

**THE MARKET ACCESS RESTRICTIONS FOR FOREIGN ECONOMIC OPERATORS UNDER THE TURKISH PUBLIC PROCUREMENT LAW: A CRITIQUE ON PROTECTIONISM**

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**ABSTRACT.** The Turkish Public Procurement Law permits the contracting authorities to close tendering procedures to international competition and allows them to grant a preference margin in favour of the national economic operators and domestic products. These provisions are supported by the new “Buy National” policy announced in September 2011. This paper 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 foreign and domestic economic operators. It also aims to provide a critique of protectionism with special reference to the impact of these policies in the context of membership negotiations with the European Union.

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## 1. INTRODUCTION

For the last three decades the Republic of Turkey has been pursuing the national policies of full integration with the global economy and 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 and opened the markets to international competition.

The significance of public procurement for international trade is increasing due to the size of the public procurement markets.<sup>1</sup> 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.<sup>2</sup> However, the global economic crisis is threatening the initiatives on the liberalisation of public procurement markets and protectionist measures are increasing globally.<sup>3</sup>

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 the market share of foreign economic operators has always been limited. The usage of public procurement as a policy tool to boost national industry is not a new phenomenon. In this regard, certain restrictions have been imposed in order to limit participation of foreign economic operators to the tendering procedures and a preferential procurement system has been developed to favour national economic operators and domestic products.

This paper seeks to contribute to the literature regarding the legal status and extent of market access restrictions for foreign economic operators under the Turkish Public Procurement Law (hereafter 'the PPL')<sup>4</sup>, which is the main legal framework on public procurement. While certain scholars have provided an overview of the public procurement regulations in Turkey, little research has been done on the market access restrictions.<sup>5</sup> Moreover, the PPL

underwent a significant reform in 2008, so certain aspects of the literature are partially outdated.

## 2. THE INTERNATIONAL FRAMEWORK

The PPL was adopted in January 2002 and entered into force in January 2003. The PPL covers the procurements of the State, local and regional authorities, the state economic 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 PPL, it is still the procurement legislation that has the widest implementation. General principles of the Turkish public procurement system are outlined under article 5 of the PPL as transparency, competition, equal treatment, reliability, confidentiality, public supervision and efficiency. The principle of equal treatment is worthy of examination for the purpose of this paper.

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 and the Constitutional Court ruled that, *“The equality before the law applies to individuals in the same legal status. This principle aims to provide legal equality rather than practical equality”*.<sup>6</sup> Indeed, this decision is similar to the case-law of the European Court of Justice (hereafter ‘the EJC’) on equal treatment, which 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*".<sup>7</sup> From a public procurement perspective and in an international context, the principle of equal treatment implies that, "*all tenderers of whatever nationality and all bids including goods of whatever origin must be treated equally*".<sup>8</sup> 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 can be restricted by law in a manner consistent with international law. For the purpose of this paper, it is worth examining the restrictions that can 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. This section looks through the international agreements, institutions and organisations that have an impact on the liberalisation of the Turkish public procurement market.

### **2.1. The European Union**

Turkey's accession to the European Union has been under discussion since the 1960s. The first step was taken for establishing a common customs policy. For this purpose, the Ankara Treaty was signed between Turkey and the European Economic Community (the predecessor of the European Union) on 12 September 1963, which came into force on 1 December 1964.<sup>9</sup> The second important step was taken for extending the scope of the agreement to customs on 31 December 1995 and Turkey and the European Union agreed upon creating the Customs Union, which came into effect on 1 January 1996.<sup>10</sup> As a part of the Customs Union, Turkey has undertaken to harmonise its commercial and competition policies, including intellectual property laws in accordance with the European Union policies. The Customs Union Decision also invited Turkey to review its 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*".<sup>11</sup> Even though the Decision underlined the importance of access to the public procurement markets, no explicit commitment was undertaken by Turkey on

public procurement except the vague commitment of eliminating the technical barriers to trade in the public procurement market.

On the other hand, 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 the reforms to adopt the European norms that were initiated by the establishment of the Customs Union. In 2001 the European Council of Ministers adopted the European Union-Turkey Accession Partnership Agreement, and subsequently Turkey endorsed the National Programme for adopting the European Union norms.

Upon adoption of the Partnership Agreement and endorsement of the National Programme, the European Union initiated the screening process. The screening process analysed the situation of Turkish law at that time and outlined the necessary legal and institutional reforms to provide full harmony with the European Union norms. The screening process provided the basis of the reforms for the official negotiations. Public procurement was also screened by the European Union and at the end of the screening it was decided that “[t]he existing regime of public procurement is not in line with the *acquis*”.<sup>12</sup> In this regard, a comprehensive public procurement reform in order to align Turkish law with the *acquis communautaire* of the European Union was stipulated as one of the conditions for the negotiations. Like other candidate states, Turkey was asked to establish a public procurement system that met the European standards in terms of transparency and competition.

In fact, 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. 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”.<sup>13</sup> In the same direction, the World Bank has developed the Programmatic Financial and Public Sector Adjustment Loans and the Public Financial Management Projects where it enforces its own conditions for the lending of money in order to ensure efficiency. Turkey used such an adjustment loan in 2001 and the World Bank reviewed Turkey’s public procurement system.<sup>14</sup> The World Bank criticised the complexity of the regulations on public procurement and outlined the necessary reforms under the Strategic Framework for Public Management Reform, and also advised Turkey to revise its legal framework on public procurement to ensure conformity with the UNCITRAL standards as an initial step until full compliance with the European Union directives could be provided. Both the World Bank and the IMF advised Turkey to open its public procurement market to international competition and to eliminate any restrictive measures against foreign economic operators. However, the national economic operators at that time objected to any public procurement reforms 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.<sup>15</sup> Despite the objections raised by the domestic suppliers, under the political pressure of the European Union, the World Bank and the IMF, the PPL was enacted in 2002 and entered into force in 2003.

Indeed, the PPL mitigated the interests of both international and national stakeholders. The European Union, the IMF and the World Bank has generally welcomed the enactment of the PPL in 2002 as the PPL has conferred strong normative value to the principles of equal treatment, transparency and competition that facilitate the access of international economic operators to the Turkish public procurement market. However, the PPL maintained the preferential procurement system that existed under the State Tender Act (hereafter ‘the STA’), the predecessor of the PPL. The STA 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. The PPL took this provision further and

permitted the contracting authorities to favour domestic goods and services besides the domestic suppliers and to close tendering procedures to international competition.

The PPL does not grant equal access to European suppliers or goods even though Turkey is legally under the obligation to eliminate any discriminative measures according to the Ankara Treaty, the Additional Protocol and the Accession Partnership Agreement. The European Union has criticised Turkey and has recommended the abolishment of the preferential procurement system since no exception was provided for European suppliers and goods. In all reports published by the European Union on the progress of Turkey, it has been repeatedly underlined that the PPL has widened the discrepancies rather than bringing the system closer to the European *acquis*.<sup>16</sup> On the other hand, although the European Union opened membership negotiations with Turkey, there are considerable political problems that prevent Turkey from joining the Union. The process is quite vague and there is not a definite roadmap for membership. The maintenance of preferential procurement implies that Turkey would like to safeguard its position during the transition period and accordingly keep protectionism until being admitted to the European Union as a full member.

## **2.2. 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 is a plurilateral agreement and the WTO members are not obliged to join the GPA. The GPA therefore applies only 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.

Turkey has been a member of the WTO since 1994. The impact of the WTO on Turkey in terms of public procurement has been relatively limited. Turkey, as a developing country, has always been reluctant to join the GPA, which mostly the developed

countries are party to. Although Turkey has been a member of the WTO since 1994, it has not yet signed the GPA. Turkey has contented itself with being an observer since 1996. In fact, the GPA attempts to balance the needs of both developing and developed countries in order to encourage wider participation. In this context, 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.

The participation of Turkey in the GPA has to be evaluated together with its membership negotiations with the European Union. As explained previously, the most criticised provision under the PPL by the European Union is the provision on the national preferences, and Turkey does not plan to abolish the national preferences system until it is admitted to the European Union as a member state. It is obvious that Turkey will not open its public procurement market to developed countries before it becomes a full member of the European Union. In this context, it is the author's view that even if Turkey joins the GPA, its participation will be symbolic and Turkey will keep the coverage to a minimum by relying on the provision that provides special and differential treatment for developing countries.

### **2.3. The bilateral level: Free Trade Agreements**

Apart from 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 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.

### 3. THE LEGAL FRAMEWORK

Article 63 of the PPL 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 domestic 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 voluntary, so the contracting authorities therefore have discretion:

- a. to grant preferences to domestic tenderers up to 15% in procurement of services and works;
- b. to grant preferences to 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 PPL as follows:

- a. 792,482 Turkish Liras (equivalent to about USD 455,449) 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 USD 759,083) for procurement of goods and services by other contracting authorities within the scope of the PPL;
- c. 29,057,835 Turkish Liras (equivalent to about USD 16,699,905) for the works contracts by any of contacting authorities covered by the PPL.

The price advantage for the domestic suppliers and goods could only be applied in tender proceedings where it is stated in the

tender documents that there is a price advantage for either domestic tenderers or domestic goods. It is mandatory to include the information in the notices indication of whether the tender is limited only to domestic tenderers, and whether there is a price advantage for domestic tenderers. (Art. 24 of the PPL) In the same direction, under the technical specifications whether the procurement is limited to domestic tenderers only or whether there is a price advantage for domestic tenderers have to be laid down. (Art. 27 of the PPL)

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

### **3.1. Domestic Tenderer**

The PPL defines domestic tenderers as the citizens of the Republic of Turkey and legal persons established in accordance with the laws of the Republic of Turkey under article 4. Citizenship is the legal basis for identification as a domestic tenderer for natural persons. 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 (Art. 66 of the Turkish Constitution). In the same respect, the Turkish Citizenship Law No. 5901 defines aliens as "*anyone who has no citizenship bonds with the Republic of Turkey*" (Art. 3 of the Turkish Citizenship Law). 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 qualifying as a domestic tenderer.

On the other hand, the establishment method is the legal basis for identification as a domestic tenderer for legal persons. The original text of the PPL had defined the domestic tenderer for the legal persons as "*the legal entities established by the Turkish citizens*". This definition was revised on 30 July 2003 through the Act numbered 4964, where the reference to citizenship is abolished and 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 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 itself as a legal entity in Turkey.<sup>17</sup> 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.

### **3.2. Domestic Goods**

The PPL defines goods as any kind of purchased commodities, moveable and real properties, together with the rights thereof under article 4. However the PPL does not provide any definition of domestic goods. The domestic goods are defined under section 6.2.2 of the Public Procurement Communication (hereafter 'the PPC'). The PPC states that any tenderer who would like to benefit from the preferential procurement for domestic goods has to obtain domestic goods certification from the relevant local chamber of trade. The PPC lays down the main principles of this certification under section 6.2.4. The PPC 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 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 regulation on implementation of goods procurement (hereafter 'the Goods Regulation') specifies the implementation of the preference for domestic goods. The Goods Regulation

provides that in the tendering proceedings where it is specified that price advantage shall be applied in favour of the domestic tenderers under the specifications up to 15%, the most advantageous tender in economic terms has to be determined by applying the price advantage at the percentage specified accordingly. (Art. 59, the Goods Regulation). In this regard, the most advantageous tender in economic terms has to be determined by applying the criteria other than price firstly, and then the price advantage in favour of domestic tenderers proposing the domestic goods. Such price advantage to be applied in favour of the domestic tenderers has to be calculated by adding the price advantage to the tender prices submitted by the other tenderers. The Goods Regulation also repeats the provision at the PPL and provides that the domestic tenderers that will participate in the tendering proceedings through establishment of joint venture with the foreign tenderers are not eligible to make use of such price advantage.

The preference to domestic goods aims to boost national industry and as will be explained under sec. 5 below, the Turkish Government is keen to enhance efficiency of such preferential procurement. It is noteworthy that the pre-condition of benefiting from the provision on domestic goods is being qualified as domestic tenderer. In other words, the foreign economic operators cannot benefit from the preferential procurement even though they offer goods which are qualified as domestic goods. There is no efficient method of circumventing the preferential procurement on domestic goods. Therefore, this provision impedes competition between foreign and national economic operators and is a significant constraint for foreign economic operators when accessing the Turkish public procurement market.

### **3.3. Closing tendering procedures to international competition**

The PPL permits the contracting authorities, in cases where the estimated costs are below the threshold values, to limit tenders only to domestic tenderers. 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.<sup>18</sup> Set-asides are generally used in cases where there is the need to protect a certain group of economic operators who

cannot compete in the ordinary marketplace, such as for small businesses owned by disadvantaged groups.

The PPL 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 tendering procedures. At first glance, it could be argued that this provision is a significant market restriction for foreign economic operators. However, as explained under sec. 3.1 above, the revised definition of domestic tenderer in cases of legal persons does not discriminate against 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 on setting-aside the contracts for the domestic tenderers can be circumvented. Nevertheless, the restriction on the natural persons is still a significant market restriction.

#### **3.4. Reciprocity**

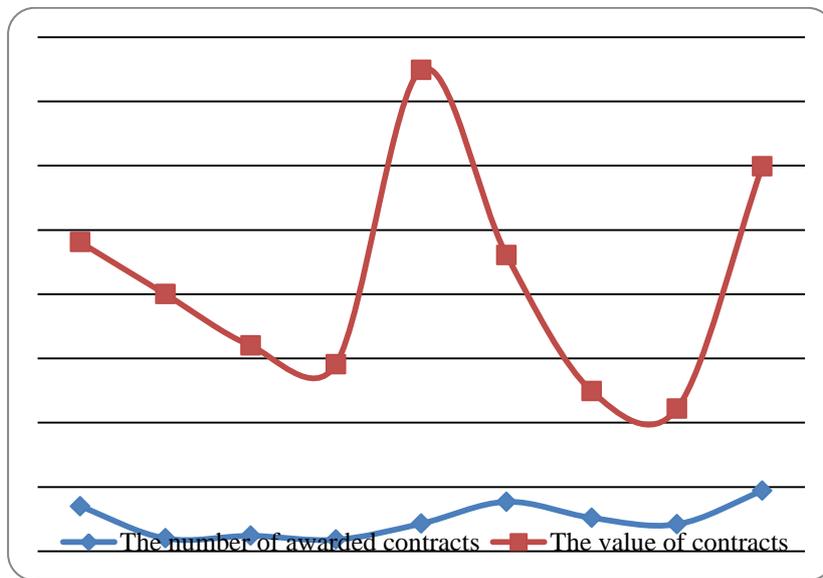
The PPL provides that in cases where it is established that domestic tenderers are prevented from participating in tender proceedings taking place in foreign countries for unfair reasons, the Public Procurement Authority (hereafter 'the PP Authority'), the public institution in charge of the implementation of the PPL, 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 PPL, 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 PPL). In other words, the PP Authority is entitled to track any protectionist measures taken against the Turkish suppliers and to take counter-measures where relevant. The measures could be applied on a product-by-product basis as well as sector-by-sector basis.

#### **3.5. The procurement statistics**

According to the statistics published by the PP Authority, between 2003 and 2011 a total of 956,642 contracts with a total value of 418,918,009,924 TRY (equivalent to about 240 billion USD) were awarded by the contracting authorities covered by the PPL. The

foreign economic operators, though, could only obtain 4024 of the total number of contracts, with a value of 15,898,768,575 TRY (equivalent to about 9.13 billion USD).<sup>19</sup>

**Figure 1 -** The 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 can be seen that the domestic economic operators maintained their position in the Turkish public procurement market.

**Table 1 -** The Public Procurement Statistics of 2011

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

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Misc.	97	115	312,858
<b>Total</b>	<b>51,912</b>	<b>192,500</b>	<b>74,858,448 TRY</b> (equivalent to about 43 billion USD)

These statistics demonstrate that the foreign economic operators could only gain about 0.94% of the contracts in 2011, which accounts for 5.05% of the overall contract value. The statistics regarding the implementation of preferential procurement and setting-aside need to be examined to have a better understanding of the limited participation of foreign economic operators.

**Table 2** - The statistics of implementation of setting-aside provision in 2011

Type of Procurement	Tendering procedures open to international competition		Tendering procedures closed to international competition	
	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
<b>Total</b>	<b>13,616</b>	<b>38,540,527</b> (equivalent to about 22.1 billion USD)	<b>86,630</b>	<b>24,418,288</b> (equivalent to about 14 billion USD)

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 tendering proceedings.

**Table 3** - The statistics of implementation of preference on national tenderers and goods within the tendering procedures open to international competition

Type of Procurement	Number	Value (1,000 TRY)
Goods	460	1,598,512

Services	501	1,892,354
Works	258	9,684,681
<b>Total</b>	<b>1,219</b>	<b>13,175,547 (equivalent to about 7.5 billion USD)</b>

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 that the foreign economic operators could only gain about 0.94% 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 PPL. However, Ercan and Oguz state that the domestic economic operators had benefited from a privileged position in the Turkish public procurement and the participation of foreign economic operators had been limited prior to the enactment of the PPL.<sup>20</sup>

#### 4. THE NEW BUY NATIONAL POLICY

The Prime Minister of Turkey issued a circular no. 2011/13 on 6 September 2011 (hereafter 'the Circular') on the promotion of usage of domestic goods by the public bodies (OJ 06.09.2011/28046). 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:

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- (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 and 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.

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

The substance of the Circular implies that the Turkish Government is keen 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 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 preferential procurement.

## 5. CONCLUSIONS

This paper aimed to provide an overview of the market access restrictions for foreign economic operators under the PPL. When the legal framework is examined, it can be seen that the contracting authorities have discretionary power in granting preference to domestic tenderers and goods, and in closing the tendering procedures to international competition.

The examination revealed that the provisions that grant preference to domestic tenderers and setting-aside are significant restrictions but not definite constraints, as they can 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 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, the effectiveness and the benefits of preferential procurement need to be evaluated. 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.<sup>21</sup> Moreover, 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.<sup>22</sup> In the same context, the European Commission highlights that protectionism raises prices for consumers and businesses and limits choice.<sup>23</sup> Indeed, 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.<sup>24</sup>

The Turkish economy is maintaining its growth rate despite the global economic crisis. However, 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 would jeopardise the international competitiveness of the Turkish economic operators. Nevertheless, protectionism is on the rise in the Turkish public procurement market. The Turkish Government is keen to maintain preferential procurement and seek possibilities to enhance the effectiveness of the current system.

## NOTES

<sup>1</sup> 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. 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 (2009). OECD Principles for Integrity in Public Procurement. Paris: OECD Publishing.

<sup>2</sup> For the initiatives on the liberalisation of public procurement markets within the WTO see Arrowsmith, S., Anderson, R. D. (2011). The WTO regime on government procurement: challenge and reform. Cambridge: Cambridge University Press.

<sup>3</sup> See, Baldwin, R., Evenett, S. (Eds.) (2011). The collapse of global trade, murky protectionism, and the crisis: Recommendations for the G20. London: Centre for Economic Policy Research; Also see, European Commission, Global Europe: Competing in the World COM(2006) 567 final.

<sup>4</sup> The English translation of the PPL provided by the PP Authority is available at [http://www1.ihale.gov.tr/english/4734\\_English.pdf](http://www1.ihale.gov.tr/english/4734_English.pdf). [Retrieved March 1, 2012]

<sup>5</sup> For the literature on the Turkish public procurement law see, Burdsal, R. L. (2002) "An overview of Turkish public procurement law", *Public Procurement Law Review*, (1):56-73; Alyanak, S. (2006) "An overview of legal remedies in public procurement in Turkey", *Public Procurement Law Review*, (5):286-305; Kural, S., Alsac, U. (2006) "Public Procurement Procedures in Turkey", *Journal of Public Procurement*, (6):100-129; Alyanak, S. (2007) "An overview of the legal rules governing public procurement in Turkey", *Public Procurement Law Review*, (2):125-143; Kortunay, A., Sezer, Y. (2007) "Kamu İhale Hukukunun 63. Maddesinin AB Hukuku Perspektifinden Değerlendirilmesi [The Assessment of the Article 63 of the Public Procurement Act in the Perspective of EU Law]", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, (3):137-171.

<sup>6</sup> The Turkish Constitutional Court, 12 January 1989, E. 1988/4, K. 1989/3, *AYMKD*, Vol. 25, p. 6-8.

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

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

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<sup>9</sup> See, the Ankara Agreement of 12.09.1963, OJ L 217, 29.12.1964; Additional Protocol of 23.11.1970, OJ L 293, 29.12.1972.

<sup>10</sup> Decision 1/95 of the Association Council of 22.12.1995, OJ L 35, 13.02.1996.

<sup>11</sup> *Id.*, Article 48.

<sup>12</sup> See, European Commission, 2001 Regular Report on Turkey's Progress Towards Accession, SEC(2001) 1756; 2002 Regular Report on Turkey's Progress Towards Accession, SEC(2002) 1412.

<sup>13</sup> Turkey's Letter of Intent and Memorandum on Economic Policies, May 3, 2001, available at <http://www.imf.org/external/np/loi/2001/tur/02/index.htm> [Retrieved March 1, 2012]

<sup>14</sup> The World Bank, Turkey Public Expenditure and Institutional Review - Reforming Budgetary Institutions for effective government, available at <http://go.worldbank.org/PQ16CMC5Z0> [Retrieved March 1, 2012]

<sup>15</sup> See, Ercan, F., & Oguz, S. (2006). "Rescaling as a class relationship and process: The case of public procurement law in Turkey", *Political Geography*, (25):641-656.

<sup>16</sup> The progress reports are available at [http://ec.europa.eu/enlargement/candidate-countries/turkey/key\\_documents\\_en.htm](http://ec.europa.eu/enlargement/candidate-countries/turkey/key_documents_en.htm).

<sup>17</sup> See, Kortunay, A., Sezer, Y. (2007) "Kamu İhale Hukukunun 63. Maddesinin AB Hukuku Perspektifinden Değerlendirilmesi [The Assessment of the Article 63 of the Public Procurement Act in the Perspective of EU Law]", *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, (3):137-171.

<sup>18</sup> Arrowsmith, S. (2005). *The Law of Public and Utilities Procurement*. London: Sweet & Maxwell., sec. 19.15.

<sup>19</sup> 1.74 Turkish Lira = USD 1 (01.03.2012 the Turkish Central Bank FX Buying Rate). See, the Turkish PP Authority, the Procurement Statistics available at [http://www.ihale.gov.tr/ihale\\_istatistikleri-45-1.html](http://www.ihale.gov.tr/ihale_istatistikleri-45-1.html) [Retrieved March 1, 2012]. The statistics exclude the procurements conducted out of the PPL.

<sup>20</sup> See, Ercan, F., Oguz, S. (2006), note 14.

<sup>21</sup> See, Schooner, S. L., Yukins, C. R. (2011). "Public procurement: focus on people, value for money and systemic integrity, not protectionism" In R. Baldwin & S. Evenett (Eds.), *The collapse of global trade, murky protectionism, and the crisis: Recommendations for the G20*. London: Centre for Economic Policy Research, p. 88.

<sup>22</sup> *Ibid.*

<sup>23</sup> See, European Commission, *Global Europe: Competing in the World* COM(2006) 567 final.

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<sup>24</sup> See, Marrakesh Agreement Establishing the World Trade Organization available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm). [Retrieved March 1, 2012]

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