

GEDİK & ERAKSOY

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Draft Mandatory Tender Offer Communiqué

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

The Capital Markets Board (CMB) is required to issue any secondary legislation with respect to the New CML by the-end of 2013. Thus, a Draft Communiqué on Tender Offers was published on 22 July 2013 for public review and comments (the Draft Tender Offer Communiqué).

Overview of MTO under the New CML

It is important to highlight that, under the New CML, non-fulfilment of the obligation to make a mandatory tender offer bid shall result with the voting rights pertaining to the newly acquired shares being frozen. This change seeks to push companies to fulfil their tender offer liabilities in a timely manner with a view to protect minority shareholders.

The New CML does not greatly amend the previous definition of management control and its acquisition but rather brings a new perspective to the same. Accordingly, direct or indirect acquisition of 50% or more of the voting rights (where the same threshold also applied previously for the relevant entity's share capital or voting rights) shall result in a change in management control and trigger a mandatory tender offer. Further, the New CML provides that any change in the management control which results from agreements between existing shareholders of an entity (e.g. shareholders arrangements/agreements) shall also trigger the mandatory tender offer requirement.

We will try to summarise the important aspects of the Draft Tender Offer Communiqué and the differences between it and the currently applicable Communiqué Serial IV, No: 44 on Tender Offers (the **MTO Communiqué**) which was adopted under the old Capital Markets Law.

Notable aspects of the Draft Tender Offer Communiqué

Under the Draft 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 of payment of the tender offer price by a Turkish bank or a third party legal entity.

One of the most important changes brought by the Draft Tender Offer Communiqué is that, a third party may initiate a competing bid/offer while the MTO process is underway. This concept is currently untested in Turkish markets.

While the MTO Communiqué provides a 45 business day period starting from the MTO triggering event, the Draft Tender Offer Communiqué provides a more relaxed term of three months from the start of the actual MTO period. In addition if the offeror does not initiate the MTO during the three month period, it may

request an extension of a further three months to start the MTO. However this three month extension does not prevent the application of daily interest to the MTO price.

The CMB has been granted with an express authority to suspend or ban the MTO process, where information, which is wrong or misleading has been written in the relevant information form.

Activities of the target company board

Until the Draft Tender Offer Communiqué, the board of directors of the target entity did not play any part in MTO procedures. However, the Draft Tender Offer Communiqué provides certain rights and liabilities to the target entity board, thus eventually adds another actor to a MTO process.

Unless its articles of association provides otherwise, the board of directors' of the target company may, between the period starting from the disclosure of the MTO decision by the offeror and ending at the end of the actual MTO period, take any action under its capacity which may result in the failure of the MTO.

This is a brand new concept under Turkish law where the target company is permitted to act to prevent a successful MTO. This authority provides the board of the target company with the possibility to prevent a hostile takeover bid. In this regard, the shareholders of the target company may provide the authority to the board of directors to take any necessary action. This authority may be provided for a maximum term of 18 months.

Further, the board of directors of the target company is required to prepare a report on the possible future consequences of the MTO and is required to publish the same simultaneously with the relevant information form.

The board of directors of the target company is obliged to inform its shareholders regarding details of the MTO. In addition, both the board of the target company and the offeror must inform their employees or their representatives with respect to the MTO.

Questions & Issues

Below are some open matters which have not been addressed by the Draft Tender Offer Communiqué and , which should be considered when planning an MTO:

- How shall the board of directors of the target company take any action to prevent a MTO?
- Whether any competing bids during an MTO shall be applicable and be beneficial for the target company and its shareholders?

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