



# **Government Favouritism in Europe**

## **The Anticorruption Report**

**Volume 3**

**Alina Mungiu-Pippidi (editor)**

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## **The Anticorruption Report 3**

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**Barbara Budrich Publishers**

**Opladen • Berlin • Toronto 2015**

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A CIP catalogue record for this book is available from  
Die Deutsche Bibliothek (The German Library)

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[www.barbara-budrich.net](http://www.barbara-budrich.net)

**ISBN 978-3-8474-0795-9 (Paperback)**  
eISBN 978-3-8474-0921-2 (e-book)

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Die Deutsche Bibliothek – CIP-Einheitsaufnahme  
Ein Titeldatensatz für die Publikation ist bei Der Deutschen Bibliothek erhältlich.

Verlag Barbara Budrich  Barbara Budrich Publishers  
Stauffenbergstr. 7. D-51379 Leverkusen Opladen, Germany

86 Delma Drive. Toronto, ON M8W 4P6 Canada  
[www.barbara-budrich.net](http://www.barbara-budrich.net)

Jacket illustration by Bettina Lehfeldt, Kleinmachnow, Germany –  
[www.lehfeldtgraphic.de](http://www.lehfeldtgraphic.de)

Printed in Germany on acid-free paper by  
Strauss GmbH, Mörlenbach, Germany

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All these contributions were given as part of the European Union Seventh Framework Research Project AN-TICORRP (Anti-corruption Policies Revisited: Global Trends and European Responses to the Challenge of Corruption). The views expressed in this report are solely those of the authors and the European Union is not liable for any use that may be made of the information contained therein.

# Abbreviations

ACR	Anticorruption Report
AKP	Adalet ve Kalkınma Partisi
ALB	Abnormally Low Bids
ANRMAP	National Authority for Regulating and Monitoring Public Procurement
ANTAC	Anti-corruption Action Centre
ANTICORRP	Anticorruption Policies Revisited: Global Trends and European Responses to the Challenge of Corruption
BCE	Corvinus University of Budapest
BDP	Bariş ve Demokrasi Partisi (Peace and Democracy Party)
BGN	Bulgarian Lev
BOT	Build, Operate, and Transfer
CAE	Identification Data for Contracting Authority
CCI	Commission for Conflict of Interest
CHP	Cumhuriyet Halk Partisi (People's Republican Party)
CPO	Central Procurement Officer
CPV	Common Procurement Vocabulary
CSD	Center for the Study of Democracy
CVM	Cooperation and Verification Mechanism
DNA	Romanian National Anticorruption Agency
DPSP	Directorate for the Public Procurement System
EC	European Commission
EFSI	European Fund for Strategic Investments
EPPP	Electronic Public Procurement Platform
EU	European Union
EUI	European University Institute
FOI	Freedom of Information
GDP	Gross Domestic Product
GVA	Gross Value Added
HDZ	Croatian Democratic Union
HRK	The Croatian Kuna
IKS	Kosovar Stability Initiative
IMF	International Monetary Fund
LPP	Law on Public Procurement
MHP	Milliyetçi Hareket Partisi (National Movement Party)
MP	Member of Parliament
MSZP	The Hungarian Socialist Party
NABU	National Anticorruption Bureau
NAO	National Audit Office
NGO	Non-Governmental Organisation
NSI	National Statistical Institute
NSRF	National Strategic Reference Framework
NUTS	The Nomenclature of Territorial Units for Statistics
OC	Organised Crime
OCC	Organised Crime and Corruption
OP	Operational Programs
PFIA	Public Financial Inspection Agency

PPA	Public Procurement Agency
PPB	Public Procurement Board
PPP	Public-Private Partnership
PPL	Public Procurement Law
PPR	Public Procurement Registry
PSD	Partnership for Social Development
QOG	Quality of Government Institute
RPR	Reanimation Package of Reforms
SAO	State Audit Office
SAR	Romanian Academic Society
SCSPPP	State Commission for Supervision of Public Procurement Procedure
SEAP	Electronic Public Procurement System
SEEs	State Economic Enterprises
SICAP	Romanian Electronic System for Public Procurement
SME	Small and Medium-sized Enterprises
TCA	Turkish Court of Accounts
TED	Tenders Electronic Daily
TPC	Turkish Penal Code
TGNA	Turkish Grand National Assembly
TMAC	Minister of Transport, Maritime Affairs, and Communications
UNCAC	The United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
USKOK	Croatia's Office for the Prevention of Corruption and Organised Crime
VAT	Value Added Tax

## 6. Public Procurement in Infrastructure: The Case of Turkey

UĞUR EMEK AND MUHITTIN ACAR

**The Public Procurement Law was put in force in 2003 with an objective to improve competition, transparency and integrity. Although it had some limitations compared with the EU directives, its enactment was a positive step in a country where irregularities in public tenders were frequently encountered. However, the post-2002 incumbent government party repeatedly changed it, with the results of frequent exemptions. Dozens of public contracts have been taken outside the scope of it over time, leading the share of Turkish public procurement in GDP (e.g. 5-6%) to fall significantly under the EU equivalent (15-16%). The use of non-competitive tender procedures such as direct procurement and restricted procedure has been on rise while the use of competitive open procedure is declining. Unlike the EU regulations, the PPL does not include procedures and provisions for the delivery of public private partnership contracts, which has risen as preferred allocation means in large scale infrastructure investments. The outcome of allocation therefore is increasingly reflecting particularism, with foreign participation in public tenders decreasing, and a price advantage award to domestic bidders in international tenders extensively and increasingly used in recent years.**

The perception of corruption or corruption risk is a serious concern for much of Turkish society, which is clearly observable in public opinion surveys. For instance, according to a Corruption Survey by Ernst & Young (2013) Turkey performed relatively better than certain European countries in terms of public perception of bribery and irregularity, but failed in the area of public procurement: 39% of respondents think that bribery is a must in order to qualify for a public procurement contract. Transparency International (2013) identified public procurement as one of the sectors' most susceptible to corruption, with many cases involving high-level figures. Similarly, the 2013 Enterprise Survey study by the World Bank and IFC (2013) singled out public procurement as the greatest source of corruption along with other activities such as getting a construction permit, as well as import and operating licenses. A nationwide survey conducted amongst firms (Adaman et al. 2009) revealed that the perceived favouritism in large scale public contracts such as highway and dam procurement increased between the years 2004 and 2008.

Preventing the emergence of such a bleak picture has been one of the main aims of Public Procurement Law (PPL) N. 4734, which was enacted in 2002 and put into force in 2003. The PPL has been implemented over the years during the reign of consecutive Justice and Development Party governments (*Adalet ve Kalkınma Partisi*, AKP, post-2002 incumbent), with much help from the bureaucrats mostly appointed by the same party. In other words, the PPL and its implementation have not passed the test of being managed and audited by a different government formed by other parties. The AKP governments have made amendments in the PPL over time, claiming to increase competition and transparency, as well as achieving further alignment with the EU procurement rules and procedures. The PPL has been repeat-

edly amended during the same party rule to the point that it has significantly deviated from its original structure over the years<sup>1</sup>. Some amendments might have really improved competitive conditions and increased value for money in public procurement. However, it seems that a large part of the changes enacted to date have imposed much higher costs to the public by actually restricting competition and transparency.

## I. Construction and Procurement Market Developments

The share of public construction expenditures constituted around 17-20% of total public expenditures over the period of 2008-2013. The sum of public and private construction expenditures accounts for roughly 8-9% of GDP in the same period. The private sector's share in the total construction expenditures (e.g. 5-6% of GDP) is twice as much as corresponding public expenditures (e.g. 3% of GDP). It is thus reasonable to suggest that the construction industry in the country offers considerable business opportunities to both domestic and foreign contractors (Column I in Table 1).

**Table 1. Construction and Public Procurement Markets (%)**

Years	Construction (I)			Share of public procurement in GDP (II)					
	Share of public construction in total expenditures	Public construction/GDP	Private construction/GDP	Central government (1)	Local government (2)	Sub-total of (1) and (2)	SEEs (3)	Total	Share of work contracts in total procurement
<b>2008</b>	19.0	3.2	6.3	3.3	2.7	6.0	1.1	7.2	38.2
<b>2009</b>	16.6	3.1	4.7	3.1	1.6	4.7	0.9	5.6	37.1
<b>2010</b>	18.3	3.3	5.1	2.6	1.7	4.2	0.7	4.9	34.5
<b>2011</b>	18.2	3.2	5.9	2.7	1.5	4.2	1.4	5.5	52.5
<b>2012</b>	16.9	3.2	5.8	2.6	1.9	4.5	1.3	5.8	57.2
<b>2013</b>	19.8	3.9	5.2	2.8	2.0	4.8	1.3	6.1	60.0

(1) General and special budgetary agencies and social security institutions  
(2) Municipalities, special provincial administration, local administrative unions and municipality-owned companies  
(3) State economic enterprises

*Source: Ministry of Finance, Ministry of Development, and Public Procurement Agency*

The share of public procurement as a percentage of GDP remained within a range of 6-7 % in the investigation period with a declining tendency. Although its proportion of GDP is lower than the EU (which is about 15-16 %), it still makes up significant part of the Turkish economy. The share of central government procurement in GDP (about 3%) is higher than that of local governments (on average 2%), indicating that public expenditures are rather centralized in the country. Procurement of SEEs accounts for about 1% of GDP. Public works contracts constitute a larger part of total procurement with a growing tendency, and its share in total was 60 % in 2013 (Column II in Table 1).

<sup>1</sup> The 35 amendments having been made in the course of 11 years have changed 135 (sub) provisions of the PPL. Ex-president of Turkish Contractors Association Eren (2010) argued that the PPL needs to be comprehensively revised to get a well-structured legislation in order to improve value for money in public procurement.

## **II. Legal Framework**

### **1. Impartiality of Tender Commissions**

The PPL contains explicit provisions for the establishment and working conditions of tender commissions. However, it remains silent on how to ensure commissioners' autonomy against improper influences which can manipulate and distort tender outcomes. For a start, commissioners who disobey improper requests may be unseated for any reason (e.g. she/he can be assigned/re-assigned to different positions) before the procurement process concerned is completed. There appears to be no mechanism to block such potential improper actions related to the commissioners' tenures. Second, tender commissions may consist of members who have a superior-subordinate relationship in the workplace independently of their responsibilities in the tender commissions. Thus, the former might force the latter to meet improper demands in order to support a favoured bidder by exercising their superiority over subordinate(s) through threats to block promotion in their careers. Furthermore, asymmetric information and transaction cost problems may arise, because tender commissions are required to be separately appointed for every single tender. On the positive side, the replacement of members of previous commissions by new ones may make it difficult for interest groups to capture commissioners, because the time and monetary cost of engaging in corrupt activities would increase as long as the rate of commissioners' substitution is high, engendering information asymmetry between new commissioners and interest groups. On the other hand, frequently unseating commissioners may impose transaction cost on public contracts, because each new commissioner needs to spend extra time and effort to ascertain how to efficiently carry out procurement procedures<sup>2</sup>.

### **2. Evolution of Procurement Law**

The PPL has frequently been amended over time. Some of the changes made to the PPL have improved transparency and competition so as to eliminate corruption risks, while others have distorted its structure by contributing to the emergence of new risks.

### **3. Eliminating Corruption Risks**

#### **3.1. Electronic public procurement platform**

One of the amendments introduced provisions enabling the Public Procurement Agency (PPA) to establish an electronic platform with the hope of increasing transparency and competition so as to ensure integrity in public procurement. The E-procurement platform (Electronic Public Procurement Platform- EPPP hereafter) officially started operation in September 2010 and has successfully evolved up until now. All tender documents from contract notices towards tender results are required to be published in the EPPP. It has eventually engendered two crucial outcomes. First, the preparation and publication of tender documents have been standardized so that procurement officials are no longer allowed to misinterpret them. Second, although the EPPP does not allow online bidding, tender call notices are required to be published through its electronic bulletin. Therefore, it is possible to say that transparency and competitive conditions have been improved in public tenders (albeit to a limited extent) simply because more candidates have been enabled to get electronic information about tender calls across the country, perhaps resulting in more participation in public procurement.

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<sup>2</sup> Note that it is still possible to assign the same officials to different commissions.

### 3.2. Abnormally low tenders

The PPL initially introduced a new concept, the rejection of abnormally low bids (ALB) in line with EU directives. Within this concept, tender commissions are required to identify the ALBs compared with other bids and estimated cost calculated by the contracting agency which is also required to be kept confidential. Tender commissions enjoyed broad discretion to evaluate and reject ALBs, likely resulting in the rejection of lower bids and the selection of a favoured-bidder with a relatively higher bid. The trick to discriminate between bidders, and to support a favoured one was working as follows: in suspected cases, the contracting agencies were artificially calculating the estimated cost much higher than real market conditions that bidders should normally take into account while preparing bids. Therefore, a high number of bids were likely becoming abnormally low except for risk-averse bidder(s) with higher bids. A contracting agency with broad discretionary power was able to accept only the expression of the single (favoured) bidder whose bid's status would then move up from the ALB to the lowest bid enough to win the tender concerned<sup>3</sup>. In other cases, a contracting agency was able to directly identify all bids as abnormally low only lower than the bid of a favoured bidder who would become the winner of the tender<sup>4</sup>.

Eventually, an amendment in 2008 improved the evaluation process and considerably limited the discretionary power of tender commissions by introducing an objective criteria set for the evaluation of tenders. The PPA has also been authorized to prepare detailed guidelines regarding how to deal with ALBs, which then has also published a larger set of relevant rules and procedures.

## 4. Emerging Risks

### 4.1. Exemptions

A growing number of public contracts have been left out of the PPL over the years. We have estimated the size of exemptions by calculating the difference between the actual volume of expenditures of central and local governments on goods, services and works contracts

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<sup>3</sup> For instance, Istanbul Water and Sewerage Administration (İstanbul Su ve Kanalizasyon İdaresi, İSKİ) a subsidiary of Istanbul Metropolitan Municipality (İstanbul Büyükşehir Belediyesi, İBB) called tenders for the construction of a water distribution network with an estimated cost of TRY 21.2 million in the past. 43 out of 57 bids were considered as abnormally low. İSKİ approved the viability of only single bid among the rejected bids with an amount of TRY12.2 million, the owners of which have allegedly maintained close connections with top level politicians for years. Note that, the bid envelopes submitted were opened in front of all bidders participated in the tender in order to secure transparency. Most probably with an advantage of being informed about the value of other failed bids, the winning company authorized one of failed companies with a bid value of TRY9.6 million as a sub-contractor. Interestingly, before the award, the contracting agency had not been convinced with the explanation of sub-contractor which then successfully completed the awarded network construction. Thus, winning company presumably gained an easy-profit not less than the difference between its own bid and the sub-contractor's bid submitted earlier -i.e. TRY2.6-(Gürek, 2011; pp. 56-7). We are unaware of whether or not the winning bidder incurred any other cost paid covertly. Winning bidders of such tenders are called 'bag-man', because they transfer works contracts to a sub-constructor shortly after winning tenders without engaging in the construction work.

<sup>4</sup> In another tender carried out again by the İSKİ for the construction of wastewater network and collector, the threshold value for the identification of ALB was calculated as TRY10 522 350.00. The difference between the threshold value and winning bid (TRY10 522 350.01) was only TRY1 cent (the PPA Decision Date Jan. 11, 2006 and N.2006/UY.Z-3143). Allegedly the winning bidder was a close friend of top managers of İSKİ.

and total public procurement of said procurement agencies on the same areas. The difference between two figures indicates the potential amount of public procurement exempted from the PPL which is about 4% of GDP in 2013. In monetary terms, a representative amount of exemptions has jumped from €9.1 billion in 2008 up to €24.8 billion in 2013, indicating a growing tendency (Table 2).

**Table 2. Potential Size of Exemptions in GDP (%)**

Years	Total expenditures of central and local government/GDP	Total procurement of central and local governments/GDP	Exemptions/GDP	Amount of potential exceptions (billion €)
2008	7.9	6.0	1.8	9.1
2009	8.5	4.7	3.7	16.6
2010	8.2	4.2	3.9	21.6
2011	8.1	4.2	4.0	22.2
2012	8.2	4.5	3.7	23.0
2013	8.8	4.8	4.0	24.8

*Source: Ministry of Finance, Ministry of Development, Public Procurement Agency, and Authors' Calculations.*

Exclusions seem to have been introduced on an ad hoc basis. Many public officials seem willing to avoid PPL procedures and the review mechanism of the PPA. Therefore, individual ministries have frequently introduced new exemptions. Under single party rule, parliamentarians were unable to check and balance the changes proposed by the government. Thus big-ticket projects<sup>5</sup> and/or agencies responsible for these kinds of projects are also excluded from the scope of the PPL. The procurement procedures of exempted contracts are quite flexible compared with those managed within the scope of the PPL<sup>6</sup>, thus making the former types more prone to the abuse. Although the expenditures of public institutions are finally audited by Turkish Court of Accounts (TCA), flexible procurement rules may still reduce the efficiency and effectiveness of audit by the TCA.

#### **4.2. The use of non-competitive procurement procedures**

The scope of special conditions enabling the use of non-competitive tender procedures has been expanded over the years. Therefore their use has significantly increased over time. Table 3 provides supporting figures for this argument. For instance, the use of restricted procedure has

<sup>5</sup> For instance, 2011 Winter Universiade Olympics with a cost of €225 million; Fatih project aiming at putting a tablet computer on the table of every student in elementary schools with a cost of €2.8 billion in total; organization of G-20 meeting to be held in 2015 with a cost of €365 million; IMF-World Bank Istanbul Summit with a cost of €107 million (ironically, IMF-World Bank along with the EU as external anchor forced Turkey to undertake the EU procurement directives with an objective to remove exemptions among others in public procurement in the wake of 2000-01 financial crisis).

<sup>6</sup> While defending the exemption of G20 meeting from the PPL, an AKP's deputy said that "we would need to become flexible against unexpected developments, because it is a huge organization. For instance, if we rented 50 luxury automobiles and used just 10, we would have been held accountable for the unused 40 cars under the PPL provisions" (Kuvel, 2014).

grown from 2% in 2008 to 9 % in 2013. Moreover, the share of direct procurement<sup>7</sup> in total has increased from 7% in 2008 to 21% and 12% respectively in 2011 and 2012, and fell back to its initial value of 7% in 2013. Conversely, the proportion of competitive open procedure in total has sharply dropped by 8%, from 81% in 2008 to 73% in 2013 (Row I in Table 3).

One of the main goals of the EU procurement directives is to improve competitive conditions in the single market. Conversely, Turkey appears not keen to benefit from international competition in procurement markets. The PPL involves a specific provision which enables contracting agencies to apply a price advantage up to 15% for domestic bidders<sup>8</sup>. Furthermore, the procuring administrations may enable only domestic bidders to participate in public tenders in cases when the estimated costs fall below the threshold values<sup>9,10</sup>.

Row II in Table 3 again provides information with respect to international participation in total public procurement. The share of internationally competitive procurement in total dropped from 68% in 2008 to 63% in 2013. In other words, 37% of total procurement was closed to international competition in 2013. Furthermore, the domestic price advantage was extensively used. The proportion of public procurement with domestic price advantage in international tenders has significantly risen from 15% in 2008 to about 40% in recent years. Turkey's growing interest to protect domestic bidders against international players may however backfire in the common market while helping consolidation of some domestic actors. Moreover, the lack of foreign competition may mitigate efficiency in public procurement, facilitating opportunistic behaviours between domestic bidders and procurement officials.

### 4.3. Reducing sanctions

Corruption in public procurement requires collusion among politicians, bureaucrats and businessmen. In 2013, the country witnessed an unprecedented solidarity between ruling AKP on the centre-right and the main opposition People's Republican Party (*Cumhuriyet Halk Partisi*, CHP) on the centre-left. Under this solidarity initiative, two parties along with the support of other smaller parties, National Movement Party, (*Milliyetçi Hareket Partisi*, MHP) and Peace and Democracy Party (*Barış ve Demokrasi Partisi*, BDP) unanimously amended Turkish Penal Code Law N. 5237 (TPC) in order to reduce the term of imprisonments imposed on the those engaging in bid-riggings in public tenders.

In fact, the statement made the then-Interior Minister at the beginning of the year 2014 provides a useful insight to help better understand the very *raison d'être* of this amendment. Between the year 2009 and the year 2013 the ministry authorized 3,861 investigations for mayors across the country (Cihan News Agency, 2014). The breakdown of this figure according to the political parties is as follows: AKP (1,682), CHP (1,181), MHP (481), BDP (199), and others (318). Allegations against mayors basically involve bid-rigging in public tenders as well as the forgery of official documents and membership in a terrorist organization. Apparent-

<sup>7</sup> Direct procurement enables the contracting agencies to purchase their needs directly from the sole supplier through negotiating about technical terms and price under certain conditions.

<sup>8</sup> Domestic bidder means Turkish citizens and legal persons established in accordance with the Laws of Republic of Turkey.

<sup>9</sup> The threshold value of works procurement was about €11 million in 2014.

<sup>10</sup> The law amendment of 2013 made optional domestic price advantage of up to 15 % compulsory for medium and high-technology industrial goods. The amendment introduced offsets which allow the contracting agencies to request compensating measures if goods are not produced domestically. The change contradicts the EU *acquis*.

ly, none of the political parties represented in the Turkish Grand National Assembly (TGNA) were sure whether their mayors would remain clean. The relief introduced by the amendment would also be exploited by the procurement officers of central government as well as that of local administrations. When taking into account the signal sent by the solidarity of political parties represented in the TGNA in the amendment process, it is reasonable to suggest that launching an investigation for the bid-rigging allegations would hereupon be hampered, while mischief in public tenders would be implicitly tolerated.

**Table 3. Selected Procurement Statistics (%)**

Years		2008	2009	2010	2011	2012	2013
<b>I. Use of procurement procedures (as share in total)</b>	open procedure	81.0	79.0	78.0	66.0	71.0	73.0
	restricted procedure	2.0	2.0	4.0	7.0	9.0	9.0
	negotiated procedure	10.0	11.0	9.0	6.0	8.0	11.0
	direct procurement	7.0	8.0	10.0	21.0	12.0	7.0
<b>II. Foreign participation in total procurement</b>	share of procurement open to foreign participation	68.0	66.0	67.0	61.0	64.0	63.0
	share of procurements with domestic preference in procurement open to foreign participation	15.0	21.0	21.0	34.0	42.0	38.0
<b>III. Cancellation rate of tenders complained</b>	cancellation rate of tenders complained	11.9	6.2	4.1	3.5	3.7	2.2

Source: Public Procurement Agency

#### **4.4. Appeal mechanism**

An important particularity of the PPL was the establishment of the Public Procurement Agency and the introduction of appeal mechanism for bidders who claim that they have suffered from a loss of a right or otherwise damage by the process. The first members of the Public Procurement Board (PPB) had been appointed before the AKP took office in 2002. The AKP governments completely reshuffled formerly appointed board members in 2007. The appointment criteria of board members are allegedly the relations to the AKP's cadres rather than merit. As a result of such political appointments, the PPB has allegedly begun not to consider some award decisions as a violation of law in recent years which were regarded as infringement by ex-members of the Board. The policy shift of the PPB regarding appeal decisions are explained as an attempt to ignore or tolerate irregular procurement decisions of the central government and the AKP municipalities. Row IV in Table 3 depicts cancellation rates of tender decisions complained in works procurement. While the PPB was cancelling 11.9%

of tenders appealed in 2008, it invalidated just 2.8% in 2013. Note that the cancellation rate was 22.9% in 2006 which was the very last year of tenure of board members appointed before the AKP. These figures apparently illustrate how the decisions of PPB have shifted from protecting complainants towards safeguarding accused contracting agencies.

### III. Public-Private Partnerships

Public-private partnerships have been extensively used in many European countries including Turkey for the delivery of infrastructure investments over the last two decades. Unlike EU procurement directives, the current Turkish PPL does not involve rules and procedures for the procurement of PPPs. Therefore, the PPA is not in charge of exercising *ex post* control on PPP procurement, implying that the decisions taken in bidding processes by the contracting agencies are appealed only to the courts where delivering final verdicts may last for years, which may indeed reduce the effectiveness of the appeal.

Concerning implementation, 72 contracts with a project value of €52.8 billion were signed between the beginning of 2008 and the end of 2013. These contracts constitute 41% of those PPP contracts which were delivered between early 1990s and 2013, while the value of the contracts of the period of 2008-13 accounts for 67% of the total, indicating that the government has tended to deliver larger-scale investment projects through PPPs in the most recent years.

#### 1. Relations Between Government and Businesspeople

17 out of 72 PPP contracts were awarded to eight companies which won contracts individually in some tenders or jointly in others since 2008. The value of contracts awarded to these companies is worth about €43.2 billion and accounts for 82% of total projects. The main characteristic of these companies among others is that they are key participants of the so called ‘*pool media*’ which was allegedly formed by the request from top level government officials according to the corruption prosecution reports and voice recordings leaked on 17 and 25 December 2013. According to Bloomberg (Srivastava et al. 2014) and many other sources<sup>11</sup>, an attempt was made by business allies of government to secure control of Sabah-ATV media group in order to reposition it as the government’s mouthpiece. Aforementioned eight companies were allegedly required to put 630 million US dollars in the pool in return for the promises to award them major government tenders including a multibillion-euro third airport in Istanbul and some other major transport and energy projects<sup>12</sup>. Furthermore, it was allegedly promised by some members of government to provide loans from public banks for those who claim lack of cash money to contribute to the pool. Accordingly, the Sabah-ATV media group was purchased by one of members of the pool allegedly with the pooled funds.<sup>13</sup>

All of those alleged to have participated in the pool denied any wrongdoing (Dombey, 2014). The Turkish government has described the bribery and corruption accusations as “a judicial coup

<sup>11</sup> See among others, Cengiz (2013), Rethink Institute (2014), Schenkkan (2014), and sources cited therein.

<sup>12</sup> Besides, the members of ‘the pool media’ also allegedly made donations, upon request of top level decision-makers, in the form of both cash and real estate to the Turkey Youth and Education Services Foundation (Türkiye Gençlik ve Eğitime Hizmet Vakfı-TÜRGEV) whose executive board is composed of relatives and close friends of the then Prime Minister (Gürsel, 2014).

<sup>13</sup> In the meantime, a deputy of the main opposition party, CHP, directed a parliamentary inquiry (Oran, 2013) to the then Prime Minister in order to ask whether a minister on behalf of him had asked millions of US dollars in bribes from a group of businessmen known to be close to the government for the acquisition of the Sabah-ATV Media Group. As of this writing, the inquiry has been unanswered.

attempt”, launching a strong fight against investigators at police and judiciary through sacking and relocating hundreds of officials who had initiated the graft probe. The government got strong support from voters in municipal and presidential elections held respectively in March and in August 2014 as proof of renewed legitimacy, but concerns still remained. In autumn 2014, the newly-appointed chief prosecutors dropped the corruption prosecution against all suspects including ministers, their relatives and businessmen. The reasoning behind the decision was that previous prosecutors in the probe breached judicial procedures, and conducted unlawful wiretaps and physical surveillance in order to attempt to overthrow the government (Gürsel, 2014)<sup>14</sup>. Although the government has survived, the four cabinet ministers whose sons and relatives were linked to the investigation were forced to resign (Arango, 2014). Furthermore, the then Minister for Environment and Urban Planning, one of alleged ministers, announced his resignation from Cabinet and Parliament, further calling on the then Prime Minister Erdoğan to resign because most of the amendments on construction plans mentioned in the investigation had been made within the then Prime Minister’s knowledge (Hürriyet Daily News, 2013)<sup>15</sup>. Finally, a parliamentary investigation committee established to examine the graft allegations decided not to commit for trial four former ministers accused, and TGNA subsequently approved the Committee’s decision.

At the end of the day, the companies alleged to have participated in the scheme won the new airport tender of Istanbul as well as some other major tenders in the transport and energy sectors. Furthermore, they stand out as the winners of large-scale public tenders over the last decade. Although the establishment of these companies goes back to years before, their growth has gained great momentum in recent years.

## 2. Risks in PPP Contracts

PPP contracts give the private operator the right only to collect revenues. Since PPP assets are still owned by the government, they cannot be pledged against loans which are expected to finance the project concerned. The only asset to be used as collateral is the revenue stream of the project concerned. Besides, the governments generally retain a right to early termination of the contracts under certain conditions. If the government terminates a PPP contract before it expires, the creditors have no right to the revenue generated in the remaining period of the original contract. These limitations inherent in part of the PPP/concession contracts increase re-payment risks, raise capital costs and affect overall financing conditions.

In this context, some large scale PPP projects in Turkey had been long unable to qualify for the needed project finance. The related laws were amended with an objective to provide loan guarantees for PPP projects in 2013. Within the framework of the new guarantee scheme, the government will assume the relative debt in the events in which PPP contracts are terminated before their expiration date, and then take over PPP assets in question. Furthermore, the newly introduced guarantee scheme has also been granted to previously signed contracts which had been still unable to put altogether the needed private finance. This is not the only legal change which affects financial conditions of PPP contracts after they were signed. For instance, the Value Added Law was amended in 2012 to introduce exemptions for PPP projects signed be-

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<sup>14</sup> Incidentally, the then Prime Minister Mr. Erdoğan publicly confirmed at least one of wiretaps in which he was instructing a manager of a broadcasting firm to remove an opposition politician’s speech on TV (Schenkkan, 2014).

<sup>15</sup> Soon after, the minister took back his resignation and apologized to the then Prime Minister.

fore the amendment. All in all, these kinds of amendments provide extra advantages for those private companies.

The stated reasoning of amendments was to improve the bankability of PPP contracts, and deliver public services in question on time. Even if these arguments are valid, it is still plausible to claim that the expected benefit of competitive tender being executed long before the amendments took place would have been significantly reduced if the winning bidder had strategically overbid or underbid to enter a PPP contract with an expectation or assurance of revising it at a later stage<sup>16</sup>.

It is a well-known fact that PPP contracts have frequently been revised in Turkey, but their nature of confidentiality seldom enables third parties to evaluate financial consequences of the amendments. Fortunately, we still have open sources which may signal risks regarding the contract revisions. In this respect, the new multi-billion-euro airport tender of Istanbul, which was won by a consortium including companies involved in the “pool media” in 2013, represents an interesting case. The tendered airport’s estimated cost is about 28.9 billion euros of which 6.7 billion euros is investment value and the rest (22.2 billion euros) will be paid to government by the consortium as annual rents over 25 years starting when the airport is set to open. Like many other PPP projects, the airport project has long suffered from lack of funding and is likely to benefit from debt assumption guarantee as well. Most strikingly, the BOT (Build, operate, and transfer) contract of airport was allegedly revised to reduce investment cost. According to the news reported by Boyacıoğlu (2014), reaching the desired elevation level for the airport, which is planned to be built on an area with many old open-pit coal mines that must be filled, requires around 2.5 billion cubic meters of filling material. After the contract was signed, the elevation level of the airport has been allegedly reduced to lower the amount of filling material needed<sup>17</sup>. A deputy of the main opposition party CHP submitted a parliamentary inquiry (Acar, 2014) to be replied by the Minister of Transport, Maritime Affairs, and Communications (TMAC hereafter) in order to request information about (i) whether the elevation level was reduced by 30 meters which may carry out cost savings amounted to 2 to 3 billion euros, (ii) why the revision of elevation was made shortly after the tender, and (iii) what else changed other than identification of winners after the tender<sup>18</sup>.

Last but not the least, the Turkish Court of Accounts (TCA, 2012: pp. 22-4) reported that while transferring operation rights of electricity distribution companies, millions of euros were left in the bank accounts of the companies on the transfer day. During transfer of operation rights of distribution networks, the cash accounts of distribution companies were underreported, and non-reported accounts were not taken into account in the valuations, and

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<sup>16</sup> Şimşek (2012) reported that some of failing bidders of Gebze-Izmir Motorway and Izmit Bay Crossing Project with an investment value of 4.9 billion euros had claimed that they would have submitted higher bid, had they been told that technical and financial specifications would be changed in this manner.

<sup>17</sup> In fact, in a newspaper interview, one of the members of the consortium said: “We would build up the airport much cheaper than its estimated cost, that’s why we did not get nervous in the tender. If we had had a foreign partner, we would seldom have submitted a bid at such a high level” (Güngör, 2013). This businessman’s tax debt of €151.6 million was allegedly cleared through reconciliation in 2010 as well (Today’s Zaman, 2014).

<sup>18</sup> As of this writing, the inquiry has been still unanswered within required period of time. However, the Minister of TMAC informally asserted in the press that all bidders before the tender had been informed about that a change may be made in the elevation level of airport project through an addendum, if needed at further stages of investment. Moreover, he noted that if a cost saving emerges from a change in the elevation level, it will certainly go to the public purse (Hürriyet Daily News, 2014).

eventually transferred to acquiring firms. On the other hand, the report stated that compared to previous months, electricity usage was also significantly underreported in the bills a month before the contract date, then the non-reported usage was billed by new private-operators, causing a wealth transfer from public to private party.

## CONCLUSIONS AND POLICY RECOMMENDATIONS

The Public Procurement Law was put in force in 2003 with an objective to improve competition, transparency and integrity. Although it had some limitations compared with the EU directives, its enactment was a positive step in a country where irregularities in public tenders were frequently encountered. However, the post-2002 incumbent AKP repeatedly changed it, so that it has significantly been deviated from its original structure.

The most striking feature of amendments is the emergence of frequently introduced exemptions. As such, dozens of public contracts have been taken outside the scope of it over time. Therefore, the share of Turkish public procurement in GDP (e.g. % 5-6) is much lower than the EU equivalent (% 15-16). The exemptions are frequently introduced in order to avoid tight regulations of the PPL and oversight authority of the Public Procurement Agency. The exempted public contracts have been procured through relatively flexible rules and procedures. Note that even though the flexible procurement rules and procedures may expedite procurement process, they are still prone to opportunistic behaviour. Furthermore, the use of non-competitive tender procedures such as direct procurement and restricted procedure has been on rise while the use of competitive open procedure is declining. In the meantime, the foreign participation in public tenders has decreased, and the price advantage to domestic bidders in international tenders has been extensively and increasingly used in recent years.

Unlike the EU regulations, the PPL does not include procedures and provisions for the delivery of PPP contracts. Given the fact that, delivering especially large scale infrastructure investments through PPPs has emerged as one of the crucial policy objectives of the government, this issue becomes more significant than ever. Currently, the legal structure of PPPs is very fragmented, implying that almost every sector and model has its own procurement law which is largely incompatible with the PPL and the EU regulations. Not surprisingly, smaller group of companies which have allegedly close connections with top level politicians won PPP contracts worth billions of euros. In other words, the public procurement and PPPs have likely to become significant means of business development for particular enterprises cultivating close relations and affiliations with high-level representatives of the government.

Based on our analyses and findings, the following policy implications and recommendations could be put forward:

Public procurement regime of any country cannot and should not be analysed independently of overall characteristics of dominant governance system in that country. Thus, institutional and incremental improvements in Turkey in such areas as rule of law, independence, impartiality and integrity of the judiciary, transparency and accountability of governing bodies would definitely contribute to the betterment of public procurement policies and practices in the country.

The initial legal-institutional framework governing public procurement should not be the sole source for understanding the actual situation in the country. The changes and challenges emerged during the implementation phase should also be assessed

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diligently. It is plausible to assert that through the frequent amendments and exemptions introduced over the years, some key properties of the PPL serving as a general framework for public procurement in Turkey has been significantly eroded. Therefore, policy makers should give priority to restore-reinvigorate key elements of the PPL aimed at supporting effective competition and reducing risks of collusion and corruption in public procurement in line with the needs of the country as well as with EU directives and best practices.

3. The increased use of PPPs in Turkey calls for a renewed attention from policy makers and the public at large to the need for developing a comprehensive legal-institutional framework for PPPs, as well as to the risks and challenges surrounding the current practices in the country.

4. Policy makers and researchers should also pay long-overdue attention to institutional autonomy and capacity of public bodies regulating, overseeing and/or managing public procurements. Governance characteristics and operational capabilities of public procurement agencies should not be left out of current policy debate as 'black boxes' of public procurement system.

5. Finally, the data recording and information sharing policies of the PPA and other public organizations involved public tenders and purchases should be improved so as to increase transparency and accountability. Monitoring and control mechanisms associated with public procurement system of the country should shift attention from almost solely focusing on procedural adequacy to detecting systemic fraud (cf. Fazekas et al, 2014, p. 88). Although general tendencies can be observed through aggregate data, the contract level data are still needed in order to evaluate bidding strategies in certain tenders and sectors. Nevertheless, the PPA of Turkey does not publish tender-level data, reducing transparency and limiting external evaluation of researchers. Thus, the contract-level data should be published in the standard manner in order to improve transparency and accountability by allowing third parties to use various data mining techniques for independently assessing the public procurement policies and practices in the country.

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## Acknowledgments



This project is co-funded by the Seventh Framework Programme for Research and Technological Development of the European Union

This policy report, *The Anticorruption Report 3: Government Favouritism in Europe*, is the third volume of the policy series “The Anticorruption Report” produced in the framework of the EU FP7 ANTICORRP Project. The report was edited by Prof. Dr. Alina Mungiu-Pippidi from the Hertie School of Governance, head of the policy pillar of the project.

ANTICORRP is a large-scale research project funded by the European Commission’s Seventh Framework Programme. The full name of the project is “Anti-corruption Policies Revisited: Global Trends and European Responses to the Challenge of Corruption”. The project started in March 2012 and will last for five years. The research is conducted by 21 research groups in sixteen countries.

The fundamental purpose of ANTICORRP is to investigate and explain the factors that promote or hinder the development of effective anti-corruption policies and impartial government institutions. A central issue is how policy responses can be tailored to deal effectively with various forms of corruption. Through this approach ANTICORRP seeks to advance the knowledge on how corruption can be curbed in Europe and elsewhere. Special emphasis is laid on the agency of different state and non-state actors to contribute to building good governance.

Project acronym: ANTICORRP

Project full title: Anti-corruption Policies Revisited: Global Trends and European Responses to the Challenge of Corruption

Project duration: March 2012 – February 2017

EU funding: Approx. 8 million Euros

Theme: FP7-SSH.2011.5.1-1

Grant agreement number: 290529

Project website: <http://anticorrrp.eu/>

Full country reports were published at <http://anticorrrp.eu/publications/integrated-report/> and at <http://anticorrrp.eu/publications/country-policy-reports-on-institutions-in-public-procurement-for-the-infrastructure-sector/>

All these contributions were given as part of the European Union Seventh Framework Research Project ANTICORRP (Anti-corruption Policies Revisited: Global Trends and European Responses to the Challenge of Corruption). The views expressed in this report are solely those of the authors and the European Union is not liable for any use that may be made of the information contained therein.