



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ROUNDTABLE ON COMPETITION IN BIDDING MARKETS

-- Note by Turkey --

This note is submitted by the Turkish Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 18-19 October 2006.

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1. The Turkish Competition Authority (TCA) does not have any direct authority to advocate for a better auction design or recommend a certain auction design, for instance, in privatization tenders which is within the responsibility of the Privatisation Administration (PA). However, it is compulsory to seek the Opinion of the TCA before the privatisation transactions exceeding certain thresholds or including de facto or legal privileges. Basically, the TCA's role at this stage is to evaluate the results of such a privatisation in the relevant market and the condition of legal or de facto privileges of the undertaking to be privatised after the privatisation. Therefore, the main priority of the TCA is to ensure a competitive market following privatisation transactions. However, while carrying out this advocacy role, TCA's opinions may have an indirect impact on the auction design in the sense that it may enable a more efficient tender by enabling more participants. To substantiate this argument, it is necessary to cite some examples.

2. Before the tender announcement was made public, the TCA sent its Opinion¹ for the privatisation of Turk Telekom (TT - the incumbent fixed line operator at that time). The TCA, in its Opinion, recommended that the dominant GSM operator not be allowed to participate in the tender alone. However, the TCA has left the room opened for this dominant GSM operator to participate in the tender with any consortia provided that it does not have a direct or indirect controlling right over TT in case it wins. Moreover, the TCA also recommended that the persons or groups directly or indirectly controlling the dominant GSM operator (Turkcell) could participate in the tender alone, together and/or separately within any consortia on the condition that all means granting controlling right in this dominant GSM operator and/or any undertakings having a direct or indirect controlling right on it would be transferred to a person outside their economic whole after the tender. It can be said that this recommendation (that was complied with and inserted in the tender specifications by the PA) aimed a more competitive and efficient tender by permitting, albeit with conditions, the participation of the persons or groups holding controlling rights in the dominant GSM operator and their bidding for TT. This can be regarded as a condition that has had a direct impact on both the tender design and its efficiency.

3. Similarly, the TCA reiterated its recommendation that persons or groups having direct or indirect control over the dominant GSM operator (Turkcell) could participate in the tender for the sale of the second largest GSM operator (Telsim) that was taken over by the State (Savings Deposit Insurance Fund - SDIF²) if they would transfer those rights following the tender.³ As the TCA had the powers to block transfer of Telsim if it was taken over by Turkcell because it was highly likely that the transaction would strengthen Turkcell's dominance and lead to significant decrease in competition in the relevant market, the rationale of the TCA by this recommendation was to illustrate the possibilities following the transfer and therefore remove ambiguities before the tender process that could be faced by the bidders. Moreover, by allowing participation in the tender of persons or groups holding controlling rights in Turkcell, the TCA aimed to provide minimum level of measures that would not only provide minimum restrictions on those willing to participate in the tender (which could be compatible with the objective to raise the highest possible revenue) but also ensure more competition in the tender.

4. Various times, the TCA recommended partial sale of assets against block sale. For instance, concerning the sale of 10 cement factories managed by SDIF and situated in various regions of Turkey, the TCA recommended that cement factories be offered for sale separately because their sale *en bloc*, although

¹ Opinion of 2.9.2004.

² The Savings Deposit Insurance Fund, a public legal entity, has been established to insure deposits in order to protect the rights and interests of depositors and to ensure confidence and stability in financial markets; insure deposits and contribution funds; manage the banks with the Fund; strengthen and restructure their financial standing; transfer, merge, sell or liquidate such banks; execute and conclude the follow-up and collection transactions of the receivables of the Fund. Telsim was taken over by the SDIF due to the liabilities of the bank of the group owning Telsim.

³ Opinion of 19.10.2004.

possible, could cause negative consequences for the competitiveness of the relevant markets.⁴ It is thought that although this is not a direct intervention to the tender design, it may have an indirect impact on the efficiency of the tender as it may enable more participants. Similarly, regarding the privatisation of cigarette factories and brands owned by the state, the TCA recommended that the cigarette brands be sold separately rather than en bloc.⁵ The TCA considered that this could enable more undertakings to participate in the tender, including those who, otherwise, either do not afford to bid in case of block sale or do prefer a strategy to bid for only certain brands rather than all. Moreover, the market, characterised by high entry barriers, was thought to be more competitive in case of partial sale. However, when the PA preferred to privatise the relevant assets en block, the tender failed to attract any bids and the sale could not be realised in the end. Currently, the PA works on different strategies that also include partial sale. These opinions by the TCA can be regarded as indirect contributions to the tender design as the PA, if concurs with the TCA, inserts TCA's recommendations in the tender specifications.

5. Two cases, one about pharmaceuticals and the other regarding GSM licences, can be mentioned as examples where tender design has led to negative effects.

6. In the first case⁶ concerning a complaint including allegations that a pharmaceuticals company abused its dominant position via price discrimination, the TCA commented that tender design was not efficient as tender specifications prepared by the Social Security Organisation were not based on the active ingredient which could increase the number of participants in the tender and improve the competitiveness of it. Because tender specifications included the dose and/or form) (sometimes even the product brand name) in addition to the active substance, number of participants bidding in the tender decreased and the price emerged at the end of the tender increased to maximum price levels which was approved by the Ministry of Health. In contrast, some state hospitals, which mentioned only the active substance in the tenders, could buy the medicines at cheaper prices because of the increase in the number of participants. However, the TCA mentioned that whether a sound competitive environment was achieved in the tenders was out of the scope of the Act No 4054 on the Protection of Competition. Despite this comment, as the allegations caused widespread publicity and criticisms in the press, the President of the TCA made public comments regarding the faulty design of the tenders.

7. In the second case, in April 2000, a sequential first-priced sealed bid auction to award three GSM concession (1800 MHz) contracts has been held by the Ministry of Transport. Tender specifications⁷ were:

- two GSM 1800 MHz licenses were to be auctioned;
- one GSM 1800 license was to be awarded to TT (state owned telecom monopoly) at the winning price of first license;
- the conceding authority was the Ministry of Transportation;
- incumbent GSM operators were not allowed to enter the auction;

⁴ Opinion of 1.10.2004

⁵ Opinion of 21.9.2004

⁶ 20.9.2004: 04-60/866-205.

⁷ See "The Role of Auction Design in Awarding Spectrum Concessions Turkish GSM Experience" by Uğur EMEK, Senior Expert in General Directorate of Economic Sectors and Coordination Department of Legal Measures and Institutional Arrangements in State Planning Organisation, NOVEMBER, 2002, available at <http://ekutup.dpt.gov.tr/yazar/emeku/>

- the auction method was a first-price sealed bid auction which was to be sequentially held;
- depending on the discretion of the conceding authority, after opening bids taken from the bidders, the owner of the highest bid and next highest bid might be invited to a competitive negotiation;
- after completing the first round of the sequential action, the rest of bidders were going to bid in a first-price sealed bid auction with a reserve price at the winning price of the first license.

8. At the end of the tender procedure, after first round İş-Tim made a stunning bid of US\$ 2,525 million plus 18 per cent in value added tax (VAT) for a total price tag of US\$ 2,954 million, the rest of bidders did not show up to bid for second license. The government has only been able to award two of three concessions one of which has gone to İş Bankası-Telecom Italia consortium (İş-Tim). The TCA permitted the acquisition transaction on 16.8.2000. The other one has been awarded to TT at winning price of first license. The concession agreement between İş-Tim and Ministry of Transportation was signed on October 27, 2000, while Aycell the subsidiary of TT signed a contract with the Ministry on January 11th, 2001. Emek argues that “... since the auction design inappropriately dealt with market conditions, İş-Tim, winning bidders of one of two spectrums on offer, was able to make a high bid by deriving the price of first license, the reserve price of second one, up to excessive level, so other bidders were not able to afford to bid over this price at second round. As a result by not selling second license, **Turkish GSM market has been unnecessarily concentrated** [emphasis added]; Turkish Treasury has obtained less revenue than it would; and the liability of TT owner of third license at the extremely high winning price of the first license, has soared more than what it otherwise would be by possibly undermining the market value of TT.”⁸ Emek, in its study, concludes that “... if an ascending price auction (possibly backed by a sealed bid component at later stage to discourage collusion and encourage new entrants) was held by the conceding authority, the outcome was going to be better in terms of efficiency. Put it this way,

- (a) public revenue from selling spectrum would be more than what it is;
- (b) **one more license would be sold and market concentration would be less than what it is** [emphasis added]; and
- (c) TT would have less liability than what it has.”⁹

9. With respect to law enforcement in auction context, one case¹⁰ concerning bid rigging by the participants to equally share the amount and value of a sealed-bid tender for milk organised by the Fund for the Encouragement of Social Assistance and Solidarity under Prime Ministry can be cited. The tender involved provision and distribution of 1 million packed milk to primary schools. Such an amount exceeded the capacity of any milk producer in Turkey. 8 milk producers joined the tender. The TCA obtained enough evidence indicating that the milk producers held several meetings and shared the amount and the value of the tender equally. However, milk producers alleged that the outcome of the tender was influenced by guidance of the relevant Ministry and therefore it was out of their volition. Moreover, the participants also alleged that the tender specifications permitted the participants to form joint ventures with different undertakings for different regions which enabled the participants to learn the price for the regions in which the tender was related and the tender would not be realised successfully if the participants did not share equally the amount foreseen in the tender.

⁸ Ibid. p. 2-3.

⁹ Ibid., p. 20.

¹⁰ 19.1.2004: 04-05/54-15.

10. The TCA mentioned that tender design permitted sharing the amount equally only if all the participants acted in agreement. Refusal to join the agreement even by a single milk producer makes who would be awarded the tender in what region unclear and disallows a clear-cut market sharing.

11. As to allegations of intervention by the Ministry, the TCA argued that despite attempts by the Ministry to influence the bids to be made by milk producers, the correspondence sent from the Ministry did not designate that outcome of the tender was fixed by the Ministry. Moreover, given the existence of various laws prohibiting such instances, even an instruction by the Minister would be far from binding legally. However, the TCA agreed that the several attempts¹¹ by the Ministry had an impact on milk producers and regarded them as mitigating circumstances.

12. Regarding the allegations that tender specifications permitting the participants to form joint ventures with different undertakings for different regions enabled the participants to learn the price in the region in which the tender was related, the TCA argued that the tender specifications enabled undertakings to join the tender alone or by a joint venture. The TCA argued that the fact that the tender design was wrong could not justify bid-rigging and the resulting equal sharing of the outcome. Moreover, tender specifications forbade bidding by both the milk producer and the JV it involved for the same region. Finally, the TCA argued that it could not be said that a sealed-bid tender was so falsely designed that it enabled equal sharing of the outcome in terms of the amount and value. At the end of the case, milk producers were imposed fines.

¹¹ The Ministry accepted that it advised milk producers to act responsively and encouraged them to make their bids below market prices. Moreover, the Ministry requested milk producers to determine their prices below the estimated value and distribute the amount among them. The fact that the price in the tender occurred below the estimated value proved that the Ministry had an impact on the behaviour of the milk producers during the tender process.