

DRAFT COMMUNIQUE AMENDING THE TENDER OFFER COMMUNIQUE

The Law No. 7222 Amending the Banking Law and Certain Other Laws has been published in the Official Gazette dated 25 February 2020 and numbered 31050 and entered into force on the same day (the “**Amending Law**”). Among others, the Amending Law has introduced a substantial framework for novelties to the Capital Markets Law No. 6362, which was published in the Official Gazette dated 30 December 2012 and numbered 28513, detailed regulation of which have been left to the secondary legislation. Accordingly, on 1 February 2021 the Capital Markets Board (the “**CMB**”) has prepared the Draft Communiqué No. II-26.1.ç Amending the Tender Offer Communiqué No. II-26.1. (the “**Draft Communiqué**”), that will upon its enforcement amend the Tender Offer Communiqué No. II-26.1. which was published in the Official Gazette dated 23 January 2014 and numbered 28891 (the “**Current Communiqué**”) and submitted such on its official website to public opinion.

The Draft Communiqué proposes to amend essential aspects of the Current Communiqué such as, among others, determination of the shareholders that are subject to mandatory tender offer and the offer price, the exceptions and exemptions applicable to the tender offer, the content of the brokerage agreement and the liabilities arising from the tender offer information form. This Monthly Updates aims to provide a brief explanation on the Draft Communiqué and highlight the essential novelties introduced therein.

Novelties Regarding the Shareholders that are Subject to the Mandatory Tender Offer and the Offer Price

Pursuant to the Draft Communiqué, only the shareholders, who hold shares in the relevant company as of the date on which (i) the acquisition of the shares or voting rights granting control is disclosed to the public; or (ii) the agreements between the current shareholders regarding the acquisition of the shares or voting rights granting control is disclosed to the public, shall participate in the mandatory tender offer. It has been further stated that for the companies listed on the stock exchange, the list indicating the share amounts and shareholders that can participate in the mandatory tender offer shall be provided by the Central Securities Depository of Turkey on the business day preceding the launch of the tender offer.

Additionally, the Draft Communiqué proposes substantial amendments to the tender offer price in a manner that simplifies the procedures and principles regarding the determination of the offer price, details of which are explained the Draft Communiqué. It has been further regulated that the CMB shall be entitled to recalculate the price, or to suspend the mandatory tender offer process, in the event of (i) information abuse or market fraud; and (ii) extraordinary situations affecting the economy or the relevant industry.

Finally, the TRLIBOR (*Turkish Lira Reference Rate Announced by the Banks Association of Turkey*) interest rate to be applied to the offer price has been exchanged with TLREF (*Turkish Lira Overnight Reference Rate*) and pursuant to the Draft Communiqué, if the bidder is not in fault, no interest shall accrue on the offer price even if the mandatory tender offer launch is delayed.

Exceptions and Exemptions Applicable to the Tender Offer

First of all, the Draft Communiqué clarifies the hesitancy in practice by stating that if the voting rights that grant control are acquired via share transfer transactions between (i) the legal entities that are controlled by the same real or legal persons; or (ii) such controlling real or legal persons, the obligation to make a mandatory tender offer shall not be applicable.

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The Draft Communiqué then introduces new exceptions to such obligation to make a tender offer. In this regard, in addition to exceptions as per the Current Communiqué, the obligation to make a mandatory tender offer shall not be applicable in case:

- (i) a real or legal person participates to the capital increase of a company and acquires the company's control with the existing controlling shareholders, equally or to a lesser extent, for the first time via an agreement, provided that such acquisition constitutes 50% or less of the shares granting voting rights;
- (ii) squeeze-out or sell-out rights arise due to obtaining the control rights in a company;
- (iii) for public companies listed on the stock exchange, change of control due to new share acquisitions by the existing shareholders via participation to the capital increases for which the pre-emptive rights are not limited; and
- (iv) involuntary changes to control as a result of events such as suspension of voting rights of certain shareholders, capital decrease through share redemptions, amendments to the articles of association regarding the privileges assigned to the shares or share buybacks of the company.

Nevertheless, in the event that any of the exceptions to make a mandatory tender offer is applicable for a case, those who obtained control shall be required to make a public disclosure within 2 business days following such acquisition of the control.

Finally, the Draft Communiqué adds an exemption to the current exemptions under the Current Communiqué, by stating that in case of change of control due to inheritance or allocation of matrimonial property, the CMB shall be able to exempt the acquirer from the obligation to make a tender offer, upon the application of such acquirer.

Novelties Regarding the Content of the Brokerage Agreement

As per the Current Communiqué, a brokerage agreement shall be executed by and between the bidder and the brokerage firm, the minimum requirements of which are set forth under the current legislation. Prior to the Draft Communiqué, there has been a hesitancy in practice on whether the brokerage agreements can limit the inclusion of the shares that are subject to transfer restrictions, legal conflicts or other third-party claims to the mandatory tender offer. In order to shed light on such matter, the Draft Communiqué regulates that the inclusion of such shares to the offer, in fact, cannot be limited via inserting a relevant provision to the brokerage agreements. It has been further stated that the offer price pertaining to the shares that are subject to transfer restrictions, legal conflicts or other third-party claims shall be blocked in a bank account until such restriction expires or such conflicts or claims ceases.

Novelties Regarding the Liabilities Arising from the Tender Offer Information Form

As per the Current Communiqué, it is mandatory to submit an information form along with the application to be made to the CMB with regards to the mandatory tender offer. Prior to the Draft Communiqué the bidders and the brokerage firms that sign the information form have been designated as responsible in case any information on the form deems to be false, misleading or incomplete. The Draft Communiqué adds the brokerage firms on whose behalf the information form may be signed to the list of those liable for the contents of the tender offer information form, however the objective of such an insertion should be clarified prior to the enactment of the Draft Communiqué since the brokerage firms are already deemed to be liable for the information form as per the Current Communiqué.

Conclusion

Upon the enactment of the Draft Communiqué, it is aimed that the principles and procedures regarding the mandatory tender offer procedure will be clarified and investors will have more flexibility by virtue of the new exceptions and exemptions and more safety by virtue of the authority of the CMB to recalculate the offer price or suspend the mandatory offer process in case of extraordinary situations.