

SERFED Decision: A New Precedent for Third-Party Information Exchange Practices by Association of Undertakings

Authors: Dr. Gönenç Gürkaynak¹, Buğrahan Köroğlu, İzzet Şerbetçigil of ELIG Gürkaynak Attorneys-at-Law

This case summary includes an analysis of the Turkish Competition Board’s (“**Board**”) Türkiye Seramik Federasyonu (*Turkish Ceramics Federation*) (“**SERFED**”) decision² in which the Board determined that sharing of data collected from members regarding their activities with both participating members and with the public via SERFED cannot be issued a negative clearance certificate pursuant to Article 8 of the Law No. 4054 on the Protection of Competition (“**Law No. 4054**”), but may be granted individual exemption within the scope of Article 5 of the Law No. 4054.

(1) Background Information

SERFED comprises seven undertakings engaged in the production of ceramic tiles, vitrification, refractory, and raw material production. Prior to the case outlined in this article, SERFED had submitted an application for negative clearance/individual exemption to the Turkish Competition Authority (“**Authority**”) in May 2020, and thereby, proposed obtaining aggregated data from its members via an independent third party with the intention of publishing the information on its official website and sharing it among its members.³ However, the Board ruled against granting neither negative clearance nor individual exemption for the initial application on the grounds that such approval could potentially result in a restriction of competition within the relevant market.

Subsequently, in June 2021, SERFED submitted a distinct application for negative clearance/individual exemption before the Authority, presenting similar grounds as its initial

¹ Attorney at Law and Founding Partner of ELIG Gürkaynak Attorneys-at-Law, Istanbul, Türkiye. Honorary Professor of Practice at University College London (UCL), Faculty of Laws and Senior Fellow at University College London, Centre for Law, Economics and Society. Member of faculty at Bilkent University, Faculty of Law, Ankara, and Bilgi University, Faculty of Law, Istanbul

² The Board’s SERFED II decision dated 22.09.2022 and numbered 22-43/638-268.

³ The Board’s SERFED I decision dated 20.08.2020 and numbered 20-38/526-234.

application. Noteworthy in later submission were several modifications to the information exchange scheme. The Board, however, determined that the envisaged sharing of collected data posed a potential risk of coordination among competitors and, consequently, declined to grant a negative clearance again. Nevertheless, the application underwent the Board's assessment in terms of the cumulative conditions for individual exemption outlined in Article 5 of Law No. 4054 and was found eligible for an individual exemption, contrary to the initial application.

(2) The Information Exchange Scheme Proposed by SERFED

As per the envisaged exchange scheme, data pertaining to the operational activities of SERKAP (*Ceramic Tile Manufacturers Association*) and SERSA (*Ceramic Sanitary Ware Manufacturers Association*), both constituting two of SERFED's seven members, is designated for compilation. The scope of the information to be exchanged covers details such as (i) the number of active employees, (ii) annual energy consumption, (iii) yearly aggregate carbon emission volume, (iv) capacity, and (v) annual production and sales figures. Within its application, SERFED has elucidated the method of information sharing as follows:

- Member undertakings will bear no obligation to provide data; instead, data collection from these undertakings will be undertaken by a third-party consultancy firm following the execution of a confidentiality agreement. Each undertaking opting to share data is required to sign a confidentiality agreement.
- The consultancy firm is tasked with aggregating the collected data, and SERFED will maintain a non-interventionist position throughout the process of data gathering and consolidation. Undertakings participating in the data pool will not have access to their competitors' specific data, and the aggregated data will not be segmented by undertakings or geographical regions.
- The document prepared by the consultancy firm based on the data collected will not contain any predictions regarding the future status of production, sales, prices, or capacity utilization rates, nor any comments, analyses, or recommendations that may affect the undertakings' mutual competitive behaviour.

- The consultancy firm is prohibited from generating and exchanging data unless a minimum of five participants engage in the data pool. The condition of at least five participants will be required for each product subject to data sharing. Even if the minimum participant condition is satisfied, any participant's data exceeding 25% of the total data weight will be excluded for the relevant year.
- The independent consultancy firm will obtain all data from participating member undertakings for a period of one year. Following the three months after the end of the year, the obtained data for the previous year will be shared with both member undertakings and the public.

(3) The Board's Negative Clearance Assessment

The decision, in its substantial assessment, underscores that the envisaged practice entails an exchange of information among competitors. Subsequently, it is assessed whether the contemplated practice would lead to competition law concerns. In this evaluative process, the Board has stated that the exchange does not constitute strategic data exchange, citing two key reasons: (i) the information to be exchanged pertains to historical data (specifically, data that is at least three months old), and (ii) the identity of the information owner remains anonymous. On the other hand, the Board also emphasizes that even in instances of this nature, within markets characterized by high concentration; such exchanges may yield outcomes leading to competition restriction.

In this context, the Board scrutinized the market's unique characteristics in its assessment and took the Federal Trade Commission's ("*FTC*") guidelines into account to determine the potential classification of the information as aggregated. Consistent with the FTC guidelines, it is emphasized that data is considered aggregated when a minimum of five participants contribute, and the data of no single undertaking constitutes more than 25% of the total dataset.

Moreover, the evaluation considered the intricacies arising when only the market share data of the five players with highest market share in the market is subjected to data sharing. Notably,

it was noted that in certain instances, particularly in markets with a few major players, the leading undertaking alone may wield a significant majority of the total data by weight, rendering compliance with the 25% threshold unattainable. To illustrate, the Board gave an example of a symmetric market scenario, where the largest undertaking holds a 7% market share while the other four competitors remain at 5%. In such a scenario, sharing information among five participants would undoubtedly exceed the 25% threshold. Accordingly, the Board indicated that under such a scenario, undertakings may exploit undetected anticompetitive agreements to identify or monitor potential violators.

In light of potential risks, the Board assessed that SERFED's practice could foster the market transparency, consequently facilitating the prediction of competitors' behaviours and possibly fostering coordination among them. Grounded on these considerations, the Board opted against granting negative clearance for the envisaged practice.

(4) The Board's Individual Exemption Test

Individual exemption under Turkish Competition Law is governed by Article 5 of the Law No. 4054. Four conditions exist under Article 5, all of which must be satisfied for an agreement, decision or concerted practice to benefit from individual exemption. These conditions are as follows:

- i) New developments and improvements, or an economic or technical development in the production or distribution of goods and in the provision of services*

The Board has asserted that the envisaged information exchange will enable undertakings to better position themselves within the market, facilitating a more precise formulation of their strategies. Furthermore, the sharing of information is seen as a remedy for the lack of statistical data in the markets, affording undertakings the ability to analyze market conditions and consequently attain efficiencies. Therefore, the Board concluded that the first condition has been satisfied.

ii) Consumer benefits

Anticipated advantages for customers, stemming from heightened competition levels, encompass lower prices, enhanced service quality, and a broader array of products. Moreover, public exchange of information can benefit consumers by improving their decision-making process. Overall, the exchange of information benefits consumers since it enables undertakings to position themselves better in the market and this effect is expected to reflect customers. Based on these considerations, it is concluded that the proposed scheme fulfils consumer benefit condition.

iii) No elimination of competition in a significant part of the relevant market

The Board defined relevant product markets as “*ceramic coating materials*” and “*ceramic health tools*”. In terms of the geographic market definition, relevant market was defined as “Turkiye” as players were operating throughout Turkiye. Based on these market definitions, the Board examined the market structure. In this respect, the decision underscored the non-homogeneity of products within the market. Conversely, the product market exhibits diversity in terms of both price and quality. Additionally, the market is characterized by its capacity for rapid response to shifting demand dynamics and the agility to introduce new models. Therefore, the possible potentially negative effects on competition may be prevented and thus, the practice will not significantly restrict competition.

iv) No limitation of competition more than required to achieve the goals in paragraphs (i) and (ii)

The decision emphasized that data sharing will be cumulative, infrequent, and anonymized. Furthermore, a third-party consultancy firm will collect the data and the data collected will be aged for a sufficient period of time. Consequently, the practice met the final condition and accordingly, it was concluded that the practice could benefit from an individual exemption regime.

(5) A Brief Analysis of the Board's Assessment to Similar Practices

It is beneficial to highlight the significant disparities between the SERFED decision and the recent applications that were deemed by the Board not to meet the criteria sought. For instance, in SERFED's initial application, the data was planned to be disclosed with a two-month history. However, in the later application, the applicant extended the data aging period by an additional month. Moreover, although both applications included the condition of at least five participants, the previous application did not meet FTC conditions. Indeed, the initial application did not include a 25% threshold. Furthermore, unlike SERFED II decision, in IMDER decision⁴ and ISDER decision⁵ the information exchange scheme proposed by association of undertakings has been rejected by the Board for restricting the competition more than necessary to the attainment of the objectives pursued due to its dynamics propounding an exchange of information making the market more transparent.

(6) Conclusion

In conclusion, the significance of this decision lies in its ability to offer a comprehensive assessment of third-party information exchange within associations of undertakings. This decision not only provides valuable insights into the Board's methodology for addressing concerns related to information sharing among competitors but also exemplifies the Board's assessment criteria for such practices. It is noteworthy that this decision could serve as a guiding precedent for other sectors and associations that engage in similar data-sharing practices.

Article Contact: Dr. Gönenç Gürkaynak

E-mail: gonenc.gurkaynak@elig.com

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⁴ The Board's IMDER decision dated 19.11.2020 and numbered 20-50/688-302.

⁵ The Board's ISDER decision dated 19.11.2020 and numbered 20-50/687-301.