

GEDİK & ERAKSOY

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Corporate Governance Principles – Extended Scope for Corporate Governance Communiqué

Interestingly, the Draft Corporate Governance Communiqué published on 19 April 2013 (Draft Communiqué) not only includes a slightly revised version of the corporate governance principles but also some new provisions with respect to the “important transaction” concept introduced by the New Capital Markets Law which entered into force on 30 December 2012 (New CML). The Draft Communiqué further contains provisions of another Capital Markets Board (CMB) communiqué regulating principles for listed entities, namely the guidelines to be followed by listed entities with respect to transactions with their related parties. It should be noted that the provisions of the Draft Communiqué stipulated below may differ with respect to listed financial institutions which are governed under the authority of the Banking and Regulatory Supervision Agency.

Legislative Background for Corporate Governance Principles

The CMB published its first set of corporate governance principles in 2003 and later amended the same in 2005. However, up until October 2011, these principles were not regulated under any communiqué and were only subject to a “comply or explain” principle *i.e.* a set of rules provided by the CMB to guide listed entities in their day-to-day operations.

However, with a drastic change in October 2011, the corporate governance principles became regulated under a communiqué and thus non-compliance with certain corporate governance principles became an activity possible of being penalised by the CMB. Then, only two months later, in December 2011, the Communiqué Serial: IV, No: 56 on Determination and Implementation of Corporate Governance Principles (**Corporate Governance Communiqué**) was published and has been applicable ever since. The reason for the CMB publish a new communiqué within two months of the previous one was the reaction of multiple sources to the requirement that all entities listed on Borsa Istanbul A.Ş. (**BIST**) (formerly known as Istanbul Stock Exchange) must comply with certain principles. This issue has been resolved by the currently applicable Corporate Governance Communiqué where the CMB classified BIST-listed entities into three groups based on their market value and differentiated the applicable corporate governance principles to each group. Similar to the Corporate Governance Communiqué, the Draft Communiqué also adopts the same principles for BIST-listed entities.

Furthermore, the CMB, in line with the requirement to enact secondary legislation pertaining to the New CML, published a Draft Communiqué for public review and comments. The Corporate Governance Communiqué will be abolished by the Draft Communiqué as of its publication date.

This article seeks to summarise the revised corporate governance principles and details of the important transactions which are regulated under the Draft Communiqué.

Important Aspects of the Draft Communiqué

The Draft Communiqué introduces new rules, *among others*, in relation to the corporate governance principles, important transactions, put rights (*ayrılma hakkı*), related party transactions, guarantees, pledges and mortgages.

Important Transactions

As its most important aspect, the Draft Communiqué provides details on important transactions, defined under the New CML. In a summary, mergers, de-mergers, transfer of an important asset, granting privileges over shares and delisting are stipulated among transactions deemed as important by the New CML and the Draft Communiqué. While the importance of the relevant transaction relates to the listed entity, its minority shareholders are also affected by such transactions. Accordingly, the New CML provides the minority shareholders with a put right to the listed entity. As per the Draft Communiqué, the put right price shall not be lower than the 30-day weighted average of the relevant stock price of the listed entity, such 30-day period starting from the date preceding the date on which the first public disclosure was made in relation to the intention to carry out the important transaction. However, it should be kept in mind that, the CMB is currently working on a separate communiqué, which will regulate the exercise of put right.

Important assets

Another important aspect of the Draft Communiqué is transactions in relation to the important assets of a listed entity. According to the Draft Communiqué, a 25% threshold applies for such transactions whereby the relevant percentage applies to different values of the listed entity in accordance with the nature of the transaction. These transactions include transactions where the listed entity is the seller/ purchaser or is the lessor or the lessee of an important asset. Depending on its role in the transaction, the total value of the listed entity based on its market value or the total value of assets as per the latest financial tables or pre-tax profits, may be taken into account.

Related party transactions

It is interesting to note that while related party transactions and applicable provisions have also been incorporated in the Draft Communiqué, they are currently regulated under a separate communiqué. Further, while the Corporate Governance Communiqué provides principles for transfer of assets as well as principles for transfer of services or obligations, the Draft Communiqué only stipulates the principles for transfer of assets.

Transactions between listed entities and their related parties are also regulated under the Corporate Governance Communiqué. However, it should be noted that, the Draft Communiqué extends this scope to transaction between publicly held companies (*i.e.* listed entities and non-listed entities within the scope of the New CML), direct and indirect affiliates of these companies and their related parties.

Although the threshold for a related party transaction remains at 5% as it was under the Corporate Governance Communiqué, the reference point for such calculation has slightly changed (*i.e.* where the value of the transaction had been calculated based on assets or sale revenue, the reference points now include market value, pre-tax profit of the listed entity). An evaluation of whether a possible transaction crosses the threshold shall be performed before entering into such transaction.

If a possible transaction is deemed to reach such threshold, a valuation report, similar to the valuation report prepared in accordance with the Corporate Governance Communiqué, shall be prepared. However the Draft Communiqué also sets out requirements for the institution preparing the valuation report. Additionally, differently from the Corporate Governance Communiqué, the Draft Communiqué requires the evaluation process to be conducted in accordance with an agreement between transaction parties.

In accordance with the New CML, the Draft Communiqué also includes details on restriction for transactions between publicly held companies, its affiliates and subsidiaries on the one hand and real or legal persons who are directly/indirectly in a management, supervision or capital relationship with said entities. The Draft Communiqué goes on to specify who is deemed to be in relation to publicly held entities, their subsidiaries and affiliates. Accordingly, any transaction between these parties and persons must be done on an arm's length basis and in compliance with similar transactions, market standards and must be fair and reasonable.

Guarantees, pledges and mortgages

The Draft Communiqué introduces a highly important provision relating to the granting of guarantees, pledges and mortgages. It provides that entities listed on the BIST (other than investment firms and financial institutions (*e.g.* banks)) shall not establish any pledges or mortgages or give guarantees to third persons other than (i) their own legal entities, (ii) for the benefit of entities whose accounts are fully consolidated with those of the entity granting the security or giving the guarantee or (iii) for the benefit of third persons in order to pursue usual commercial activities. We understand that, once the Draft Communiqué is enacted, entities listed on the BIST shall be granted with a timeframe in order to adjust their existing pledges, guarantees or mortgages.

Corporate governance principles

While the corporate governance principles remain mostly same as under the current communiqué, the Draft Communiqué provides for the obligatory establishment of a corporate governance committee and a committee in charge of audit. Furthermore, the Draft Communiqué provides for a requirement to publish corporate information including general assembly minutes, attendance list, up-to-date copy of the articles of association, activity reports, detailed information on privileged shares and their privileges and also frequently asked questions and their responses and ethical rules of the company pertaining to the last 5 years.

It is helpful to remember that the New CML grants extensive authority to the CMB in respect of non-compliance with corporate governance principles and the CMB may even, *ex officio*, apply to court to require the listed entity to comply with the applicable provisions.

Questions for the Draft Communiqué

- The exercise of the put right?
- Whether the market value for the listed entities regarding related party transactions and important transactions are a reasonable reference point?
- Applicable actions of the CMB on non-compliance with obligatory corporate governance principles?

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