5 April 2006

Screening report

Turkey

Chapter 5 – Public procurement

Date of screening meetings:
Explanatory meeting: 7 November 2005
Bilateral meeting: 28 November 2005

I. CHAPTER CONTENT

The *acquis* on public procurement is based on the **general principles** deriving from the Treaty and from the jurisprudence of the European Court of Justice such as transparency, equal treatment, free competition and non-discrimination. These principles apply to all procurement procedures including those falling outside the scope of the EU procurement directives for example in view of their value (procurement below the EU thresholds) or subject matter (service concessions).

The **award of public contracts** (public works, public supply and public service contracts) is coordinated by two specific directives: directive 2004/18/EC regarding the so-called "traditional contracting authorities" (the “classical sector”) and directive 2004/17/EC concerning the authorities and entities operating in the fields of water, energy, transport and postal services (the “utility sector”).

The respective scope of application of the directives is defined in terms of the contracting authorities/entities and contracts covered, application thresholds and specific exclusions. Within this framework, specific requirements are laid down to guarantee full respect of the general principles in the course of the procurement process. In particular, specifications and contract documents, different types of procurement procedures, advertising and transparency, as well as the conduct of the procedure including qualitative selection and contract award are regulated. Specific requirements apply to design contests and - in the “classical sector” – for public works concessions as well.

The directives also provide a framework introduced in 2004 for electronic procurement including electronic means of communication, dynamic purchasing systems and electronic auctions. The rules on the contracts covered and on advertising are complemented by separate regulations on the Common Procurement Vocabulary (CPV) and on standard forms for publication.

Compliance with the procurement directives requires an adequate implementation capacity. In particular, there is need for appropriate administrative structures at central level to ensure the key functions of policy-making, drafting of primary and secondary legislation, provision of operational tools, help-desk, monitoring and statistics as well as controls in a coherent manner for all areas related to public procurement. Moreover, main purchasers at all levels have to possess the necessary administrative capacities to allow for an effective implementation of the procurement rules.

Further to the award of public contracts, the procurement *acquis* entails two directives on **remedies**: directive 89/665/EEC regarding the “classical sector” and directive 92/13/EEC concerning the “utilities sector”. The remedies directives contain requirements for the establishment of effective review procedures against any action or inaction of contracting authorities/entities liable to produce legal effects. The procedures need to guarantee access to independent review, including the powers to adopt interim measures and award damages. Review bodies have to be equipped with the adequate capacity to guarantee the effectiveness of the system as a whole. Furthermore, in line with the principle of judicial protection deriving from the Treaty, the availability of remedies is also required outside the scope of application of the directives.

II. COUNTRY ALIGNMENT AND IMPLEMENTATION CAPACITY

Turkey indicates that it can accept the *acquis* in this chapter. Turkey indicates that it does not expect any difficulties to implement the *acquis* by accession

This part summarises the information provided by Turkey and the discussion at the screening meeting.

II.a. General principles

Public Contracts

Turkey considers its legislation, notably the provisions of the Public Procurement Law and the Public Procurement Contracts Law adopted in 2002, to be in line with the EC Treaty principles of free competition and transparency. Those acts also emphasize the principles of reliability, confidentiality and public supervision in procurement.

Procurement below the thresholds mentioned in the Law may be restricted to domestic bidders. Procurement above those thresholds is open to all domestic and foreign bidders, but may be subject to a national price preference up to 15%, which Turkey acknowledges as being incompatible with the *acquis*. Data for 2005 indicate that the share of public contracts open to foreign bidders has been 22%, corresponding to 49% of the total value of contracts.

Turkey underlines that procedures ensuring transparency and free competition also apply to contracts covered by the Public Procurement Law whose value is lower than the thresholds that it defines.

Turkey also underlines that all works contracts by State Economic Enterprises and assimilated entities are up to now subject to Public Procurement Law. Supply and service contracts above the estimated value of YTL 3,968,935 (approx. €2,493,000) are covered as well. Below that threshold, supply and service contracts are covered if they are not related to the commercial activities of the entity, as verified by the Public Procurement Authority. Turkey acknowledges such an approach to be different from that followed in defining the scope of the directives.

A number of sector-specific law also lay down procurement regimes derogating from the Public Procurement law, notably the Law of July 1983 regarding the restoration of cultural heritage, the Forest Law n°6831, the Law of November 1994 regarding procurement for consultancy services in privatisation, or the Law of March 2005 on emergency interventions related to sea pollution by petroleum. The same went for the Izmir Universiade Law of November 2004.

Turkey intends to align its legislation with the general procurement principles by accession at the latest.

Concessions

The Turkish legislation does not include a horizontal legal framework for concessions. Concessions were originally granted on the basis of private law contracts and legislation later developed as a consequence of case-law based on constitutional principles.

Concessions are currently partly regulated across different legal instruments, some of which provide for transparency, publicity, or free competition.

These include general law such as the administrative case law regarding equality before law, the State Revenue-Generating Activities Law and the 2005 Municipalities Law. A number of sector acts also apply in this area. Various pieces of legislation regulate concessions with respect to the State Economic Enterprises, notably the Wireless Communications Law as regards the operation of maritime communications and cruising safety services, the PTT Law regarding postal services, the Air Safety Law regarding air traffic management and airport operations other than terminal services, the Electricity Markets Law, the State Railways Statute as regards ancillary passenger services, Coastal Safety and Rescue Administrations as regards the maritime safety in the coastline and in the Straits.

The Turkish legislation does not contain a specific legal framework for private-public partnerships.

Turkey envisages adopting a horizontal framework regarding concessions and public private partnership following an ongoing study on general principles for public private partnerships . This would include the principles of transparency, non-discrimination and free competition. Sector legislation would be retained in order to ensure flexibility. No particular date is planned for its adoption.

International aspects

Turkey is not a party to the WTO Government Procurement Agreement. It regularly participates in the GPA activities with an observer status.

Turkey has concluded nine Free Trade Agreements (FTAs) with the EFTA States, Israel, Romania, Bulgaria, The former Yugoslav Republic of Macedonia, Croatia, Bosnia and Herzegovina, Tunisia, and the Palestinian Authority. These FTAs foresee the possibility for the parties to open up public procurement, but so far no measures have been agreed for that purpose.

II.b. Award of public contracts

Public contracts

The main acts are the Public Procurement Law, the Public Procurement Contracts Law adopted in 2002 and amended in 2003 and 2004, as well as a General Communiqué on Public Procurement issued in 2004 and other pieces of implementing legislation.

The *scope of application* of the Law includes public supply contracts, public services contracts and public works contracts, defined partly in conformity with the procurement directives.

The different types of *contracting authorities and entities* include central and provincial State departments, municipalities, their related bodies, social security establishments, as well as most legal persons established in accordance with special laws and that perform public duties. A number of bodies governed by public law are excluded from the scope of the Law. Certain banks meant for privatisation are included within the scope as regards their works contracts. As regards public undertakings and entities operating on the basis of special or exclusive rights in the "utilities sector", utilities are currently only covered by the Law to the extent that they are in-house branches of public authorities, or when they form part of State Economic Enterprises, which consist of public corporations and State economic establishments and the entities which they control (hereafter SEEs). Most private-owned utilities fall outside the scope of the Law.

As regards the *specific exclusions* from the scope of the public procurement legislation, the Public Procurement Law foresees a series of usual exemptions such as international financial cooperation, procurement of banknotes, purchases by embassies abroad. Defence procurement of materials directly related to defence, security and intelligence, as well as procurement of confidential nature are carried out by the Ministry of Defence and by the units or institutions of the Turkish Armed Forces in accordance with specific decrees adopted by the Council of Ministers on the basis of parliament legislation. The Law adds a series of exemptions in cases such as forestry, rural development bodies, and a range of sheltered jails and borstals workshops, education and other sheltered workshops. Moreover a number of sector-specific procurement regimes mentioned above leads to wider exemptions.

The *application thresholds* which determine the procurement announcement rules, time limits and provisions established in respect of domestic tenders, are set out differently than in the Directives and are higher. This is notably the case of public works contracts (approx. € 10,401,035 whereas it is € 6,242,000 in the Directives), as well as of the utilities sector, where those SEEs that would be considered contracting entities under the *acquis* are subject to public procurement rules from the threshold of YTL 3,968,935 (approx. €2,493,000). The Turkish legislation provides a complex set of rules relating to the calculation of the estimated value.

As regards *specifications and contract documents*, the Turkish legislation prescribes the use of a set of detailed standard documents, rather than that of the standard forms as they appear in the *acquis.*

As regards the different *types of procurement procedures* the law foresees the basic open, restricted and negotiated procedures, albeit with some variations such as direct award. The Turkish legislation lays down a specific regime for a series of consultancy services including software development and project design. The competitive dialogue procedure, framework agreements, electronic auctions and dynamic purchasing systems are not regulated.

Concerning the *use of the procurement procedures*, the use of the restricted procedure is subject to restrictive conditions, and this procedure accounted for 0.1% of procurement operations and 1% of the total procured value. Direct contract award is possible for small sized daily purchases, even repetitive.

Regarding *advertising and transparency*, publication methods are included with a number of differences. There is a slight difference in time limits due to different computation of their starting point, although for international tenders they are extended by 12 days, and their determination is based on the estimated value without taking account of contract complexity. Art. 35 of the Directive is taken into account to a limited extent. The compulsory use of the common procurement vocabulary (CPV) is not mandatory.

Concerning the *conduct of the procedure*, the Turkish legislation incorporates some basic procurement elements notably grounds for exclusion, and some differentiation between qualification and award criteria. The legislation foresees blacklisting of bidders. Mutual recognition of evidence is not entirely provided for. Some of the mandatory exclusions are included. Turkey indicates that the assessment of financial and professional capacity is covered, while there is no provision regarding the relative weighting of award criteria. The law includes provisions related to procedural guarantees in terms of confidentiality, conflict of interest. The integration of environment considerations in procurement is also foreseen within the limits laid down by the acquis.

Turkey envisages amending its public procurement legislation in order to align it fully with both Directives. A separate legislative framework regarding utilities would be adopted following an ongoing study. No particular date was planned for the drafting and adoption of those laws.

Electronic Procurement

Although the conduct of procedures on paper remains mandatory in the absence of adequate provisions, parallel use of electronic means has been widely encouraged. As regards procurement notices, an IT based management system allows for their electronic transmission to the Public Procurement Authority (PPA) for publication. In practice 99% are transmitted in this way. The Turkish legislation already includes a legal framework for electronic signature. An Electronic Procurement Model was developed in 2004 and has led a roadmap which foresees by stages the transition to full electronic, under the responsibility of the PPA.

Turkey intends to continue developing its electronic procurement capacity gradually. This includes a Public Procurement Platform by end 2005, which would allow linking progressively all procurement stakeholders, including a one-stop-shop for e-bidding. Electronic auctions would be initiated on a pilot basis in 2006 for pharmaceuticals supplies of the healthcare institutions and later be extended successively to all supplies, services, and works. No particular dates are planned for the completion of this work or drafting and adoption of the necessary legal basis.

Concessions

The Turkish legislation does not include a horizontal legal framework for concessions. Concessions are currently partly regulated across different sector legal instruments, none of which provide a definition of concessions or refer to the different types of concessions (public service concession, public works concession) provided in the procurement directives. The notion of concession is not applied uniformly throughout the sector acts and the acquis criteria for differentiating between public contracts and public concessions do not appear, in particular as regards the bearer of the risk. The conclusion of the contracts is in some instances accompanied by Treasury guarantees awarded via parallel procedures.

In terms of concession decisions, some sectoral provisions provide a measure of transparency, publicity, or free competition. The procedures for granting public works concessions are entirely *sui generis*, and Turkey considers this legislation insufficient to meet the acquis requirements.

Concessions for building are regulated in particular by the 1988 Build-Operate-Transfer in Express Ways Law, the 1994 Build-Operate-Transfer Model Law, the 1997 Build-Operate Model Law, the 2005 Municipalities Law. The provisions of the 1984 Build-Operate-Transfer in Energy Sector Law have not been used since 2001. In addition, 2005 Build-Lease in Health Sector Law is an example for public-private-partnerships.

Turkey envisages regulating public works concessions together with public service concessions in a distinct horizontal framework to be combined with sector acts. No particular date was planned for their drafting and adoption.

Implementation capacity

At the level of the central procurement organisation, the Public Procurement Authority (PPA) is in charge of policy-making, supervision, providing training and operational support to contracting authorities and entities, publishing tender notices, informing the economic operators and awareness-raising. In terms of monitoring, the Ministry of Finance has delegated to spending agencies the ex-ante control of operations funded from the State budget.

The PPA was legally established by the Public Procurement Act as a financially and administratively autonomous regulatory body. It is managed by a 10-members Board. The President is appointed by the Council of Ministers among Board members. The PPA President supervises the daily management of the PPA. The PPA comprises 10 departments. It has moved into in own premises in September 2003, and has 199 staff, of which 178 University graduates. A training programme is underway.

In 2005 the PPA has recorded 115,639 operations, of which 87% open procedures and 13% negotiated procedures. The PPA has prepared training packages for bidders and purchasers, and has so far trained 10,237 from 296 administrations. It maintains a website for information and dissemination purposes.

Turkey recognises the need of strengthening the administrative capacities of the public procurement system. Turkey outlines in broad terms some activities meant to provide the necessary administrative capacity by end 2006. It would notably improve information on public procurement legislation, standardise the training process and practices, and improve IT tools supporting procurement. No particular plans have been presented for 2006 onwards.

Concessions and *public-private partnerships* fall outside the competence of the Public Procurement Authority, as these remain under the competence of various institutions such as notably the Undersecretariat of Treasury, the Ministry of Energy and Natural Resources, the Ministry of transport, the State Planning Organisation.

II.c. Remedies

Regarding legislation, the Turkish remedies system includes both administrative and judicial review. Based on the provisions of the Public Procurement Law and of the general administrative law, the administrative review is carried out by the Public Procurement Authority further to the handling of the objection by the contracting authority or entity concerned.

According to the Public Procurement Law, the persons entitled to request review are actual and potential candidates or tenderers. The remedy is available at pre-contractual phase against various acts taken by the contracting entity, including tender notice or award decision.

The complainant first has to submit an objection to the contracting authority or entity concerned. The submission of an objection automatically suspends the conclusion of the contract. In the event of refusal or absence of reply after 30 days, the complainant may submit a complaint to the Public Procurement Authority within 15 days unless the contract is signed. There is also automatic suspension except otherwise decided by the Public Procurement Board

Decisions by the Public Procurement Board are binding and include suspension or cancellation of tendering procedure, injunctions to contracting entities to take corrective actions, or continuation of the tendering.

The public procurement legislation does not stipulate a standstill period between the award notice and contract signature. The Law specifies deadlines for answer from the contracting entity to objections from tenderers.

Decisions of the Public Procurement Authority are subject to judicial review by Administrative Court, including the possibility to appeal in front of the Council of State in accordance with the general Law on Procedure of Administrative Justice and Council of State Law. Appeals are filed against the decisions of the Public Procurement Authority. The scope of the review includes both substance and procedure, and the Court is not limited by the reasons put forward by the parties. Compensation for damages may be sought from administrative and civil courts.

The above review procedures apply to procurement activities covered by the Public Procurement Law, without extending to contracts not covered such as those assimilated to concessions and public-private partnerships. These are dealt with by the competent administrations in accordance with the general administrative law. Judicial review is ensured in line with the general Law on Procedure of Administrative Justice and Council of State Law. For contract implementation international arbitration may be sought.

In terms of implementation capacity, The Public Procurement Authority is established as a financially and administratively autonomous regulatory body. It comprises a Board of ten members appointed by different ministries, the high courts, and by the Union of Chambers of Commerce and Commodity Markets and the Turkish Employer Unions Confederations for a five-year term. Member terms are not renewable. The President is appointed by the Council of Ministers among Board members. The Law also lays down the educational and professional backgrounds required from the Board members. It regulates the conditions under which the Prime Minister may relieve a member from its duties, it lists activities incompatible with the mandate, and foresees budget autonomy for the Public Procurement Authority.

The procedures in front of the Public Procurement Board are determined by the Public Procurement Law and secondary legislation. These operate as *lex specialis* to the general Administrative Justice Act.

The Public Procurement Board is supported by the Remedies Department of the Authority, one among ten divisions. It provides logistical support and secretariat to the proceedings on the Board on remedies, performs admissibility checks on complaints, and assigns experts to support Board members. Turkey acknowledges the need for strengthening the administrative capacity in this respect.

In 2005, the Board processed 3665 requests for redress. This is estimated at 2.6% of the total public procurement announcements. 4.8% of the cases processed in 2004 gave rise to administrative disputes in Court. There are no data on the outcome of those court proceedings.

III. ASSESSMENT OF THE DEGREE OF ALIGNMENT AND IMPLEMENTATION CAPACITY

Turkey's public procurement system is only partially in line with the acquis in this chapter. Major efforts are necessary to align the legislative framework, with particular challenges as regards general principles, award of public contracts in the utilities sector, and concessions, while important challenges remain on all other aspects including remedies. Coherence of any legislative initiative on public-private partnerships with other rules requires attention. The

administrative and judicial capacity requires many efforts at all levels, as there are important concerns regarding the administrative capacity of main purchasers and effective application of the public procurement rules.

With the limited exception of the IT environment for electronic procurement, Turkey has fallen short of presenting any plans for future alignment against which future progress could be measures. The fulfilment of Turkey's declared intention to be in line upon accession in this chapter will in particular require that all necessary legislative and institutional steps necessary for full alignment be planned, including clear mandates for follow-up, time-schedules for each step and milestones, and that a first legislative step is taken to align the scope of the Public Procurement Law.

III.a. General principles

In the field of public contracts, Turkey complies with the general principles to a limited extent, since only transparency and free competition are envisaged.

The Turkish legislation is not in line with the principle of equal treatment given that smaller value procurement is reserved to domestic bidders while a 15% national preference applies above the thresholds. This would breach the EC Treaty provisions, as well as Directives 70/32/EEC and 71/304/EEC. So far Turkey and the Community have not agreed to mutually open their public procurement markets.

The principle of transparency is not fully respected either, due to the important differences in scope between Turkish and EC law (see below under Award of Public Contracts). Removing the provisions protecting the domestic bidders will necessitate political will as well as a gradual approach to enable a smooth transition. Aligning other aspects would require important rationalisation of the legislation. Turkey only indicated its willingness to ensure alignment by accession and fell short of presenting a timetable for that purpose.

In the area of concessions, the current set of sector-specific acts is not in line with the general principles. Far-reaching legislative efforts are needed to ensure the compatibility of the legislation on public service concessions with the general EC Treaty principles and with the definition contained in the directives. It is also crucial that any Turkish legislative initiative regarding public-private partnership is well coordinated with the other legislative sectors.

Whereas Turkey indicated that a study was underway, no timetable has been outline for effective steps towards alignment (see below under Award of Public Contracts).

Turkey's international obligations in the field of procurement are limited and do not mirror the EC ones. This does not raise particular difficulties given that the EC exclusive external competence has a wide coverage in this area. Turkey should be cautious in taking up any other international obligations (see Chapter 30 – External Relations).

III.b. Award of public contracts

On Public contracts, the Turkish Public Procurement legislation is only partially in line with the *acquis*.

The Turkish authorities have implemented an important reform of procurement legislation in 2002 and, on that basis appeared quite confident about the existing system. Nevertheless, EU procurement law was certainly not the only model for that reform, and has developed in the meantime through the important legislative package of Directives 2004/17 and 2004/18.

Specific concerns relate to the scope of the Public Procurement Law, whether in terms of contracting entities covered, application thresholds, and exclusions.

Even if the General Communiqué on public procurement of 2004 specifies and extends the contracting entities covered by the Public Procurement Law, its scope remains too narrow and still differs from EU legislation in various aspects, namely the concept of State, the definition of a body governed by public law, and exemptions that are not in line with the EU Directives. Turkish authorities are aware that the inclusion of State Economic Enterprises and assimilated entities (SEEs) as well as of certain banks is not a valid substitute for coverage of the utilities sector required by the acquis. Moreover, a current draft 8th amendment to the public procurement law would result if adopted in taking the SEE (i.e. purchases of 3,796,000 YTL) outside the scope of the law. Covering both private and public utilities will necessitate political will as well as sound technical work to adjust the current system which is largely tailored on public authorities, as illustrated with the detailed approach to standard documents.

Specific concerns also relate to the number of thresholds and their respective values which should be lowered, as well as to the calculation of estimated contract value which lacks clarity. The presence of derogatory regimes and extensive exemptions ranging from the Izmir Universiade to rural development institutions and social exemptions requires an additional important effort of rationalisation of the scope of the public procurement legislation.

Much work is needed in all other areas. Several types of procedure need to be added, while the special provisions for consulting services are matter for concern. The specifications and standard documents seem rigid, especially in view of implementation outside the central government. As regards transparency, time limits should be extended. Regarding the conduct of procedures, modifications are needed notably to criteria for qualitative selection in order to fill gaps in assessment of capacity and in mandatory exclusions, to address the use of blacklisting, to align award criteria through the introduction of relative weighting. Moreover most of the provisions introduced in the acquis in 2004 are not incorporated in the Turkish legislation.

A far-reaching legislative programme is needed in order to bring full alignment. It will necessitate to remove from legislative amendments that increase deviations from the *acquis* and multiply derogatory sector regimes, as has been the case in 2003 and 2004, and to plan successive steps in a technically sound, economically sustainable manner and with adequate political backing.

Turkey indicated that it is studying new legislative initiatives for respectively concessions, utilities, as well as amendments to the procurement rules in the classical sector. However it fell short of outlining a strategy, or dates of drafting or final adoption. The challenges would make this indispensable.

As regards electronic procurement, despite the importance of the Programme for e-transformation of Turkey, real progress can only be expected further to the incorporation of rules regulating the use of electronic means in the Public Procurement Law.

On concessions, Turkey is not in line with the classical directive and general principles. Transparency and free competition are unevenly included, and basic EU concepts of public contract and concessions are not adequately defined and differentiated in the various sector laws A significant difference stems from the fact that the Build Operate and Transfer contracts (BOT) are considered under private law, while they do fall within the scope of EU

Directive 18/2004. A major reform is needed to establish a coherent and comprehensive legislative framework in compliance with the acquis.

Turkey indicated that it is studying new legislative initiatives for respectively concessions, utilities, as well as amendments to the procurement rules in the classical sector. However it fell short of outlining a strategy, or dates of drafting or final adoption. The challenges would make this indispensable, especially as all pieces of specific legislation regulating concessions in the different sectors would have to be brought in compliance simultaneously.

The implementation capacity needs to be significantly upgraded at all levels. This concerns both the Public Procurement Authority and the contracting authorities and entities, in particular the main purchasers.

Turkey's plans to deliver training to further purchasers are welcome. A clear action programme for electronic procurement has been provided. However the staff needs seem underestimated in view of the need to manage wide changes in the procurement system.

III.c. Remedies

The Turkish legislation on review procedures is partially in line with the directives and general EC Treaty principles.

Important changes are needed, notably introducing direct and broader access to the Public Procurement Board, providing for effective possibilities to obtain compensation for damages in accordance with the principles of Directives 89/665 and 92/13, providing for effective possibilities for complainants to obtain rapid and adequate interim measures that, in line with the EU standards, should be capable of suspending the procurement procedure. Furthermore, concessions and all utilities should be included in the scope of pre-contractual remedies.

The comments under Award of Public Contracts above, concerning the need for a strategy to coordinate legislative plans, are valid here too.

The implementation capacity of the Public Procurement Authority's Remedies Department is hardly sufficient to perform its tasks. This should be expanded in parallel with the expected legislative change, as the scope of activities would expand.

The nature of the Public Procurement Board as a judicial body (under the meaning of Article 234 EC) should also be further examined, in particular with regard to the requirement for independence from other functions and the need to provide for an *inter partes* procedure.

Here also the plans to upgrade the administrative capacity would deserve to be significantly more precise and ambitious. Moreover, particular attention needs to be paid to training the administrative courts in the area of public procurement, and in providing technical support.