

GEDİK & ERAKSOY

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The CMB enacts the new Tender Offer Communiqué

Within the context of The Capital Markets Law No. 6362 (the CML), the mandatory tender offer (MTO) rules have been slightly altered for the better protection of minority shareholders by way of a change in the management control of a listed entity.

The Capital Markets Board (CMB)'s Communiqué on Tender Offers entered into force on 23 January 2014 (the Tender Offer Communiqué). The new piece of legislation shall apply for mandatory or voluntary tender offers (VTO) to be conducted from its effective date.

Overview of MTO under the CML

Under the CML, failure to launch a mandatory tender offer results in the voting rights pertaining to the newly acquired shares (*i.e.*, the majority shares) being frozen. This change seeks to push companies/acquirers to fulfil their tender offer liabilities in a timely manner with a view to protecting minority shareholders.

According to the previously applicable Communiqué Serial IV, No: 44 on Tender Offers (the **Old Communiqué**), which was adopted under the old Capital Markets Law, management control was defined as direct or indirect acquisition of 50% or more of the capital or voting rights of a publicly held entity. Regardless of such threshold, acquiring privileged shares that give the holder the right to nominate or appoint a simple majority of the board members was also defined as acquisition of management control.

As per the CML and the Tender Offer Communiqué, (i) direct or indirect acquisition of more than 50% of the voting rights of a publicly held entity, or (ii) regardless of such threshold, direct or indirect acquisition of privileged shares which give its holder the right to nominate or appoint a simple majority of the board members of a publicly held entity shall result in a change in management control, and trigger a mandatory tender offer. Further, the CML provides that any change in management control, resulting from agreements between existing shareholders of a public entity (*e.g.* shareholders arrangements/agreements) also triggers the mandatory tender offer requirement.

Accordingly, the CML and the Tender Offer Communiqué change the management control definition in the Old Communiqué, resulting in the change of an MTO triggering event from the acquisition of 50% or more of the capital or voting rights to the acquisition of more than 50% of the voting rights (*i.e.*, 50% + 1 voting right) of the relevant public entity.

We will try to summarise the important aspects of the Tender Offer Communiqué and the differences between this and the Old Communiqué.

Notable aspects of the Tender Offer Communiqué

Under the Tender Offer Communiqué, the offeror shall take reasonably necessary measures to ensure payment of the full tender price. The CMB is now authorised to request a guarantee for payment of the tender offer price by a Turkish bank or a third party legal entity.

While the Old Communiqué granted a 45 business day period starting from the MTO triggering event, the Tender Offer Communiqué provides a term of two months from the date of the MTO triggering event until the start of the actual MTO period. In addition, if the offeror does not initiate the MTO during the two months period, it may request an extension from the CMB to launch the MTO. However, this extension does not prevent the application of daily interest to the MTO price.

The CMB has been granted with the express authority to suspend or prohibit the MTO process, if information provided in the relevant information form is wrong or misleading.

Mandatory tender offer price

The Tender Offer Communiqué sets out different calculation methods depending on whether the target company is listed or not.

If the target company is a listed entity, the mandatory tender offer price cannot be less than: (i) the six-months arithmetical average of the stock price, such six-months ending on the day preceding the date on which execution of an agreement on the transfer of listed entity's shares has been disclosed; and (ii) the highest amount paid for the acquisition of the same type of shares during the six months preceding the start of the MTO. In addition to the two factors stipulated above, for mandatory tender offers to be conducted in the case of an indirect change in management control; a valuation report should be prepared by taking the date of the share transfer as basis.

Whilst a valuation report is not expressly required for listed entities, the Tender Offer Communiqué, as in the Old Communiqué, re-iterates the CMB's ability to request a valuation report to be prepared.

Further, the Tender Offer Communiqué provides that while the MTO price is calculated based on a share transfer/purchase agreement; secondary obligations, which may be considered as part of the purchase price, shall also be taken into account for the MTO price.

In addition, the Communiqué goes on to state that any future conditional payments agreed between the contracting parties shall also be taken into consideration *vis-à-vis* the MTO price. However, the Tender Offer Communiqué is silent on whether these conditional payments shall be taken into consideration before or after realisation of such conditions. Further to our reading of the Communiqué, we believe that such conditional payments (*e.g.* future performance payments, an increase in the purchase price in case of certain financial results etc.) should be taken into consideration while determining the MTO price.

If the MTO does not start within the two months period, statutory interest shall apply. The Tender Offer Communiqué differs from the interest rates applied in the Old Communiqué. Accordingly, if the purchase price is denominated in Turkish Lira, the tender offer price shall be subject to statutory interest of the yearly TRLIBOR rate plus 50%, to be accrued for each day after the expiry of the two months period. In the Old Communiqué, such statutory interest used to be the weekly TRLIBOR rate plus 30%. Where the share purchase price is denominated in EUR or USD, the yearly rate of 50% shall apply to EURIBOR or LIBOR respectively.

Voluntary tender offer

As in the Old Communiqué, a voluntary tender offer may be launched for all or a part of the publicly held entity's shares. The CMB shall evaluate each application on a case by case basis regarding whether it is a complete or a partial VTO.

Until the Tender Offer Communiqué, directors of the target entity did not play any part in VTO procedures. However, the Tender Offer Communiqué provides certain rights and liabilities to the target entity's directors, thus adding another actor to a VTO process.

Accordingly, the board of directors of the target company is required to prepare a report on possible future consequences (including their opinions); the board is required to disclose the report on the business day preceding the launch of a VTO.

Further, the Tender Offer Communiqué also paves the way for a competing bid to be launched during a VTO. This is a brand new provision in Turkish capital markets legislation, where competing bids on voluntary tender offers have not been stipulated before. Accordingly, a third party may launch a competing tender offer during the VTO period. The Tender Offer Communiqué is silent on the price which can be offered by the competing bidder.

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