

Public Procurement and Competition Law Enforcement in Turkey

24.01.2020

ESCWA-UNCTAD-OECD COMPETITION FORUM

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The views and opinions expressed in this presentation do not necessarily reflect the official policy or position of TCA.

Outline

- General overview on the importance of competition in public procurement
- Legal framework in Turkey
- The role of Turkish Competition Authority (TCA):
 - First dimension: Targeting collusion
 - Second dimension: Competition advocacy
- Some examples from the case-law

Legal Framework

- Main prohibitions in the Competition Act
 - Anti-competitive agreements, concerted practices and decisions (Art. 4)
 - Price fixing, market sharing, **bid rigging** etc.
 - Abuse of dominant position (Art. 6)
 - Mergers and acquisitions creating or strengthening dominance and restricting competition significantly (Art. 7)
- Prohibition in the Criminal Code
 - Bid rigging **also constitutes a crime** and subject to criminal prosecution

General Overview

- Public procurement markets constitutes an **important share** of national economies:
 - *Turkey: 11% of the GDP*
 - *OECD : 12% of the GDP*
 - *EU : 16% of the GDP*
- Efficient public procurement is important for saving public funds
 - Not an issue limited to developing world
 - A recent trend among EU member states and Turkey.
- Efficiency of the public procurement markets is closely related to the establishment and protection of competition

Targeting Collusion

- The TCA conducts administrative investigation and imposes administrative fines up to %10 percent of undertaking's annual turnover
- Successfully completed cases in markets such as:
 - Chemotherapy medicine preparation
 - Medical gases
 - Hospital consumables
 - Construction works
 - Medical equipment
 - Pharmaceuticals
- The TCA does **not only focus on** revealing the **collusive practices** but also considers the problems involved in the tender process
 - In medical gases case, the TCA gave a **written opinion** to the public authorities about the measures that could be taken in order to make the tender process more competitive

Targeting Collusion

- Public prosecutors have **wider powers** in evidence gathering (e.g. wiretapping)
- In some cases evidence gathered by the public prosecutor have been used in TCA investigation (Hospital consumables case)
- The TCA accessed **good quality of evidence** in this case and easily proved the collusive behavior

Competition Advocacy

- The TCA also engages in activities to **raise awareness** of competitive tender process as part of its role to advocate competition
- The TCA **provides training** for public institutions and agencies on how to prevent and detect bid rigging
- Main focus of the TCA when providing feedback to the public agencies:
 - Effective tender design
 - Unnecessary qualification requirements from the applicants
- The Public Procurement Agency (PPA) gets TCA's opinion before **legislative changes**

Competition Advocacy

- The TCA and Public Procurement Agency (PPA) concluded a **co-operation protocol** on 14.10.2009 aiming to increase co-operation between two agencies
- Providing competition authorities with access to data on tenders plays an important role in detecting collusive bidding
- In 2012 the protocol have been reviewed and basis for **information sharing** between the agencies on ongoing cases have been established
- E-procurement system can be used to acquire information on the bidders in a tender under investigation

TCA Decisions on Public Procurement

➤ Chemotherapy Medicine Preparation Case

- A very recent one, **reasoned decision has not published yet**
- Confidential application triggered the process and TCA conducted on-site inspections.
- Examining each incident on a tender basis
- Findings that some undertakings acted in collusion on tenders by bid rigging practices in the procurement of the public hospitals

Chemotherapy Medicines Case

- Public hospitals are subject to act No 4734 Public Procurement Law in terms of tendering processes and procurements.
- Main procedural steps;
 - preliminary preparation,
 - determination of approximate cost,
 - carrying out tender/procurement,
 - Evaluation and contracting
- Collusive behavior in the tender does **not only cover the stage of carrying out tender**

Chemotherapy Medicines Case

- In Samsun tender, hospital was acting to collect information about **approximate cost proposals from competing companies**
- Complex relations between bidding companies and competition nature affected by this formation
 - In some geographic markets: vertical dealership relationship
 - Same undertakings rivals on horizontal level in some other geographic markets.
- Undertakings are in direct communication with one another, **that they share information with each other about the approximate cost**

Chemotherapy Medicines Case

- In the context of the Tekirdağ and Adana tenders, Board detected **market / customer / hospital sharing agreements**.
- The Board concluded that two of undertakings in Samsun tender, which operates in the field of chemotherapy medicine preparation systems, and three of undertakings in Tekirdağ tender including the one also taking part in the Samsun case violated the law.
- Amount of the administrative fine determined by calculating **administrative fine of %0,25 their turnover**.

Salary Promotions Case

- An investigation against eight banks, to determine whether there exist a «non-compete» agreement
- On-spot inspections to the Banks and other evidence revealed the content of the agreement
 - not offer promotions to private firms
 - predetermining the promotion amount that they would bid in the tender
- An administrative fine was imposed on the aforementioned eight undertakings concerned

Dialysis Devices and Consumables Case

- During the on-site inspection, the officials found a file of documents, which contained papers showing the direct communications, close personal relationships
- Increased transparency of the market between rival companies.
- Board stated that cooperation is not only limited with public tenders but also can be seen in private sectors tenders.
- In the final analysis, an administrative fine was imposed on the some undertakings while it could not obtain sufficient evidence about others.

Construction Works Case

- Board conduct an investigation on some undertakings, which operate in the constructions works tenders
- Undertakings located in same addresses, same appointed person made an offer for different undertakings in different tenders, identical guarantee letter for construction works tender used by different undertakings.
- In the final analysis, an administrative fine was imposed on the four undertakings because of bid rigging treatments while it could not obtain sufficient evidence about others.

Postal Services Case/1

- Board conduct an investigation on three (ARAS, YURTIÇI and MNG) undertakings, which operate in postal services.
- During the on-site inspection, many evidence has been obtained to demonstrate the existence of agreement and direct communications about tenders between undertakings.
- Board detected that in question agreement is made to setting maximum rates of discount to be implemented by investigation parties' over a list price level
- Appointed one person as a reviewer to detect parties' behavior, prevent deviations from agreement and they negotiated price and supply conditions in various meetings.

Postal Services Case/2

- Board states that investigation parties determined parameters in meetings that hold in different dates;
 - increasing rates of list prices,
 - establishing list prices,
 - list prices of piece work basis,
 - giving an offer by cooperating in tenders,
 - sharing the tenders between parties equably.
- Board concluded to impose an administrative fine on three undertakings because of bid rigging and other anticompetitive practices.

Medical Gas Case / 1

- Application for complaint is send by Hospitals point out that three undertakings gave an offer for tenders, which include purchasing of nine different product of medical gases.
- Because of two undertakings withdrawing from the tender, only one (Habaş) undertakings remained available.
- Hospital suffered a losses due to available offers was higher than previous tender offers.
- Board conduct an investigation on fifty-five (55) undertakings, which operate in medical gases


Medical Gas Case / 2

- Parties used various methods of bid riggings
- No one won the tenders for medical gases successively, although there is no significant increasing in costs, all undertakings, except one, giving a high substantially offer for tenders, giving identical or so close offers for tenders.
- In the final analysis, an administrative fine (fine term is changing for each undertakings) was imposed on many undertakings because of bid rigging practices.

THANKS FOR YOUR ATTENTION

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