

THE LEGITIMACY OF PREFERENTIAL PROCUREMENT AND INTERNATIONAL COMPETITION UNDER THE TURKISH PUBLIC PROCUREMENT LAW

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ABSTRACT

The Turkish Public Procurement Law permits the contracting authorities to close the tendering procedures to international competition and allows them to grant a preference margin in favour of the national economic operators and domestic products. The Turkish Government is politically determined to maintain the preferential procurement and seeking possibilities to enhance the effectiveness of the current system. This article intends to analyse the Turkish Public Procurement Law provisions that restrict the access of foreign economic operators to the Turkish public procurement market and impede competition between the foreign and the domestic economic operators. The article also aims to provide a critique of protectionism with special reference to the impact of these policies within the context of membership negotiations with the European Union and of the World Trade Organisation.

Keywords: Public Procurement, Equal Treatment, Preferences, Protectionism, Competition, Public Procurement Law, Turkey

ÖZET

Kamu İhale Kanunu, ihaleyi yapan idarelere, ihaleleri uluslararası rekabete kapatma ve yerli istekliler ile yerli ürünler lehine fiyat avantajı uygulama hususlarında takdir yetkisi vermektedir. Hükümet, tercihli alım sistemini muhafaza etmekte kararlıdır ve mevcut sistemin etkinliğini artırmak için çalışmalar yapmaktadır. Bu makalenin amacı, yabancıların Türk kamu ihale piyasasına girişini engelleyen ve yerli ile yabancı girişimciler arasındaki rekabeti etkileyen Kamu İhale Kanunu hükümlerini incelemektir. Makale ayrıca, korumacılık politikalarına ve bu politikaların Avrupa Birliği üyelik müzakereleri ile Dünya Ticaret Örgütü bağlamındaki etkilerine eleştirel bir yaklaşım getirmeyi amaçlamaktadır.

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Anahtar Kelimeler: Kamu Alımları, Eşit Muamele, Tercihli Alım, Korumacılık, Rekabet, Kamu İhale Kanunu, Türkiye

INTRODUCTION

For the last three decades the Republic of Turkey has been pursuing the national policies of full integration with the global economy and of the formation of a free market economy primarily based on competition. Becoming a member of the World Trade Organisation (hereafter ‘the WTO’) in 1994, being party to the Customs Union in 1995 and the acceptance as a candidate state to join the European Union in 1999 are all breakthroughs in the liberalisation of the Turkish internal markets.

The significance of public procurement for international trade is increasing due to the size of the public procurement markets.¹ At the international level there have been efforts towards opening up public procurement markets to international competition and eliminating discrimination on the basis of nationality.² However, the global economic crisis is threatening the initiatives on the liberalisation of public procurement markets and protectionist measures are increasing globally.³ Protectionism in the public procurement market is also increasing in Turkey and the dissemination of policies that favour the national industry is on the agenda of the Turkish Government. Indeed, Turkey has historically always been reluctant to open its public procurement markets to international competition and

¹ For instance the public procurement market in the European Union was estimated over €2 trillion in 2009, which accounts for 19% of the Union’s GDP. See, European Commission, Evaluation Report, Impact and Effectiveness of EU Public Procurement Legislation SEC(2011) 853 final Part 1. The Organisation for Economic Co-operation and Development (hereafter ‘the OECD’) estimates the size of public procurement markets on average at 10-15% of GDP across the world. See, OECD, *OECD principles for integrity in public procurement* (Paris: OECD, 2009).

² For the initiatives on the liberalisation of public procurement markets within the WTO see Sue Arrowsmith and Robert D. Anderson, *The WTO regime on government procurement: challenge and reform* (Cambridge: Cambridge University Press, 2011); Besides the public sector procurement, there are also initiatives regarding the utilities sector. See, Rhodri Williams, ‘Access to utilities procurement markets of non-EU countries’ (2010) 2 *Public Procurement Law Review* 39. See also, Christopher Bovis, *The liberalisation of public procurement and its effects on the common market* (Aldershot: Ashgate, 1998).

³ See, European Commission, Global Europe: Competing in the World COM(2006) 567 final. See also, Richard Baldwin and Simon Evenett (eds), *The collapse of global trade, murky protectionism, and the crisis: Recommendations for the G20* (London: Centre for Economic Policy Research, 2011).

the market share of foreign economic operators has always been limited. In this regard, certain restrictions have been imposed in order to limit participation of foreign economic operators to the procurement procedures and a preferential procurement system has been developed to favour the national economic operators and domestic products.

This article seeks to contribute to the literature regarding the legitimacy of preferential procurement and international competition under the Public Procurement Act numbered 4734 which is the main legal framework on public procurement.⁴ While certain scholars have provided an overview of the public procurement regulations in Turkey, limited research has been done on the preferential procurement and international competition in public procurement.⁵ Moreover, the Public Procurement Act underwent significant revisions in 2008 and 2011; therefore, certain aspects of the literature are partially obsolete which necessitates a review of the literature.

This article is structured as follows: Section 2 examines the liberalisation of the Turkish public procurement market within the context of the European Union, the World Trade Organisation and the free trade agreements; Section 3 analyses the current regulatory framework of the preferential procurement; Section 4 reviews the procurement statistics; Section 5 evaluates the policy framework and Section 6 concludes.

I. THE LIBERALISATION OF THE TURKISH PUBLIC PROCUREMENT MARKET

The Turkish Public Procurement Act was adopted in January 2002 and entered into force in January 2003. The Public Procurement Act covers the procurements of the State, local and regional authorities, the State Economic

⁴ The English translation of the Public Procurement Act provided by the Public Procurement Authority is available at <www.ihale.gov.tr/english/4734_English.pdf> (last accessed 1 October 2012)

⁵ For the literature on the Turkish public procurement law see, Servet Alyanak, 'An overview of the legal rules governing public procurement in Turkey' (2007) 2 *Public Procurement Law Review* 125; Ayhan Kortunay and Yasin Sezer, 'Kamu Ihale Hukukunun 63 Maddesinin AB Hukuku Perspektifinden Değerlendirilmesi' (2007) 56(3) *AUHFD* 137; Sakire Kural and Umit Alsac, 'Public Procurement Procedures in Turkey' (2006) 6 *Journal of Public Procurement* 100; Abdullah Uz, *Kamu Ihale Hukuku* (Ankara: Turhan Kitabevi, 2005); Robert L. Burdsal, 'An overview of Turkish public procurement law' (2002) 1 *Public Procurement Law Review* 56.

Enterprises, the social security institutions, and the procurements of any institutions, organisations, associations, enterprises and corporations for which more than half of the capital, directly or indirectly, together or separately, is owned by those stated. Even though certain exemptions have been introduced to the Public Procurement Act, it is still the primary procurement legislation that has the widest implementation in Turkey. The general principles of the Turkish public procurement system are outlined under article 5 of the Public Procurement Act as transparency, competition, equal treatment, reliability, confidentiality, public supervision and efficiency. The principle of equal treatment needs to be examined for the purpose of this article.

The equal treatment principle, which is outlined as one of the main principles of the Turkish public procurement law, derives from a constitutional provision. Article 10 of the Turkish Constitution provides that all individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any other such considerations. However, this principle does not mean absolute equality. A landmark case-law of the Turkish Constitutional Court has provided a comprehensive definition of this principle. The Constitutional Court ruled that the equality before the law applies to individuals in the same legal status and the Court held that the principle of equality aims to provide legal equality rather than practical equality.⁶ Indeed, this decision is in line with the case-law of the Court of Justice of the European Union (hereafter ‘the CJEU’) on equal treatment, where the CJEU held that “*the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified*”.⁷ From public procurement perspective and in international context, the principle of equal treatment implies that “*all tenderers of whatever nationality and all bids including goods of whatever*

⁶ The Turkish Constitutional Court, Case No. 2009/9, Decision No. 2011/103.

⁷ See, Joined Cases C-21/03 and C-34/03, *Fabricom v État Belge* [2005] ECR I-1559, para 27.

origin must be treated equally”.⁸ In this context, any discrimination on the basis of nationality or origin contradicts the principle of equal treatment.

The legal status and extent of equal treatment, however, depends on the legal context in which it is applied. Article 16 of the Turkish Constitution provides that the fundamental rights and freedoms of foreigners could be restricted by law in a manner consistent with international law. For the purpose of this article, it is worth examining the restrictions that could be considered consistent with international law and the situations where Turkey is under the obligation of non-discrimination, i.e. to whom Turkey owes the legal duty to open public procurement markets. The following sections look through the international agreements, institutions and organisations that have impact on the liberalisation of the Turkish public procurement market at regional, plurilateral and bilateral level.

A. The Regional Level: The European Union

Turkey’s relations with the European Union date back to 1960s.⁹ The relations were officially initiated by the application of Turkey for association to the European Economic Community on 31 July 1959. The application was followed by the signature of the Ankara Agreement between Turkey and the European Economic Community on 12 September 1963 which came into effect on 1 December 1964.¹⁰ The Ankara Agreement envisaged a gradual transition of integration, based on the establishment of a customs union and specified three key stages in order to initiate the integration process consisting of preparatory, transitional and final stages. Upon the completion of the preparatory stage, Turkey and the European Economic Community signed the Additional Protocol on 13 November 1970 determining the provisions and obligations related to the transitional stage which came into effect in 1973.¹¹

⁸ Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (New York: Oxford University Press, 2004), p. 391.

⁹ For the chronology of Turkey’s relations with the European Union see, Joseph S. Joseph, ‘EU Enlargement: The Challenge and Promise of Turkey’ in Bindi Federiga M. (ed), *The foreign policy of the European Union assessing Europe’s role in the world* (Washington, D.C.: Brookings Institution Press, 2010). See also, European Commission, EU-Turkey relations <http://ec.europa.eu/enlargement/candidate-countries/turkey/eu_turkey_relations_en.htm> (last accessed 1 October 2012)

¹⁰ See, the Ankara Agreement of 12.09.1963, OJ 1964 L 217.

¹¹ See, Additional Protocol of 23.11.1970, OJ 1972 L 293.

The completion of the transition stage established foundations for the further step of integration: establishment of the common customs regime. In that regard, Turkey and the European Union agreed upon creating the Customs Union on 31 December 1995 which came into effect on 1 January 1996.¹² The Customs Union provided a significant momentum to initiate reforms to adopt the European norms particularly in trade and competition areas. It is noteworthy that the Customs Union Decision also invited Turkey to review the policies on public procurement. The Decision stated that “[a]s soon as possible after the date of entry into force of this Decision, the Association Council will set a date for the initiation of negotiations aiming at the mutual opening of the Parties’ respective government procurement markets”.¹³ In this context, the EC-Turkey Association Council agreed on the initiation of negotiations aiming the liberalisation of services and the mutual opening of public procurement markets to begin in April 2000.¹⁴ Even though the Decision underlined the importance of access to the public procurement markets, no explicit commitment was undertaken by Turkey on that matter.

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The relations between Turkey and the European Union were accelerated after the establishment of the Customs Union. In that regard, the European Union Helsinki Council held on 10-11 December 1999 recognised Turkey as a candidate State to join the European Union on the basis of the same criteria applied to the other candidate States. This period is a breakthrough in relations between Turkey and the European Union. The official acceptance of Turkey’s status as a candidate provided a new momentum to initiate the reforms to adopt the European norms in Turkey. For instance, the EU Council Decision 2001/235/EC identified short term and medium term reform priorities for the Turkish public procurement system.¹⁵ According

¹² See, the Decision 1/95 of the Association Council of 22.12.1995, OJ 1996 L 35.

¹³ *Id.*, Article 48.

¹⁴ See, Decision No. 2/2000 of the EC-Turkey Association Council of 11 April 2000 on the opening of negotiations aimed at the liberalisation of services and the mutual opening of procurement markets between the Community and Turkey, OJ 2000 L 138/27.

¹⁵ See, Council Decision of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey (2001/235/EC), OJ 2001 L 85/13.

to this Council Decision, Turkey in short term is expected to start alignment with the Community *acquis* in particular by making the procurement system more transparent and accountable; and in medium term, Turkey is required to complete alignment with the Community *acquis* and ensure effective implementation and enforcement.

On the other hand, the European Council, during the Brussels Summit held on 16-17 December 2004, noted that Turkey sufficiently fulfilled the political criteria and decided to open accession negotiations with Turkey on 3 October 2005 which shifted the relationship between Turkey and the European Union into a new phase. Furthermore, in conjunction with the enlargement of the European Union, Turkey signed the “Additional Protocol” which extended the Ankara Agreement of 1963 to the new members of the European Union.¹⁶

The Council Decision of 2008/157/EC sets out the general principles, priorities, objectives and conditions of accession on the basis of the Copenhagen criteria regarding alignment of Turkish legislation with the EU *acquis* and public procurement is the 5th chapter of official negotiations out of 35 chapters.¹⁷ Like other candidate states, Turkey is expected to establish a public procurement system that meets *the acquis communautaire* of the European Union on public procurement, i.e. Directive 2004/18/EC (hereafter ‘the Public Sector Directive’) and Directive 2004/17/EC (hereafter ‘the Utilities Directive’).¹⁸

The public procurement chapter has not been opened for official negotiations, yet. The European Union has set two benchmarks for opening the public procurement chapter for negotiations:

¹⁶ Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey following the enlargement of the European Union, OJ 2005 L 254/58.

¹⁷ See, Council Decision 2008/157/EC of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the Republic of Turkey and repealing Decision 2006/35/EC, OJ 2006 L51/4, 26.2.2008; For the repealed decision see, Council Decision 2006/35/EC of 23 January 2006 on the principles, priorities and conditions contained in the Accession Partnership with Turkey, OJ 2006 L 22/34.

¹⁸ See, Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L134/114; Directive 2004/17/EC of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ 2004 L 134/1.

1st Opening Benchmark: Turkey is required by the Council Decision of 2008/157/EC to assign a public institution in charge of coordination of all areas related to legal and policy framework on public procurement in order to ensure a coherent policy during the pre-accession period. Turkey fulfilled this criterion in 2009 through designating the Ministry of Finance as the coordinator body for the legal and policy framework on public procurement. The Ministry of Finance is currently entitled to determine the key policies on public procurement in the context of general economic policies and strategies and to ensure coordination among the related parties in the preparation of the draft laws in this area.¹⁹

2nd Opening Benchmark: The second opening benchmark is more comprehensive and encapsulates a broad range of substantial reforms. The Council Decision of 2008/157/EC invites Turkey to present a comprehensive strategy which needs to include all reforms necessary for legislative alignment and institutional capacity building in order to comply with the *acquis*. Turkey has prepared a strategy for that purpose which elaborates a complete list of actions and time-schedules for the prospective legal reforms in order to provide full alignment with *the acquis communautaire*.²⁰ It is noteworthy that the strategy prepared by Turkey contains an action plan for the elimination of domestic preferences and other discriminatory practices other than price preferences under the Public Procurement Act.

Turkey has currently fulfilled the first opening benchmark and is gradually reforming the public procurement system in order to bring it in line with *the acquis communautaire* of the European Union.²¹ However, although the European Union opened membership negotiations with Turkey, there are considerable political problems that prevent Turkey from joining the

¹⁹ See, the Act numbered 5917, dated 25 June 2009, amending the Decree Law numbered 178 on Organisation and Duties of the Ministry of Finance.

²⁰ The strategy is available at <www.mfa.gov.tr/data/AB/ABMuktesebati/05KamuAlimlari.pdf> (last accessed 1 October 2012)

²¹ For instance, the Public Procurement Act was amended through the Act numbered 5812 dated 20.11.2008 in order to provide compliance with certain aspects of the *acquis communautaire* of the European Union.

European Union.²² Currently, no chapter, including the public procurement chapter, is being negotiated. The process is quite vague and there is not a definite roadmap for membership. As Alyanak points out, the negotiations have lost their momentum.²³ On the other hand, although the negotiations are frozen, the European Union has been consistently criticising Turkey and recommending the abolishment of the preferential procurement system since no exception is provided for the European suppliers or goods.²⁴

The European Union is not the only external dynamic that has put political pressure on Turkey for eliminating restrictive measures against the foreign economic operators. At the beginning of 2001 Turkey was under political pressure from the World Bank and the International Monetary Fund (hereafter ‘the IMF’) regarding the modernisation of the Turkish public procurement system.

Turkey suffered from a widespread financial crisis at the beginning of 2001 and Turkey applied for long-term loans from the IMF in order to overcome the economic crisis. The IMF stipulated substantial financial reforms in order to provide more efficient public spending and promulgation of fifteen new pieces of legislation for this purpose as the preconditions for releasing the loans. One out of these fifteen pieces of legislation was the enactment of a new public procurement law. In this regard, Turkey undertook to enact that “[a] public procurement law in line with UN standards (UNCITRAL) will be submitted to Parliament by October 15, 2001”.²⁵ The IMF also advised

²² It would be beyond the scope of this article to attempt any extensive analysis of the political problems preventing Turkey to join the European Union. In a nutshell, due to the Turkish failure to apply to Cyprus the Additional Protocol to the Ankara Agreement, the EU Council decided on December 2006 that chapters will not be opened for negotiation and no chapter will be provisionally closed until Turkey has fulfilled its commitment with regard to Cyprus. For the political obstacles of Turkey’s membership see, Esra LaGro and Knud Erik Jørgensen, *Turkey and the European Union: prospects for a difficult encounter* (Basingstoke: Palgrave Macmillan, 2007); A. Schrijvers and Eline D. Ridder, ‘European Union accession policy’ in Wunderlich Jens-Uwe and David J. Bailey (eds), *The European Union and Global Governance: A Handbook* (London: Routledge, 2011).

²³ Servet Alyanak, ‘The Public Procurement System of Turkey in Comparison to European Community Procurement Legislation’ (2007) 36 *Public Contract Law Journal* 203, p. 205.

²⁴ The criticism has been raised in all annual progress reports published by the European Union regarding Turkey’s membership process. The annual progress reports are available at <http://ec.europa.eu/enlargement/candidate-countries/turkey/key_documents_en.htm> (last accessed 1 October 2012)

²⁵ See, Turkey’s Letter of Intent and Memorandum on Economic Policies, May 3, 2001, available at <www.imf.org/external/np/loi/2001/tur/02/index.htm> (last accessed 1 October 2012)

Turkey to eliminate any restrictive measures against foreign economic operators. However, the national economic operators that time objected to any public procurement reform that would grant foreign suppliers full and equal access to the Turkish public procurement market, asserting that they would not be able to compete against the foreign suppliers in a competitive market.²⁶ In fact, the national economic operators achieved their goals and the Public Procurement Act which was enacted in 2002 maintained the preferential procurement system that existed under the State Tender Act numbered 2886, the predecessor of the Public Procurement Act. It is noteworthy that the State Tender Act permitted the Council of Ministers to decide upon a preference margin in favour of the national economic operators. In this context, the Council of Ministers decided on 27 March 1985 that the contracting authorities were allowed to apply a preference margin of up to 15% to national economic operators while awarding contracts. As it will be explained in the following sections, the Public Procurement Act took this provision further and permitted the contracting authorities to favour domestic goods and services besides the domestic suppliers and granted discretion to the contracting authorities on closing the tendering procedures to international competition.

In conclusion, Turkey is not a full member of the European Union; therefore, it is not under the obligation of non-discrimination against the European suppliers or goods and does not owe the legal duty to fully open public procurement markets to the European suppliers and goods at that stage. The maintenance of preferential procurement despite the criticisms of the European Union implies that Turkey would like to safeguard its position during the transition period (i.e. the pre-accession period) and accordingly it signals that Turkey will keep protectionism until being admitted to the European Union as a full member.

B. The Plurilateral Level: The World Trade Organisation

The WTO Agreement on Government Procurement (hereafter ‘the GPA’) dealing with public procurement entered into force in 1996. The GPA

²⁶ Fuat Ercan and Sebnem Oguz, ‘Rescaling as a class relationship and process: The case of public procurement law in Turkey’ (2006) 25 *Political Geography* 641, p. 648 et seq.

is a plurilateral agreement and the WTO members are not obliged to join the GPA. The GPA, therefore, only applies to the signatory states. In its preamble the objective of the GPA is stated as contributing to the liberalisation and expansion of world trade. The GPA attempts to achieve this objective by opening the public procurement markets of the signatory states to international trade. In this context, the GPA requires the signatory parties to apply the principles of transparency and non-discrimination (most notably the principles of national treatment and most-favoured nation) to their national public procurement laws, regulations and procedures. The public procurement market covered by the GPA, considering the potential accession candidates, provides a remarkable market access opportunities world-wide.²⁷ Accordingly, the most prominent benefit of the GPA accession is being safeguarded against any protectionist or 'buy national' measures introduced by other GPA members.²⁸

Turkey has been a member of the WTO since 1994. However, the impact of the WTO on Turkey in terms of public procurement has been relatively limited. Turkey has not signed the GPA, yet. Turkey, as a developing country, has always been reluctant to join the GPA, which mostly the developed countries are party to.²⁹ In that regard, Turkey has contented itself with being an observer to the GPA since 1996. The GPA, in fact, attempts to balance the needs of both developing and developed countries in order to encourage wider participation. Article V of the GPA outlines the extent of the special and differential treatment for developing countries and allows them to negotiate exclusions from the rules on national treatment with respect to certain entities, products or services. It is noteworthy that on 15 December 2011, the Ministers of the Parties to the GPA reached a political agreement on renegotiation of the GPA and most importantly the

²⁷ For the estimations see, Robert D. Anderson, Anna Caroline Muller, Kodjo Osei-Lah and Philippe Pelletier, 'Assessing the value of future accessions to the WTO Agreement on Government Procurement: some new data sources, provisional estimates, and an evaluative framework for WTO members considering accession' (2012) 4 *Public Procurement Law Review* 113.

²⁸ For a comprehensive review of potential benefits and relevant factors of the GPA accession see, *ibid*, p. 119.

²⁹ The current parties and observers including the countries negotiating accession to the GPA are available at <www.wto.org/english/tratop_e/gproc_e/memobs_e.htm> (last accessed 1 October 2012)

Ministers agreed upon the previously negotiated revised GPA text can come into effect. The revised GPA text is considered by Anderson as clarifying and improving the transitional measures, i.e. the special and differential treatment, available to developing countries that accede to the GPA.³⁰

Turkey is neither party to the GPA nor negotiating accession. Indeed, the participation of Turkey to the GPA needs to be evaluated together with its membership negotiations with the European Union. As explained previously, the most criticised provision under the Public Procurement Act by the European Union is the provision on the national preferences and Turkey does not plan to abolish the national preferences system until admitted to the European Union as a member state. It is apparent that Turkey will not fully open its public procurement market to developed countries before it becomes a full member of the European Union. It is noteworthy that Mavroidis and Hoekman had argued in 1995 that Turkey did not join to the GPA in order to maintain the price preference policies.³¹ The past years seems to justify this correlation put forward by Mavroidis and Hoekman since Turkey is still maintaining the preferential procurement and not yet party to the GPA.

C. The Bilateral Level: The Free Trade Agreements

Aside the Customs Union agreement with the European Union, Turkey has signed free trade agreements with the European Free Trade Association (consisting of the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation), Albania, the Former Yugoslav Republic of Macedonia, Bosnia-Herzegovina, Croatia, Tunisia, Morocco, the Palestinian Authority, Syria, Israel, Egypt and Georgia. The common feature of these free trade agreements is that they have provisions on public procurement. Each free trade agreement invites the signatory parties to consider the effective liberalisation of their

³⁰ See, Robert D. Anderson, 'The conclusion of the renegotiation of the World Trade Organization Agreement on Government Procurement: what it means for the Agreement and for the world economy' (2012) 3 *Public Procurement Law Review* 83, p. 85.

³¹ See, Petros C. Mavroidis and Bernard M. Hoekman, 'The WTO's Agreement on Government Procurement: expanding disciplines, declining membership?' (1995) 2 *Public Procurement Law Review* 63, p. 73.

respective public procurement markets. The liberalisation is considered as an integral objective of the free trade agreements. Furthermore, the free trade agreements aim to ensure reciprocal respect to transparency and non-discrimination in the public procurement markets. In this context, the free trade agreements require a gradual adjustment of the conditions governing the participation in contracts awarded by public authorities and public undertakings and by private undertakings which have been granted special or exclusive rights.

II. THE LEGAL FRAMEWORK

As it is examined under the previous section, Turkey is not legally required to fully open its public procurement to international competition. However, this does not imply that the access of foreign economic operators to the Turkish public procurement market is absolutely restricted. This section examines the public procurement framework that has impact on the access of the foreign economic operators to the Turkish public procurement market. The subsequent section further analyses the last ten years' procurement statistics in order to identify the extent and the effectiveness of implementation of the legal framework.

A. The General Principles

Article 63 of the Turkish Public Procurement Act entitled 'Arrangements regarding domestic tenderers' provides that, "*[t]he contracting authorities may insert some provisions to the tender documents with regard to; in procurement of services and works, a price advantage would apply to domestic tenderers up to 15%; and in procurement of goods, a price advantage up to 15% would apply to tenderers who offer products which are accepted as domestic products by the Authority by taking the opinions of Ministry of Industry and Trade and of other relevant organisations and institutions; and in cases where the estimated costs are below the threshold values, only domestic tenderers can participate in procurements. In order to be deemed as domestic tenderers, all partners of the joint ventures must be domestic tenderers*". The application of this provision is discretionary in general unless any retaliatory measures are adopted; so the contracting authorities have discretion:

- a. to grant preferences to domestic tenderers up to 15% in procurement of services and works;
- b. to grant preferences to any tenderers offering domestic goods up to 15%;
- c. to close tendering procedures to international competition in cases where the estimated costs are below the threshold values.

The update threshold values applicable for the implementation of Article 63 are determined under article 8 of the Public Procurement Act as follows:³²

- a. 792,482 Turkish Liras (equivalent to about 345,669 EUR) for procurement of goods and services by the contracting authorities operating under the general or the annexed budget;
- b. 1,320,805 Turkish Liras (equivalent to about 576,116 EUR) for procurement of goods and services by other contracting authorities within the scope of the Public Procurement Act;
- c. 29,057,835 Turkish Liras (equivalent to about 12,674,620 EUR) for the works contracts by any of contacting authorities covered by the Public Procurement Act.

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According to article 24 of the Public Procurement Act, it is mandatory to include the information in the notices whether the tender is closed to the foreign economic operators or whether a price advantage is applied in favour of the domestic tenderers or the domestic goods. If the contracting authorities fail to publicise those restrictions in advance under the tender notices and tender documents, they are not permitted to discriminate against the foreign economic operators or non-domestic goods. In such cases, any measure taken against the foreign economic operators or non-domestic goods would be violating the principle of equal treatment which is one of the main principles pursued by the Public Procurement Act.

³² 1 Turkish Lira is equivalent to about 0.43 EUR (01.06.2012, the Turkish Central Bank FX Buying Rate). In 2005, 6 zero digits have been deleted from the Turkish Lira. Within the scope of this article, old monetary values will be converted to the current monetary system to provide harmony. It is important to note that exchange rate of Turkish Lira against Euro has fluctuated over time. Therefore, the conversions within this article are only informative and consist of approximate figures.

Furthermore, the contracting authorities, which do not restrict participation of the foreign economic operators, are required to accept any equivalent documentation or means submitted by the foreign economic operators to prove their economic, financial, technical or professional capacity.

The concepts of domestic tenderer, domestic goods and conditions of closing the tendering procedures to international competition need to be analysed fully in order to identify the extent of Article 63.

B. Domestic Tenderer

Article 4 of the Public Procurement Act defines domestic tenderers as the citizens of the Republic of Turkey and the legal persons established in accordance with the laws of the Republic of Turkey. Citizenship is the legal basis for identification as a domestic tenderer for natural persons. Article 66 of the Turkish Constitution provides that everyone bound to the Turkish state through the bond of citizenship is a Turk and citizenship can be acquired under the conditions stipulated by law and can be forfeited only in cases determined by law. In the same respect, Article 3 of the Turkish Citizenship Law No. 5901 defines aliens as “*anyone who has no citizenship bonds with the Republic of Turkey*”. Turkish citizenship can be acquired by birth or after birth. For the implementation of the provision on domestic tenderers, however, the method of acquisition of citizenship has no legal impact. Similarly, dual nationality does not prevent anyone from being qualified as a domestic tenderer.

On the other hand, for the legal persons the method of establishment plays a key role in order to be identified as a domestic tenderer. The original text of the Public Procurement Act had defined the domestic tenderer for the legal persons as “*the legal entities established by the Turkish citizens*”. This definition was amended on 30 July 2003 through the Act numbered 4964 whereby the reference to citizenship has been revoked and the legal persons are qualified as domestic tenderers only if they are established in accordance with the laws of the Republic of Turkey. The reason for this revision is laid down under the preamble of the Act numbered 4964 as facilitating the foreign capital inflow to Turkey and boosting competition

in the public procurement market. There is no restriction in the terms of the nature of the entity or the number of shareholders to be established. However, the revision in 2003 is considered controversial by Kortunay and Sezer as the revised definition permits any foreign economic operator to benefit from the preferential procurement by establishing a legal entity in Turkey.³³ Taking into account the revised text it could be argued that, even though there are still legal burdens to be fulfilled, nationality is not a significant constraint for foreign economic operators when accessing the Turkish public procurement market.

C. Domestic Goods

Article 4 of the Public Procurement Act defines goods as any kind of purchased commodities, moveable and real properties, together with the rights thereof. However the Public Procurement Act does not provide any definition of domestic goods. The domestic goods are defined under section 6.2 of the Public Procurement Communication (hereafter ‘the PP Communication’).³⁴ The PP Communication states that any tenderer who would like to benefit from the preferential procurement for domestic goods has to obtain a domestic goods certification from the relevant local chamber of trade.

The PP Communication stipulates that for goods to be certified as domestic goods they have to be produced or obtained entirely in Turkey or the significant phase of the production process and the latest labour and actions deemed necessary economically have to be completed in Turkey. For the industrial products to be certified as domestic goods they have to be produced by firms that hold an Industrial Registration Certificate issued by the Ministry of Industry and Trade and the significant phase of the production process and the latest labour and actions deemed necessary economically have to be completed in Turkey. In the same context, for food and agriculture products the producer has to hold a Food Registry Certificate and Food Production Certificates and the significant phase of

³³ See, Kortunay and Sezer, *supra note* 5, p. 161.

³⁴ It is to note that the domestic goods were firstly addressed by the Public Procurement Board Decision No. 2002/DK-8 of 12.12.2002 which was then incorporated into the PP Communication.

the production process and the latest labour and actions deemed necessary economically have to be completed in Turkey. Similar conditions apply for vegetative products, animal products and mining products.

The preference to domestic goods aims to boost the national industry and as will be explained under Section 5 below, the Turkish Government is politically determined to enhance efficiency of the preferential procurement. It is important to note that before 2011 the pre-condition of benefiting from the provision on domestic goods was being qualified as domestic tenderer. In other words, the foreign economic operators were not entitled to benefit from the preferential procurement even though they were offering goods which were qualified as domestic goods. This provision significantly impeded the competition between foreign and domestic economic operators and it was a significant constraint for foreign economic operators while accessing the Turkish public procurement market. However, this provision was revised on 13 February 2011 through the Act numbered 6111 and the reference to domestic tenderers is abolished. In other words, the foreign economic operators henceforth can also benefit from the preferential procurement system once they offer products which are qualified as domestic goods. The main motivation behind this revision is to encourage foreign economic operators to invest in Turkey and eventually to enhance national industrial production capacity of Turkey.

D. Closing the tendering procedures to international competition

The Public Procurement Act permits the contracting authorities, in cases where the estimated costs are below the threshold values, to limit tenders only to domestic tenderers regardless of the type of procurement. As all the tendering opportunities are solely dedicated for a particular group, these kinds of mechanism to use public procurement as a policy tool are identified as set-asides.³⁵ Set-asides are generally used in cases where there is the need to protect a certain group of economic operators who could not compete in the ordinary marketplace, such as small businesses owned

³⁵ See, Sue Arrowsmith, *The Law of Public and Utilities Procurement* (London: Sweet & Maxwell, 2005), sec. 19.15, p. 1244.

by disadvantaged groups. The Turkish legislature, though, aims to protect the Turkish economic operators against the foreign economic operators through closing the tendering procedures to international competition.

The Public Procurement Act permits the contracting authorities, in cases where the estimated costs of the procurement are below the threshold values, to exclude all foreign economic operators from the participation to any procurement procedures. At first glance, it could be argued that this provision is a significant market restriction for foreign economic operators. However, as explained under Section 3.2 above, the revised definition of domestic tenderer in cases of legal persons does not discriminate against the nationality of the natural persons establishing the legal entity. In other words, once a foreign economic operator establishes a legal entity according to the Turkish laws, the operator will be legally accepted as a domestic tenderer and will therefore start benefiting from all privileges granted to the domestic tenderers. In this way, the provision setting-aside the contracts for the domestic economic operators could be circumvented. Nevertheless, the restriction on the natural persons is still a significant market restriction.

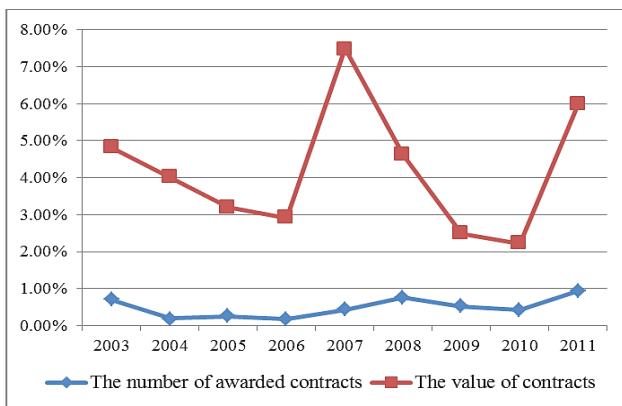
E. Retaliatory Measures

The Public Procurement Act provides that in cases where it is established that domestic tenderers are prevented from participating in tender proceedings taking place in foreign countries for unfair reasons, the Public Procurement Authority, the public institution in charge of the implementation of the Public Procurement Act, is entitled to take relevant measures in order to ensure that the tenderers of those countries are prevented from participating in the tenders held under the scope of the Public Procurement Act and to furnish proposals to the Council of Ministers in order to ensure that the necessary arrangements are made (Art. 53 (b)(8) of the Public Procurement Act). In other words, the Public Procurement Authority is entitled to track any protectionist measures taken against the Turkish suppliers and to adopt counter-measures where relevant. The measures could be applied on a product-by-product basis as well as sector-by-sector basis.

III. THE PROCUREMENT STATISTICS

It is worth of examining the last ten years' public procurement statistics in order to identify the extent and the effectiveness of implementation of the preferential procurement explained hereto. According to the statistics published by the Public Procurement Authority, between 2003 and 2011 a total of 956,642 contracts with a total value of 419 Billion TRY (equivalent to about 180 billion EUR)³⁶ were awarded by the contracting authorities covered by the Public Procurement Act.³⁷ The foreign economic operators, though, could only obtain 4024 of the total number of contracts.

Figure 1 - The approximate number and value of contracts awarded to foreign economic operators in the Turkish public market between 2003 and 2011



The statistics indicate that the number of contracts awarded to foreign economic operators could not exceed 1% of the overall contracts whilst the value of these contracts could not exceed 8% of the total value of contracts. When the recently published statistics for 2011 are examined, it is seen that the national economic operators are maintaining their dominant position in the Turkish public procurement market.

³⁶ See *supra* note 32.

³⁷ See, the Turkish Public Procurement Authority, the Procurement Statistics available at <www.ihale.gov.tr/ihale_istatistikleri-45-1.html> (last accessed 1 October 2012). The statistics only cover the procurements conducted according to the Public Procurement Act.

Table 1 - The Public Procurement Statistics of 2011³⁸

Nationality	Number of Contractors	Number of Awarded Contracts	Contract Value (1,000 TRY)
Turkish	51,425	191,848	71,077,357
European Union	286	362	3,328,087
United States of America	104	175	140,146
Misc.	97	115	312,858
Total	51,912	192,500	74,858,448 (equivalent to about 32.6 billion EUR)

These statistics demonstrate that the foreign economic operators could only gain about 0.34% of the contracts in 2011 which accounts for 5.05% of the overall contract value. The statistics regarding the implementation of preferential procurement and set-asides need to be examined to have a better understanding of the limited participation of foreign economic operators.

Table 2 – The statistics of implementation of set-asides in 2011³⁹

Tendering procedures open to international competition			Tendering procedures closed to international competition	
Type of Procurement	Number	Value (1,000 TRY)	Number	Value (1,000 TRY)
Goods	8,035	9,712,465	36,685	4,149,596
Services	4,724	12,241,008	28,961	3,796,583
Works	857	16,587,054	20,984	16,472,109
Total	13,616	38,540,528 (equivalent to about 16.8 billion EUR)	86,630	24,418,287 (equivalent to about 10.6 billion EUR)

³⁸ Kamu İhale Kurumu, *Kamu Alımları İzleme Raporu: 2011* (Ankara: Kamu İhale Kurumu, 2012), p. 11.

³⁹ *Ibid*, p. 12.

The statistics indicate that only 13.58% of the tendering proceedings were open to international competition in 2011. However, the total value of these was about 61.20% of all procurements which implies that the foreign economic operators, nevertheless, accessed a significant amount of the contracts.

Table 3 – The statistics of implementation of preference on domestic tenderers and goods within the tendering procedures open to international competition⁴⁰

Type of Procurement	Number	Value (1,000 TRY)
Goods	460	1,598,512
Services	501	1,892,354
Works	258	9,684,681
Total	1,219	13,175,547 (equivalent to about 5.7 billion EUR)

The statistics demonstrate that domestic tenderers and goods are favoured in only 1,219 out of 13,616 tendering procedures that were open to international competition. In other words, the provision on the preference for domestic tenderers and goods was implemented for only 8.95% of the tendering procedures that were open to international competition.

Taking into consideration the statistics overall, it could be concluded that only 13.58% of the tendering procedures were open to international competition in 2011 and the foreign economic operators could only gain about 0.34% of the contracts which accounts for 5.05% of the overall contract value.

Due to the fragmented legal and institutional framework, there is no consistent data about the share of foreign economic operators under the Turkish public procurement market before 2002, i.e. before the enactment of the Public Procurement Act. However, Ercan and Oguz maintain that the domestic economic operators had benefited from a privileged position in the Turkish public procurement prior to the enactment of the Public Procurement Act.⁴¹

⁴⁰ *Ibid*, p. 13.

⁴¹ See, Ercan and Oguz, *supra note* 26, p. 649.

IV. THE POLICY FRAMEWORK

The Prime Minister of Turkey issued the Circular no. 2011/13 on 6 September 2011 (hereafter ‘the Circular’) on the promotion of usage of domestic goods by the public bodies.⁴² The Circular highlights that meeting the needs from domestic goods is significant for the economy as far as the principles of efficiency and competition are respected. In this regard the Circular asks the public agencies and institutions, in addition to the legal framework on the procurement that favours domestic goods, to take into consideration following issues while procuring goods:

- (1) To refrain from stipulation of any conditions under the technical specifications that might negatively affect offerings of goods that are produced or manufactured in Turkey;
- (2) To refrain from making regulations that are not in line with the legal framework on public procurement that might lead the tenderers to offer imported products or the products of a certain country;
- (3) Not to request any non-obligatory certificates which are issued by foreign certification institutions.

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The Circular also reiterates that the goods produced/manufactured in Turkey need to be prioritised through the procurements conducted according to the Public Procurement Act and the procurements conducted by the State Supply Agency. In this regard, the Circular requires the managers of the public agencies and institutions to raise awareness through their individual entities.

Alyanak discusses that there have been debates over the efficient usage of the existing preferential procurement system by the contracting authorities.⁴³ The substance of the Circular implies that the Turkish Government is politically determined to maintain the preferential procurement system. In fact, the Turkish Government is planning to establish a distinctive task force to monitor the implementation of the provisions on preferential procurement. Moreover, under the Turkish Government’s Programme of

⁴² See, the Turkish Official Journal of 06.09.2011/28046.

⁴³ Alyanak, *supra* note 5, p. 136.

2012, it is projected to conduct a public procurement reform to enhance efficiency of the public procurement system. The Circular signals that it might be the case that additional measures might be introduced to enhance the efficiency of the preferential procurement.

CONCLUSION

This article aimed to provide an insight with regard to the legitimacy of preferential procurement and international competition under the Public Procurement Act. When the legal framework is examined, it is seen that the contracting authorities have discretion in granting preference to domestic tenderers and domestic goods and closing the tendering procedures to international competition.

The examination revealed that the provisions that grant preference to domestic tenderers and set-asides are significant restrictions but not definite constraints as they could be circumvented by establishing legal entities according to the Turkish laws. On the other hand, the restrictions imposed on natural persons are significant constraints as there is no efficient method of circumvention. Even though foreign economic operators are allowed to participate in the tendering proceedings, they could still be subject to discrimination on the origin of the products they offer. In that regard, the preference given to domestic goods significantly impedes competition between the tenderers in the Turkish public procurement market.

The legitimacy of the restrictions laid down for the economic operators that hamper the free movement of goods, right of establishment and freedom to provide services could be justified since Turkey is not a member of the European Union and is not yet party to the GPA. The legitimacy could be questioned only for the countries with which Turkey has signed free trade agreements and implemented provisions for the effective liberalisation of the public procurement markets.

On the other hand, as underlined by Kortunay and Sezer, effectiveness and benefits of the preferential procurement need to be questioned.⁴⁴

⁴⁴ Kortunay and Sezer, *supra* note 5, p. 168.

The European Commission maintains that protectionism raises prices for consumers and businesses, and limits choice.⁴⁵ Schooner and Yukins argue that protectionism restricts markets and limits competition, increases transaction costs and most importantly, procurement preferences routinely fail to achieve the intended outcomes.⁴⁶ In the same context, Bovis contends that even though preferential procurement is used for specific purposes e.g. the development of infant industries, the intended outcomes need to be evaluated through examining whether the infant industry when gets specialised or internationalised would be able to counterbalance any losses emerged during its protected period.⁴⁷ Furthermore, it is argued that the protectionist measures bear the risk of retaliation since the domestic public procurement markets are opened in return for access to foreign procurement markets.⁴⁸ In fact, the implementation of reciprocity in international trade is a common practice. In its preamble, the Marrakesh Agreement establishing the WTO states that multilateral trading is established on the principles of reciprocity and mutual benefits.⁴⁹

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The Turkish economy is maintaining its growth rate despite the global economic crisis. The preferential procurement, favouring the national suppliers and domestic goods and reserving the public contract opportunities to the national suppliers, is being used as an instrument to maintain the national economy. However, Turkey needs to evaluate the possible implications of the preferential procurement in long-term within the dynamic context of efficiency and sustainability. In that regard, instead of adopting a general preferential procurement policy, sector-specific, targeted and dynamic preferential procurement policies need to be developed. Indeed, the preferential procurement could be used as an efficient instrument to boost competitiveness of the national industry and

⁴⁵ See, European Commission, Global Europe: Competing in the World COM(2006) 567 final, p. 4.

⁴⁶ See, Steven L. Schooner and Christopher R. Yukins, 'Public procurement: focus on people, value for money and systemic integrity, not protectionism' in Baldwin Richard and Simon Evenett (eds), *The collapse of global trade, murky protectionism, and the crisis: Recommendations for the G20* (London: Centre for Economic Policy Research, 2011), p. 88.

⁴⁷ See, Christopher Bovis, *EU public procurement law* (Cheltenham: Edward Elgar Pub., 2007), p. 459.

⁴⁸ Schooner and Yukins, *supra note 46*, p. 89.

⁴⁹ See, Marrakesh Agreement Establishing the World Trade Organization available at <www.wto.org/english/docs_e/legal_e/04-wto_e.htm> (last accessed 1 October 2012)

to promote innovation in long term once it targets development of specific industries (primarily the infant or emerging industries) or protection of disadvantaged economic operators. In such cases, the implemented policies need to be monitored consistently and revised regularly according to the changing circumstances of the market.

On the other hand, taking into consideration the limitations laid down for the foreign economic operators, it seems inevitable that the Turkish suppliers could be subject to protectionist measures abroad which could jeopardise the international competitiveness of the Turkish economic operators. Turkey, therefore, needs to question the costs of high barriers of entering public procurement market through evaluating the benefits of international competition and free trade.

In conclusion, protectionism is on the rise in the Turkish public procurement market. The Turkish Government is politically determined to maintain the current preferential procurement and seeking possibilities to enhance the effectiveness of the current system.

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