They are structurally liable to cooperation. On the other hand, even if competitively sensitive information is shared among only few leading undertakings, it may be an indicator for the rest of the market and lead to coordination risk. Since there are a few leading undertakings and many undertakings with very low market shares, undertakings with lower market shares can monitor the coordination as followers. In this regard, it is concluded that the market structure, the level of aggregation and the time period for aging the data are not sufficient to prevent the restriction of competition.
- (65) FTC guidelines require a three-month time period whereas in previous Board decisions, this period is two or three months for the data to lose its strategic value. It is notable that the Commission states that if this period is shorter than one year, the data are deemed current. The notified decision of the association of undertakings suggests that the data be collected quarterly and not be shared without being aged for two months. Although the application explains that the data to be published quarterly will include not monthly totals but quarterly totals, it is understood that the most current data in the data set will be two months old. Therefore, the data are not intended to be old enough to lose its strategic value that restricts competition. In addition, the data may create future effects if shared quarterly.
- (66) It is understood from the abovementioned explanations that the information exchange will be conducted via a third party. However taking into account the facts that the data will be shared without being aged for three months and aggregated sufficiently as well as the market structure, it is concluded that the notified information exchange may distort competition in the relevant markets under article 4 of the Act no 4054; thus the agreement cannot be granted negative clearance.

G.5.4. Assessment under Article 5 of the Act

- (67) According to article 5 of the Act no 4054, in order for agreements between undertakings, concerted practices and decisions of associations of undertakings to be exempt from the application of Article 4 they should fulfill all of the requirements below:
- a) They must ensure new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services,
 - b) The consumer must benefit from those,
 - c) They must not eliminate competition in a substantial part of the market,
 - d) They must not restrict competition more than necessary to achieve the goals

set out in sub-paragraphs (a) and (b).

In line with this, the assessment of the notified transaction pursuant to the said conditions is given below.

G.5.4.1. Promoting developments and improvements or technical or economic progress for the production and distribution of goods and provision of services,

- (68) As stated in subparagraph (a) of article 5 of the Act no 4054, in order for an agreement restrictive of competition to benefit from the protection of exemption, first of all, it must produce gains by way of ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services to such an extent that its negative effects on competition are removed.¹⁵ The efficiency gains must be valid for the economy in general, objective and tangible.
- (69) It is argued in the application form that showing the average, the highest and the lowest consumption will motivate undertakings to lower their energy consumption, develop projects to increase energy efficiency and make investments to this end and decrease energy costs, which are considerable costs in manufacturing ceramics. Apart from that, sharing data about the current capacity intends to give a general idea about the existing capacity in the sector. This capacity data will not only create insight about idle capacity in the ceramics sector but also motivate for making investments to protect the industry with convenient industry policies and to increase capacity usage rates. Sharing data about past cumulative sales figures will help undertakings operating in the sector have information about supply and demand structure in the market and position themselves correctly. They can develop more efficient competition strategies.
- (70) It is also suggested in the application form that idle capacity may create entry barriers. The supply and demand balance will be interpreted correctly by evaluating manufacturing data together with capacity data. Undertakings can have foresight about whether they may need additional capacity. They can obtain efficiency gains by improving their manufacturing, sales and distribution plans. Undertakings can position themselves in the market properly and take more rational decisions by having information about the market size and their positions therein. In this way it will be possible to lower their costs and improve their quality.
- (71) It is concluded that sharing especially cost, sales, manufacturing and capacity data, which are regarded as strategic information, without being aggregated or aged sufficiently to lose their strategic nature will restrict competition; lead to controlling of costs that constitute purchase or sales prices of goods and services as well as of purchase and sales amounts and determining those out of the market due to the market structure. Moreover, sharing of the information whether undertakings need additional capacity as stated in the application will lead to determination and restriction of capacity and supply in a coordinated way.
- (72) As stated above, information exchange not contributing to the transparency of the market is less likely to restrict competition compared to one increasing transparency considerably in the market. Therefore, the transparency level before and after the information exchange and how the information exchange changes that level is determinant for the potential of the information exchange to create restrictive effects on competition. It is concluded that the notified practice will increase the risk of coordination between the parties of the information exchange. In addition, other undertakings in the sector will also act in coordination even if they do not provide data.

¹⁵ The Guidelines on the General Principles of Exemption (Exemption Guidelines), paragraph 22

- (73) Accordingly, the notified practice will not produce efficiency gains in the form of ensuring new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services.

G.5.4.2. Consumers benefiting from the results

- (74) The second condition of exemption is that the consumers must also benefit from the efficiency gains generated. Within the framework of the explanations above, it is concluded that the practice in question will not generate sufficient efficiency gains. As a result of the decision to share information, especially sharing supply and capacity data will lead to coordination and consequently to a rise in product prices reflected to consumers. In line with this, it is concluded that the condition in article 5(1)(b) is not met.

G.5.4.3. No elimination of competition in a substantial part of the relevant market

- (75) The third condition of individual exemption assessment is that the agreement must not eliminate competition in respect of a substantial part of the market. The basic principle of the assessment is the maintenance of the competitive process in the market. Whether competition is being eliminated depends on the degree of competition existing prior to the agreement and on the restrictive impact of the agreement on competition. In line with this, while analyzing whether this condition is fulfilled, issues such as the positions of the parties and competitors in the market, market structure, the effect of the agreement on competition and entry barriers are taken into account.
- (76) When assessing the restrictive effects of information exchange on competition, the market coverage degree of the undertakings exchanging information should be taken into account. If the information exchange covers most of the undertakings in the market, the possibility of the information exchange to create restrictive effects on competition are higher. Besides, the potential of undertakings not party to the information exchange to restrict anticompetitive behavior of the parties to the information exchange decreases. Parties' market shares in both markets are given in Table 4 and Table 5. It is understood from Table 2 and Table 3 that undertakings' shares have not changed too much in years. The undertakings with the highest shares have not changed much in themselves.
- (77) The table below shows the market shares of the first three undertakings with the highest market shares among the undertakings that operate in CSW and CT market but are not members of SERKAP or SERSA.

Table -7: The market shares of the first three undertakings with the highest market shares among the undertakings that operate in CSW and CT market but are not

members of SERKAP or SERSA (%)

| Undertaking | CSW | | | Undertaking | CT | | |
|--|---------|---------|---------|---|---------|---------|---------|
| | 2017 | 2018 | 2019 | | 2017 | 2018 | 2019 |
| Ay Yapı Malzemeleri Tic. Ve San. Ltd. Şti. | (.....) | (.....) | (.....) | Altın Çini ve Seramik Tic. San. A.Ş. | (.....) | (.....) | (.....) |
| Sanikay Seramik Sağlık Gereçleri San. ve Tic. A.Ş. | (.....) | (.....) | (.....) | Akgün seramik San. ve Tic. A.Ş. | (.....) | (.....) | (.....) |
| Akgün seramik San. ve Tic. A.Ş. | (.....) | (.....) | (.....) | Tamsa Fayans Üretim Dağıtım San. ve Tic. A.Ş. | (.....) | (.....) | (.....) |

Source: SERFED

- (78) It is seen from the table that competitors' market shares are negligibly low.
- (79) The structure and growth of the market are taken into account while evaluating entry possibilities. A stable or shrinking market is not attractive for new entries. Referring to the Report¹⁶ prepared by Turkish Industrial Development Bank, The Application Form states that the demand in CT and CSW is directly affected by the growth in the construction sector. The said report includes the following evaluations: *"The sales amounts in ceramic tile and ceramic sanitary ware increased in 2017 compared to the previous year. It is thought that the increase in sales volume is stemming from the construction sector, which was active in 2017 and from the growing foreign demand...the need for housing is increasing constantly in our country and the foreign demand has a tendency to rise. These factors are important for the future of the sector. It is thought that the ceramic sanitary ware consumption per capita will increase, which will affect domestic demand positively"*. In addition, the Report indicates that ceramic tile domestic sales increased by 3% in 2017 compared to the previous year whereas ceramic sanitary ware domestic sales increased by 17% in 2017 compared to the previous year.
- (80) The Application Form included the following explanations about the demand for CT and CSW: An important part of the final CT and CSW products is shaped in line with the growth in the construction sector. Although the construction sector had a growing tendency until 2018, the demand started to decrease in 2018 and continued to decrease in 2019. The construction sector shrank by 9% between the second quarter of 2018 and the second quarter of 2019. This depressed some sectors such as cement and ceramics and decreased capacity use rates.
- (81) Although the Application Report suggested that there are not serious entry barriers in CT and CSW markets and it is possible that any undertaking can enter the market as long as they have the necessary capital to operate, as mentioned above, it is not possible to say that undertakings not party to the notified practice exert competitive pressure on the parties to the notified practice. In addition, it is stated in the Application Form that there have not been new entries in CT and CSW markets in the

¹⁶ http://www.tskb.com.tr/i/assets/document/pdf/sektorel-gorunum_ins-cimento-seramik-mayis.pdf. Accessed: 06.08.2020

last three years.

- (82) It is concluded that sharing of costs, sales, production and capacity data, which are strategical in terms of the notified practice, without being sufficiently aggregated and aged will restrict competition, lead to control of costs that form the purchase or sales price of goods and services as well as of purchase and sales amounts and determination of those outside the market because of the market structure. Even if the information exchange covers the first five undertakings in the relevant market, more than 50% of the market will be affected. Taking into account those facts, the condition in subparagraph (c) of according to article 5 of the Act no 4054 is not fulfilled.

G.5.4.4. Competition must not be restricted more than necessary to achieve the objectives listed in subparagraphs (a) and (b)

- (83) According to the last condition of article 5 of the Act no 4054, the agreement should not restrict competition more than necessary to achieve the efficiencies aimed by the agreement. The necessity and indispensability of the competition restrictions in the agreement are evaluated.
- (84) The data will be published on SERFED's official website. Providing data is voluntary and the data are not concerning future. Although these may be considered as the factors that lowers the risk for restrictive effects on competition, the structure of the relevant market, the strategic nature of the data to be shared and the fact that the data will be shared without being aggregated and aged sufficiently will restrict competition more than necessary to attain the objectives suggested by the applicant related to efficiency gains and consumers benefiting from those.
- (85) In order to grant individual exemption to a decision of associations of undertakings, all of the conditions listed in article 5 of the Act should be fulfilled. Consequently, the decision of associations of undertakings cannot be granted individual exemption.

H. CONCLUSION:

- (86) According to the report prepared and the scope of the file examined, it is decided UNANIMOUSLY that the collection by Rekabet Danışmanlık A.Ş. of certain information related to the activities of the members of Ceramic Sanitary Ware Manufacturers Association and Ceramic Tile Manufacturers Association and sharing of those with the participating members and the public according to the board of directors decision taken by Turkish Ceramics Federation cannot be granted negative clearance certificate within the framework of article 8 of the Act no 4054 on the Protection of Competition
- 1- Since the data to be shared will not lose its strategic nature as they will not be aggregated and aged sufficiently when the market structure is also taken into account.
 - 2- It is decided WITH THE MAJORITY OF THE VOTES that individual exemption cannot be given to the practice in question within the scope of article 5 of the same Act either

with the decision subject to review before Ankara Administrative Courts within 60 days as of the notification of the reasoned decision.

**Dissenting opinion regarding the Decision dated 20.08.2020
and numbered 20-38/526-234**

I do not agree with the decision of the Competition Board ruling that the collection by Rekabet Danışmanlık A.Ş. of certain information related to the activities of the members of Ceramic Sanitary Ware Manufacturers Association (SERSA) and Ceramic Tile Manufacturers Association (SERKAP) and sharing of those with the participating members and the public according to the board of directors decision taken by Turkish Ceramics Federation cannot be granted individual exemption within the framework of article 5 of the Act no 4054 because of the following grounds stated below:

Knowing certain historic data in an aggregated form about a sector, as long as they are not individual, provides benefits to many segments of the society especially the undertakings in the sector, possible investors, researchers/academia and public institutions. The important point is the content and the nature of the data as well as by whom and how the data are collected. There are many previous Board decisions where exemption is granted provided that the market structure is not a tight oligopoly with few players; the data are not related to the future; the data are sufficiently aged and aggregated; the data are not trade secrets, and there are no concerns that individual data collected will be shared. Above all, if an independent organization is collecting the data and the data will not be circulated within the sector but will be available to the public, it is possible to decide more comfortably that two positive and two negative conditions of exemption are fulfilled.

The Board decision in question includes the following findings:

“If the information is no longer a trade secret but has a public nature, is aggregated rather than individual, based on past data rather than future data, its restrictive effects on competition are limited. (Para.37)

“Sharing of data that are sufficiently aggregated to make it difficult to identify any individual data is less likely to create restrictive effects on competition compared to undertaking-based data. Suppliers and customers may benefit from collection and aggregated publication of data such as sales, capacity, input or component costs via a professional association or market survey company as it may shed light on the economic conditions in the sector. Undertakings can make choices depending on information and adapt their strategies efficiently to market conditions by means of such collection and publication of data. Generally, if there is not a concentrated oligopoly, exchange of aggregated data is less likely to create effects restrictive of competition. (Para.37)

“...FTC states that thanks to the transparency caused by reasonable information exchange, companies can compete more effectively and that can be good for consumers, making more and better goods and services available to them at lower prices. For the definition of reasonable information exchange, it is stated that if the information provided by participants is more than three months old, at least five participants provide the data, the data are aggregated in a way that no single provider’s data contributes more than 25% of the total data, and the exchange is managed by a third-party, like a trade association,

the exchange of information is not considered as the sharing of strategic data...
(Para. 41)

It is understood from the information in the file that

- SERSA has 18 and SERKAP has 40 members,
- An independent consultancy firm that does not carry out activities directly or indirectly in the sector will collect the data once every three months to aggregate and publish those according to the principles explained,
- Providing data is voluntary; data will not be collected from those who do not want to share data,
- The data collected once every three months will be published after being delayed/aged for two months,
- Aggregation will include at least five undertakings; in this way it will not be possible to make individual calculations and estimations; the issues where there are data pertaining to less than five undertakings will not be shared,
- The aggregated data will be shared not only with the undertakings in the sector but also with the public via the relevant website.

Accordingly, all the measures to be taken for minimizing competitive concerns and anticompetitive information exchange are taken, moreover, the data will be collected by an independent organization and even with the public, which has not been observed in similar sectors where exemption is granted; therefore, I do not agree with the Board decision in question, thinking that the decision and practice in question can be granted individual exemption.

Hasan Hüseyin ÜNLÜ
Board Member