

GEDİK & ERAKSOY

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Draft Material Transactions Communiqué

In accordance with the new Capital Markets Law No. 6362 (CML) which entered into force on 30 December 2012, all secondary legislation pertaining to this new piece of legislation shall be enacted until 30 December 2013. The Capital Markets Board (CMB) lately prepared a draft communiqué on the material transactions, a concept introduced with the CML. A publicly listed entity's execution of a material transaction triggers the exit (put) right for the minority shareholders in that entity. Accordingly, the Draft Communiqué on Exit Right and Joint Principles on Material Transactions of Publicly Listed Entities (Draft Communiqué) sheds light on the materiality definition with a take on both accounting and corporate perspectives and exercise of the exit right.

The Draft Communiqué introduces separate and broad definitions to the materiality criteria of a transaction; sets out rules for shareholders' participation to the relevant general assembly meetings; exercise of exit right and calculation of the exit right price. The Draft Communiqué also sets out a list of transactions which do not fall within the material transaction category and thus do not trigger exit right. The Draft Communiqué significantly introduces the requirement for the majority shareholder to pursue a mandatory tender offer instead of exercising of the exit right in specific material transactions.

Legislative Background for Material Transactions

In accordance with Article 23 of the CML, merger, demerger transactions, type conversions, decisions to dissolve, transfer of all or a material portion of assets, establishing of a right in rem over or leasing all or a material portion of assets, materially or completely amending the scope of activities, granting privileges and amending the scope of existing privileges and delisting decisions are considered among the material transactions of a publicly listed company. The CML further goes on to stipulate that shareholders' approval (*i.e.* a general assembly of shareholders' meeting) is required for the public company to enter into such material transaction.

As a result of such material transaction, Article 24 of the CML defines and introduces the exit right for minority shareholders. The exit right is exercisable by shareholders, which participate to the relevant shareholders' meeting, cast a dissenting vote, annotate their dissent in the meeting minutes and submit the exit right form to the public company. It is worth noting that the shares subject to exit right shall be purchased by the publicly listed company itself and therefore, may be subject to the CMB's buy-back legislation.

The CML sets out the calculation method for the exit right price. Accordingly, the exit right 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 listed company has disclosed the important transaction. The CML is silent on whether the exit right price shall be confirmed by any institution, namely the CMB.

Summary of the Draft Communiqué

Materiality definition

The Draft Communiqué provides two specific types of capital increases in addition to the material transactions listed under the CML. Such capital increases are (i) where the capital increase is paid through deduction of the public company's payment obligation pertaining to an asset purchase; and (ii) the amount of the increase in the capital is higher than the listed company's existing share capital. The draft further provides that the CMB may classify other transactions with similar results as material, thereby giving the CMB a great deal of authority in determining the material transactions.

In addition to the list of material transactions and the CMB's authority, the Draft Communiqué sets out the definition of a material transaction. Accordingly, any type of transaction, which may cause an important change in the activities or business of the entity OR any transaction, which would not be made on the same conditions if the counterparty was not a related party, may fall within the the definition of a material transaction.

Considering the CMB's authority to deem a transaction as material together with this definition, goes on to prove that the CMB is quite cautious on determining material transactions and subsequent exercise of the exit right. The existence of different interpretations and broad definitions to the material transactions may require transaction parties to clarify, whether a transaction is material, prior to their entry into the contemplated transaction.

Materiality criteria

The Draft Communiqué sets out the criteria for a transaction to be deemed material. Such criteria, (where applicable set forth as a percentage threshold) are based on either the total assets or the market value of a listed company. For material transactions, which relate to a fixed asset, the Draft Communiqué also provides a definition of the fixed asset, parallel to the fixed asset definition under the accounting or financial reporting standards. Accordingly, a fixed asset is defined as assets of listed entities, which may be subject to depreciation or loss of value. However, lack of clear references to the accounting or financial reporting standards leads to transaction parties requiring further guidance from the CMB.

Sale, lease or establishment of a right in rem over a fixed asset may constitute a material transaction, depending on the ratio of transaction value against the company value. The Draft Communiqué sets out a number of formulas applicable in determining the company value, e.g. based on figures in its financial statements or market value.

General assembly rules on material transactions

As mentioned above, shareholders' approval is required for a listed company to enter into a material transaction. The Draft Communiqué makes a reference to Article 436 of the Turkish Commercial Code No. 6102, where shareholders are prevented from voting on "personal" affairs or transactions. Accordingly, the draft follows the general rule set out in the Turkish Commercial Code, where shareholders may not vote on the general assembly with respect to a material transaction, where they are a party to.

The Draft Communiqué further indicates that general assembly meetings on mergers, type conversions, changes in the field of activity, delisting decisions are exceptions to the above rule.

Exit right price

The Draft Communiqué provides clarifications to the rule on the calculation for the exit right price. Accordingly the applicable date for calculating the exit right price (for the 30 days' calculation period), shall be the date on which the material transaction has been announced to the public. Such announcement may either be made on the Public Disclosure Platform of the Borsa Istanbul (**BIST**) or to the press or any other communication channel by the listed entity itself or its directors. Thus, any disclosure made to the public prior to the entry into a material transaction will constitute the date on which the 30-day weighted average of the stock price ends.

Material transactions which do not trigger exit right

The Draft Communiqué sets out certain material transactions for listed companies which do not trigger an exit right. To name a few of such exceptions; transactions which listed companies are required to execute due to other applicable legislation; transactions executed by listed companies whose shares representing more than 50% of their capital are owned by public institutions, transactions which trigger a mandatory tender offer (*e.g.* delisting) or a voluntary tender offer as permitted by the CMB; fixed asset transfers within the concepts of lease certificates or asset/mortgage backed securities.

Material transactions requiring mandatory tender offer

The CML provides the general rule that a material transaction would trigger exercise of the exit right. However, Article 25 of the CML further provided the CMB may introduce a mandatory tender offer requirement for certain material transactions. Accordingly, the Draft Communiqué provides that the following material transactions trigger a mandatory tender offer requirement by the majority shareholder of the public company: (i) creation of privileges over shares or changing the scope of existing privileges; (ii) delisting and (iii) capital contribution of a shareholder being paid through deduction of debts arising from an asset transfer from such shareholder to the public company.

As mentioned above, since these material transactions require a mandatory tender offer, exit right shall not be applicable for these three transaction types. The Draft Communiqué provides that information on the requirement for the mandatory tender offer shall be provided to the shareholders on the relevant general assembly. The mandatory tender offer shall start within six business days of the shareholders' meeting.

For the mandatory tender offer, required in the specific material transactions mentioned above, the mandatory tender offer price shall be equal to the exit right price. The Draft Communiqué references the exit right price calculation method for the mandatory tender offer price. Accordingly, the mandatory tender offer price shall be calculated in line with our explanations in the "*Exit Right Price*" section above.

However, in accordance with the CMB's applicable legislation on mandatory tender offers, the tender offer price can not be less than the highest amount paid for acquisition of same type of shares during the six months preceding the mandatory tender offer triggering event. In market practice, the CMB approves the mandatory tender offer price as calculated by the applicants launching the mandatory tender offer. Thus, it remains to be clarified whether the CMB will take such calculation method into account for determining the mandatory tender offer price in the foregoing material transactions.

The Draft Communiqué makes reference to the CMB legislation on tender offers for certain details, *i.e.* tender offer information form, disclosures, interest etc. The Draft Communiqué further provides the possibility to conduct a conditional tender offer.

Impact of the Communiqué

As summarized above, the material transaction concept has been introduced to the Turkish capital market legislation by the CML. While we have seen examples of exit right exercise since the CML's entry into force, we have not had a significant number of transactions, which may be considered as material. While reading the Draft Communiqué, it is evident that the CMB has been trying to cover the majority of related party transactions as material transactions, thus triggering exit right and also pushing shareholders to perform transactions at arm's length basis. We hope that the materiality definition and criteria shall be clarified and refined by the CMB over a number of transactions.

Questions for the Draft Communiqué

- How can the materiality be clearly defined?
- How will the CMB use its authority to define a material transaction?
- Whether the CMB will have a say over the mandatory tender offer price for said material transactions, considering the Draft Communiqué's express reference to the exit right price?

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