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The Role of the Turkish Competition Authority in Promoting
Competition in Public Procurement Practices

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Distinguished Colleagues,
Dear Guests, Ladies and Gentlemen,

It is a great pleasure and honor for me to take part in this roundtable discussion on “Competition and Public Procurement”. First of all, I would like to thank the Croatian Competition Agency for inviting me to this great event on this very important topic in this magnificent city.

It is a worldwide fact that public procurement markets constitute an important share of national economies. In Turkey, public procurement expenses account for about 6-8% of the Gross Domestic Product (GDP). However when the procurement exceptions stated in the public procurement law and the procurement activities of the public undertakings which are not under the scope of the public procurement law are taken into account, this ratio rises to about 12% of the GDP in Turkey. Since public procurement practices constitute a significant portion of the national economy, ensuring efficiency in such practices is considered as an important aim. Efficiency of the public procurement markets would enable the public sector to procure its needs at the best possible conditions while fulfilling its responsibility against the tax payers. In short, it will make us all save money!

Efficiency of the public procurement policy is closely related to the establishment and protection of competition. Promoting competition in public procurement processes ensures good performance of public procurement markets, which is observed through getting the best value for money. Promoting competition in public procurement is

one of the most important tools to enhance efficiency of the public procurement policy. Competition is seen as a core objective of public procurement regulations of most of the developed countries. In Turkey, the public procurement law considers “competition” as one of the basic principles of procurement in addition to transparency, equal treatment, reliability, secrecy, public supervision, meeting the needs under fair terms in a timely manner and efficient use of resources.

In this regard, the application of competition rules to collusive behavior in public procurement markets deserves special attention of the competition agencies. Ensuring competition in public procurements depends on proper analyses of the product and market conditions as well as the most appropriate tender design under the existing conditions. Obtaining an efficient result in the tender process also depends on the prevention of competitors from engaging in anti-competitive agreements during the tender processes. In other words, the expected benefits of a tender could only be obtained by a competitive tender process.

Turkish Competition Authority (TCA) has had important decisions concerning collusive behavior in public procurement markets. One of the recent cases is the *medical gas* case¹. This case is about some medical gas providers’ collusive bidding in state hospitals’ medical gas tenders. The decision taken in November 2010 involves monetary fines imposed on 24 undertakings which are found to have infringed the competition law by collusive bidding practices in medical gas procurements of state hospitals in different geographic markets. Competition Board, the decision making body of the TCA, also decided to send a written opinion to the Ministry of Health, Public Procurement Authority and other related public bodies about the measures that could be taken in order to make the tender processes more competitive.

Effective application of competition rules to public procurement markets is important but not the ‘only way’ to promote competition in this area. Competition problems that can arise from public procurement regulations and public agencies’ procurement practices should also be minimized. Competition advocacy should also be used as a tool to promote competition in public procurement markets. For this reason, TCA gives great importance to the cooperation between the other government agencies

¹ Competition Board Decision dated 11.11.2010 and numbered 10-72/1503-572.

dealing with public procurement markets, especially the Public Procurement Authority. Actually, based on documentation in a roundtable held in OECD, an informative note was submitted to the TCA with recommendations to prepare a checklist informing the government employees dealing with public procurement of bid-rigging and to contemplate creation of a system to detect bid rigging in cooperation with the Public Procurement Authority. Such recommendations were favoured by the Competition Board at that time.

Parallel to the recommendations, to foster the cooperation between the two organizations a protocol was signed between the TCA and Public Procurement Authority in 2009. The aim of this protocol is to provide cooperation and information sharing between the two authorities in order to establish and promote effective competition in public procurement markets.

Following the signing of this Protocol a joint work was carried out in between the TCA and Public Procurement Authority. Based on our joint work, the Public Procurement Authority shared 285 indictments with the TCA. Out of these 285 indictments, the TCA determined 107 files. The priority was given to first 6 (red) files to be followed by the second level (orange -29) and third level (yellow – 72) ones. Out of these 107 indictments, the ones subject to criminal action were eliminated and the TCA asked for more information from the Ministry of Justice for 35 files that were brought before the courts. However, it was stated in the Ministry's answer that "it is possible to examine the content of the file in case the relevant court or the judge gives authorization after the indictments are accepted by the courts". In other words, the TCA was asked to request the relevant information from the courts. Indeed, those 35 files were selected from files where the tender price was high, the possibility of being penalized by the courts was low, and which affected the greater part of the society.

I should hereby mention that the abilities of prosecutors' offices are wider; they have advantages such as wiretapping while the evidence standard for TCA is lower, in other words there is a difference between proving the agreement and proving the offence. This difference lets the TCA deal with those cases that are not in the priority list of the Public Procurement Authority but still important for the society as a whole.

In other words, the TCA has a rather complementary role with that of the Public Procurement Authority.

Under this joint work, I would like to highlight an important and different case that we come across. It was about collusive practices in construction tenders of public bodies. Some construction companies were investigated for bid rigging. However, during the investigation it appeared that two of the companies investigated were under the control of the same economic entity and they were bidding in the same tenders to make the tender look competitive. In this case there was also an accusation against public officers for corruption, preventing other companies from bidding in the same tender. TCA took a decision in 2011² regarding this case and did not find an infringement of the competition act because companies under control of the same economic entity could not be accused for collusive agreements. This case indicates a competition problem which can not be dealt only with competition rules.

A recent development in Turkish public procurement policy is the prevalent usage of e-auction system. E-auctions are intended to increase transparency and competition in the tender processes and to generate cost savings for the contracting public body. For the time being, the e-auction system could not be used for all suitable tenders but the aim is to increase its usage as much as possible. TCA perceives the e-auction system as a valuable data source for detecting collusion and bid ridding in public procurement markets. To ease the process of reaching information the TCA and the Public Procurement Authority are together developing a web based service which would enable the authorized users to search for information of e-auctions like tender participants data, tender process data, contracting authority data and tenders of a specific product or service in a specific time period. This system will speed up the process of reaching information and is expected to become active in the first half of 2012.

Fighting against collusive bidding requires more than just detecting the collusive behaviors. Contracting public bodies' procurement practices may create the effects that competition rules aim to prevent and facilitate competition distortions generated by the tender participants. In order to promote competition ex-ante measures should

² Competition Board Decision dated 14.07.2011 and numbered 11-43/954-308.

also be taken to minimize the possibility of making a successful collusive arrangement between tender participants. To draw attention to this fact, the TCA is carrying out the following activities:

- TCA provides training for Public Procurement Authority officers who train public officers for public procurement regulations. In other words, training of trainees program is carried out in order to prevent possible competition infringements in tenders.
- In addition, a guideline in the form of a brochure, which public institutions and agencies can easily comprehend and benefit from, was prepared and presented to the Public Procurement Authority by the TCA. If accepted and disseminated by the Public Procurement Authority, this document would explain the competition law and what procurement officials and investigators should look for in their work.
- Also the OECD Guideline for Fighting Bid Rigging in Public Procurement has been translated and shared with related public organizations.

Against this background, I can say that TCA gives great importance to promote competition in public procurement practices. However, finding collusive behavior in public procurement tenders and fining those undertakings who are involved are not enough for ensuring competitive public procurement markets. This aim also requires the active cooperation between the Public Procurement Authority and prosecutors' offices.

As a last word, I would like to share with you one of my observations related to Turkey. This observation is also a challenge on the practices between the TCA and the Public Procurement Authority:

One of the constraints before a competitive tender process is related to the different meanings attributed to the concept of "undertaking" from the relative practices of public procurement legislation and competition law. In other words, each firm is considered as a separate undertaking –regardless of its ownership- in a public tender according to public procurement legislation. This approach is problematic from the competition law perspective, that is, it is not possible to make any proceedings

according to competition legislation when the firms under the same economic unity are engaged in bid rigging. Therefore, the concept of undertaking should be clarified in the practices of public procurers in a way to give more room for competition enforcers !

Thank you for your attention.