

GEDİK & ERAKSOY

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Squeeze-out: One-way ticket out of capital markets legislation

In accordance with the new Capital Markets Law No. 6362 (CML), the Capital Markets Board (CMB) recently published the Communiqué on Squeeze-out and Sell-out Rights (Communiqué), which deals with the squeeze-out of minority shareholders by the majority shareholder and the simultaneous trigger of minority shareholders' right to sell-out their shares to the majority shareholders. The Communiqué, which becomes effective on 1 July 2014, sheds light on the applicable procedures of how to exercise the squeeze-out right, and the subsequent procedures to be completed by the shareholders (majority and minority, where applicable) and the publicly held corporation itself.

The squeeze-out right of majority shareholders was first introduced to Turkish law by the Turkish Commercial Code No. 6102 (TCC). While the provisions of the TCC may have been interpreted to include publicly listed entities within its scope, Article 27 of the CML expressly omits TCC provisions being applicable for publicly held corporations (i.e. entities subject to the CML; listed on the Borsa Istanbul A.Ş. (BIST) or not listed). As per the Communiqué, the applicable procedures for exercise of the squeeze-out right slightly differ for listed and unlisted publicly held corporations, especially when it comes to the calculation of the squeeze-out right price. Kindly note that while the squeeze-out right is triggered for majority shareholders, the sell-out right is simultaneously triggered for minority shareholders.

How is the squeeze-out right triggered?

The Communiqué defines controlling shareholders as shareholders holding 95% of the total voting rights of a publicly held corporation. The Communiqué stipulates that such controlling shareholders possess the right to squeeze-out minority shareholders. That said, the Communiqué goes on to provide that the controlling shareholders shall have either (i) reached the 95% threshold as a result of a recent tender offer, or (ii) shall reach or exceed 95% through additional purchases in the market in order to trigger the squeeze-out right. Subsequently, an existing ownership of 95% or more of the voting rights in a company is not sufficient *per se* to exercise squeeze-out rights; the controlling shareholder should make additional share purchases to trigger the squeeze-out right.

How is the 95% threshold is calculated?

For calculation of the 95% ownership of voting rights, the direct and indirect shares and the privileges over the shares held by majority shareholders and persons acting in concert, if any, shall be taken into account. For consideration of privileged shares, the Communiqué provides expressly that the privileges shall be applicable for all items on general assemblies, *i.e.* no restrictions or reserved matters shall be put in place. Otherwise, the privileged shares shall be taken into account over their nominal value.

How is the squeeze-out right exercised?

A shareholder, which turned into the controlling shareholder by reaching or exceeding (through additional purchases) the 95% threshold, shall apply to the publicly held corporation within a period of three months upon becoming the controlling shareholder. The Communiqué, very interestingly, stipulates that the three months' period is a lapse of time period. Thus, once the three months period is over, the controlling shareholders' right to squeeze-out terminates. The application to the publicly held corporation shall also include information on the squeeze-out amount (*i.e.* minority shareholders' shares multiplied by the squeeze-out price) determined in line with the Communiqué. This amount shall be put in a blocked account.

However, the Communiqué is silent as to whether any new share purchases can trigger the squeeze-out right after the end of the lapse of time. We believe that the squeeze-out right should be triggered with each new share purchase after the end of the lapse of time period. Otherwise, the squeeze-out procedure would be a one-time only opportunity, pushing potential take-over bids to make a thorough evaluation of the target publicly held corporation. This issue requires clarification from the CMB.

How is the squeeze-out price calculated?

The Communiqué provides separate calculation methods for shares of listed and unlisted entities. The CML stipulates a "fair amount" to be determined for the squeeze-out price. The Communiqué provides that the "fair amount" of the squeeze-out shares shall be calculated as follows: (i) for listed entities: the squeeze-out price shall be equal to the 30-day weighted average of the stock price, such 30-days ending on the day preceding the date on which the disclosure of the 95% threshold was triggered by the controlling shareholder reaching 95% or exceeding its existing shareholding. The Communiqué further sets out that the arithmetical average of the 30-days weighted average of the stock price shall constitute the squeeze-out price. (ii) For unlisted entities, a valuation report shall be prepared to determine the fair value of the squeeze-out price.

What is the role of the listed entity?

Once the publicly held corporation receives the controlling shareholders' squeeze-out application, it should make a preliminary confirmation on the shareholding ratio and the squeeze-out price. If this is in order, it should proceed by passing a board resolution. In accordance with the Communiqué, the board should resolve to cancel shares of the minority shareholders, to issue new shares at the same amount of the cancelled shares and apply to the CMB for approval of the relevant issuance certificate for the new shares. If it is a listed entity, it should simultaneously apply to the BIST for its delisting.

The cancellation and re-issuance of shares is in fact a simultaneous capital decrease for the minority shares and an allocated share capital increase, the newly issued shares being allocated to the controlling shareholder.

For listed entities

Upon the controlling shareholder's payment of the squeeze-out price to the publicly held corporation, the listed entity shall apply to the Central Registry Agency through a brokerage firm for payment of the squeeze-out price to the minority shareholders. The Communiqué provides that, upon completion of the squeeze-out procedures, the corporation shall submit an amount equal to the squeeze-out price times any remaining shares (*e.g.* shares which have not been deregistered etc.), for a three years' period with Istanbul Takas ve Saklama Bankası A.Ş. (*Takasbank*).

For unlisted entities

For publicly held corporations which are not listed on the BIST, shares shall be submitted to the corporation by shareholders, and duly cancelled. Such corporations are required to acquire shares subject to squeeze-out without any time restrictions.

Is CMB approval required?

Upon the CMB's approval of the issuance certificate, the controlling shareholder shall pay the squeeze-out amount into the corporation's bank account. As provided by the Communiqué, the publicly held corporation shall also submit the CMB fee for the newly issued shares and pay the relevant amount into the CMB's accounts.

Upon completion of the above squeeze-out right process, BIST shall resolve on the delisting of the listed entity. As a result of the exercised squeeze-out right, the corporation will be deregistered by the CMB from the scope of the CML.

The procedures for sell-out right?

In accordance with the Communiqué, upon the trigger of the squeeze-out right, the minority shareholders will have the right to sell-out their shares. Accordingly, minority shareholders are also subject to the same three months lapse of time period for application to the publicly held corporation. In case the controlling shareholder would lose the 95% ownership, the sell-out right persists until the end of the three months period. The corporation shall transfer the sell-out requests to the controlling shareholder, which would then make the sell-out price payments within six days of receiving the requests.

Impact of the Communiqué

As summarised above, the squeeze-out has been introduced to Turkish legislation by the TCC. The CML took a further step to develop the squeeze-out concept and provide an accommodating legislative background. The Communiqué, effective from 1 July 2014, sets out the applicable procedures for the exercise of the squeeze-out. While reading the Communiqué, one can get the sense that it is perfectly structured, an irreversible method to push a publicly held corporation out of the scope of the CMB's authority and legislation, which can be demanding on some corporations and their shareholders. However, when we dig into the Communiqué, it is evident that, in practice, the market will push the CMB to refine the Communiqué with more expressly written provisions, with a view to helping shareholders and corporations alike.

Questions for the Communiqué

- How is the CMB positioned to overview the squeeze-out procedure? When and how will the CMB intervene?
- Is the squeeze-out right a one-time only opportunity or can the process be re-triggered through additional share purchases?
- What is the applicable time period for the valuation report required for shares of unlisted publicly held corporations?

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