

GEDİK & ERAKSOY

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Mergers and Demergers of Publicly Listed Companies

In line with the provisions of the Capital Markets Law (the CML) the Communiqué on Mergers and Demergers (II-23.2) (the New Communiqué) is published in the Official Gazette dated 28 December 2013 and numbered 28865 to specifically set forth the rules of mergers and demergers of publicly held companies.

Legal Framework, Scope of Application and Limitations

The Capital Markets Board (the CMB) published the New Communiqué with the aim of regulating the rules and procedures for mergers and demergers of entities, at least one of which is a publicly held company. The New Communiqué supersedes the old Communiqué on Mergers (I-31) (the **Old Communiqué**).

The scope of the New Communiqué includes: (i) the merger of public companies with capital companies (*sermaye şirketleri*) (i.e. joint stock corporations (*anonim şirket*) and limited liability partnerships (*limited şirket*), (ii) the merger of public companies with individual partnerships (*sahıs şirketleri*) and cooperatives, provided that the public company acts as the acquiring company and survives upon completion of the merger; and, (iii) the demerger of public companies.

A company in liquidation may also be a party to a merger, provided that this company is the transferor entity and will dissolve upon completion of the merger, and this company's liquidation proceeds have not yet been distributed. A company which has incurred losses in the preceding years may only merge with a company which has sufficient equity to cover these losses.

The merger of a publicly listed company with a private company may be restricted in cases where there is a significant increase (e.g. of more than 100%) in the share capital of the publicly listed company, or in case of a merger by way of a new establishment, the percentage of shares in the newly formed company to be allocated to the shareholders of the publicly listed company is deemed to be insufficient (e.g. less than 50% of the share capital of newly formed company), as set forth under the New Communiqué.

In the case of a merger by way of acquisition, if the acquiring company is an unlisted entity, the pre-merger shares of such company may not be traded on the stock exchange within six months of the commencement of the trading of the shares of this merged entity. Pre-merger shares may be traded on the stock exchange gradually following the expiration of six months period, within the limits set forth in the New Communiqué.

Types of Merger and Demerger under the New Communiqué

As per the New Communiqué, the types of merger and demerger are as follows:

- Merger:
 - Merger by acquisition
 - Merger by formation of a new company
- Demerger:
 - Full demerger
 - Partial demerger
 - Partial demerger by shareholding (*iştirak modeliyle kısmi bölünme*)
 - Partial demerger by transfer of shares to shareholders (*ortaklara pay devri modeliyle kısmi bölünme*)

The Procedure

The New Communiqué does not provide for a clear road map for merger and demerger transactions; rather, it regulates the specific requirements for each action. Therefore, the step list provided below is an inference based on the specific provisions of the New Communiqué, and is designed to set out the main steps for mergers and demergers of publicly listed companies.

Step 1 – Corporate Authorization

In order to commence merger or demerger transactions, parties to such transactions are required to have appropriate corporate authorisation for the transaction from their respective governing bodies (*yönetim organı*).

Step 2 – Reports

The old requirement for a report of court-appointed experts, as stipulated under the Old Communiqué, is no longer required under the New Communiqué.

Financial statements to be taken into account for merger/demerger transactions are required to be prepared in the accordance with the accounting standards set forth by the CMB, and must be subject to a private independent audit. This private independent audit requirement will not be applicable in cases where such financial statements have been independently audited as per the CMB regulations. This independent audit report must include the affirmative opinion of the independent auditor. Such independent audit reports are subject to the CMB's inspection and the CMB may request a new independent audit report if (i) the CMB determines that there are issues affecting the exchange ratio, or (ii) the independent audit report indicates conditional opinion on the transaction and there are issues affecting the exchange ratio. If there is a material adverse change in the asset value or the financial status of the parties to the relevant merger/demerger transaction, an additional report must be prepared and submitted to CMB by the independent auditor.

An expert entity opinion (*uzman kuruluş görüşü*) is required for the determination of the value of the parties (or their assets) to the relevant merger/demerger transaction (as of the date of the financial statements to be taken into account for the relevant merger/demerger transaction), and the exchange ratio. The expert entity opinion must state that the exchange ratio is fair and reasonable.

Step 3 – Preparation of the merger/demerger agreement and merger/demerger reports

The minimum content of the merger/demerger agreement is set forth in the New Communiqué. Merger/demerger agreements must be prepared and signed by the directors of the relevant parties.

In case of a material change in the financial status of one of the relevant companies, the board of directors of the relevant parties must prepare a merger/demerger report (which may be prepared jointly), including the minimum content as set out in the New Communiqué.

Step 4 – Application to the CMB and Disclosure Requirements

Public companies are required to draft an announcement text, the content of which is determined by the CMB. Upon approval by the CMB, such announcement text must be disclosed to the public.

After resolving upon the merger/demerger transaction, parties are required to apply to the CMB with the relevant documents as set out in the New Communiqué.

Certain actions of publicly listed companies within the scope of merger/demerger transactions, as stipulated in the New Communiqué, are required to be disclosed on the Public Disclosure Platform (*Kamuyu Aydınlatma Platformu*) and on the relevant company's website. In the case of unlisted public companies, such disclosures must be made in the CMB's website and on the relevant company's website, in line with the CMB's disclosure regulations. All of the disclosed information and documents must be kept on the relevant company's website for at least five years.

Step 5 – Registration with the CMB and the Issuance Certificate (*İhraç Belgesi*)

Merging entities must apply to the CMB to obtain an issuance certificate within six business days following the general assembly of shareholders meeting approving the merger/demerger agreement or merger/demerger plan. The issuance certificates will be granted for:

- In the case of a merger by acquisition, for the shares to be issued due to the merger and the current shares representing the pre-merger share capital (in case the acquiring company is not registered with the CMB);
- In the case of a merger by formation of a new company, for the shares of the new company to be formed;
- In the case of a full demerger, for the current shares and the shares to be issued for the demerged company/ies acquiring the assets; and,
- In the case of a partial demerger by the transfer of shares to shareholders, for the current shares and the shares to be issued for the demerged company/ies acquiring the assets.

Accelerated Merger/Demerger Process

Accelerated Merger: The independent audit report, merger report and expert entity report are not required for merger transactions in the accelerated merger process, which includes mergers where: (i) the acquiring public company owns 95% or more of the shares with voting rights of the transferor entity; (ii) the shareholders of the transferor entity are not required to be granted shares in the acquiring public company; or (iii) the shareholders of the transferor entity are required to be granted shares in the acquiring public company, but such shares are offered with an option of cash payment in exchange of the shares in the acquiring public company. The announcement text for accelerated mergers has a different content, determined by the CMB.

Accelerated Demerger: The independent audit report and expert entity report are not required for demerger transactions in accelerated demerger process, which includes partial demerger by shareholding where the demerging public company owns 95% or more of the shares with voting rights of the acquiring company. The announcement text for accelerated demergers also has a different content, determined by the CMB. In the case of an asset transfer, the transferring entity must have been incorporated within the preceding year of the demerger application and must not provide any services or products.

Squeeze Out Mergers

Under the Turkish Commercial Code, squeeze out mergers may be undertaken and the New Communiqué sets forth details on the consideration to be paid to the shareholders who will be squeezed out of the transferor entity. The squeeze out clause must be included in the merger agreement and requires the affirmative votes of 90% of the existing shareholders of the transferor entity. The squeeze out fee may be determined in cash or in the form of a security that can be traded in the stock exchange; however, such consideration is required to be paid in cash if the squeezed out shareholders request.

The exchange ratio or the unit price of the security offered as the squeeze out fee must be determined by taking into consideration the expert entity opinion, and such exchange ratio or unit price must be announced in the announcement text.

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