Tender Offers, Squeeze-out and Sell-out Options: A Practical Guide

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I. MANDATORY AND VOLUNTARY TENDER OFFERS

The principles and guidelines governing mandatory and voluntary tender offers applicable to shareholdings in publicly held companies are set out in the Tender Offer Communiqué¹ (Serial II No.26.1) (the Tender Offer Communiqué) issued by the Capital Markets Board of Turkey (CMB).

a) Mandatory Tender Offer

Under certain circumstances, the shareholders of a public company controlling the company are obliged to launch a mandatory tender offer (MTO) to purchase the shares of the minority shareholders or shareholders who are not in control of the company. Since certain acquisitions of shares of public companies may trigger the MTO requirement, this should be taken into account before investing in a public company.

The procedures and principles regarding the execution of an MTO are set out under the Tender Offer Communiqué, through which the tender offer rules in Turkey have been amended and the previous Communiqué numbered IV-44 was repealed.

b) General Principles

Persons who acquire shares or voting rights in a public company through a partial voluntary tender offer, block or individual trades or any other method which grants them direct or indirect management control, solely or in concert with other persons, are obliged to make an MTO to purchase the shares of the minority shareholders. In addition, any change in management control resulting from the execution of special written agreements between the existing shareholders, despite the absence of any change in the ownership of the shares, can also trigger the MTO requirement.

Directly or indirectly holding more than 50% of the voting rights of a public company, solely or in concert with others, or regardless of such threshold, holding privileged shares granting the right to elect the absolute majority of the members of the board of directors or the right to nominate the same number of members in the general

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¹ The Tender Offer Communiqué is published in the Official Gazette no. 28891 on 23 January 2014 and came into effect on the same date.
assembly is deemed to constitute management control.

It is compulsory to make an application to the CMB within six business days of the acquisition of shares conferring management control, with an information form and other required documentation. During the MTO process, the company is required to employ the services of an investment banking company and the acquisition of shares through the MTO must be unconditional. The MTO process must be initiated within two months following the occurrence of the event triggering the MTO and within six business days following the approval of the information form by the CMB. The CMB may grant additional time to launch the MTO, provided that interest at an annual rate of TRLIBOR\(^2\) plus 50% is added to the MTO price for each day exceeding two months where the price is denominated in Turkish Liras. Where the price is determined in EUR or USD the applicable interest rate is based on EURIBOR or LIBOR respectively. In the event of non-completion of the MTO transaction by the end of the additional time granted by the CMB, an administrative fine up to the amount of the total value of the shares subject to the MTO may be imposed on the persons who have failed to launch such MTO.

The MTO must remain open for a minimum of ten and a maximum of twenty business days. In addition, failure to launch the MTO in a timely manner results in the automatic suspension of the voting rights of the defaulting shareholder and any parties acting in concert, without the need for the CMB to take any further action. Similarly, such shares are disregarded in determining the general assembly quorum.

Following the approval of the CMB, the application will be published in the public disclosure platform (if the shares of the company are publicly traded), and the website of the company. The company is under the obligation to disclose daily the number of shares acquired through the MTO during the MTO period.

c) MTO Price

In principle, the payments should be made in full and in cash and in Turkish Liras. However, the MTO price may be paid partially or wholly in listed securities on condition that the written approval of the shareholders is obtained. If it deems necessary, the CMB may request a guarantee for payment of the MTO price by a Turkish bank or a third party legal entity.

There are different calculation methods for the MTO price depending on whether the public company is listed, whether there is an indirect change of control in the public company, and whether the public company has more than one class of shares. If the public company is listed, the MTO price cannot be less than: (i) the arithmetic average of the daily weighted average stock exchange prices during the six-month period prior to the public disclosure date of the share purchase agreement and, (ii) the highest amount paid by the offeror or parties in concert for the same group shares of the public company during the six months preceding the MTO. Secondary obligations or premiums and similar considerations are also taken into account for the determination of the MTO price.

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2 Turkish Lira London Interbank Offered Rate.
price. The CMB may ask a valuation report as of the share transfer date in case the MTO price cannot be determined thereunder.

The MTO price is subject to redetermination in the event that the shares of the public company are purchased by the offeror or persons acting in concert with the offeror at a price higher than the MTO price between the date of the public disclosure of the share purchase agreement and the expiry date of the MTO. Any redetermined price cannot be lower than the highest price paid for the shares so acquired.

d) Exemptions from the MTO requirement

The MTO requirement would not apply in the following circumstances:

• acquisition of management control subsequent to a voluntary tender offer made to all shareholders for all of the shares under their possession;
• acquisition of management control through an approval by the general assembly of special written agreements executed between the existing shareholders and granting of exit rights to participating shareholders whose dissents have been annotated in the general assembly minutes;
• without losing the management control, reacquisition of more than 50% of the voting rights of the company by the same shareholder having management control after his shareholding dropped below such level; and
• acquisition of management control through share transfers within the same group holding a controlling interest in the public company.

The CMB may also grant an exemption from the MTO requirement under the following circumstances upon request:

• acquisition of the shares further to an obligatory shareholding structure change in order to strengthen the financial position of the company;
• disposal of the part of the shares which necessitates the MTO requirement;
• change of management control in the parent company of a public company, without aiming to gain control of the public company;
• sale of the public shares of a public company under privatisation; and
• change in management control due to a merger transaction provided that the shares of the shareholders who voted against the merger in the related general assembly are acquired.

For exemption requests, it is necessary to apply to the CMB within six business days following the MTO triggering event. If an exemption request is rejected, the MTO should be initiated within one month following the decision of the CMB.

e) Voluntary Tender Offers

Any investor (whether or not already a shareholder of the target public company) may launch a tender offer to acquire all or a specified number of shares in a public company.
In cases where the numbers of shares of the shareholders who accept the tender offer are greater than the specified number of shares subject to the tender offer, the shares of such shareholders will be transferred pro rata to the shares. The offeror must apply to the CMB in order to obtain its approval for the voluntary tender offer. The length of the CMB's evaluation period is not specified in the Tender Offer Communiqué and the CMB shall evaluate each application on a case by case basis. Similar to an MTO, a voluntary tender offer must be launched within 6 business days following the approval of the relevant notification form by the CMB and the period of such voluntary tender offer cannot be less than ten business days and cannot exceed twenty business days. A party who has initiated a voluntary tender offer process can withdraw from such process until the actual commencement of such tender offer.

The Tender Offer Communiqué stipulates certain rights and obligations of the target public company's directors. Accordingly, the board of directors of the target company is required to prepare a report on possible future consequences and the board is required to disclose the report on the business day preceding the launch of a voluntary tender offer.

It is also possible to provide a competitive bid during a voluntary tender offer. A competitive bid is a bid made by a third party during such tender offer. If such a competitive bid is made and the period of such bid is longer than the initial voluntary tender offer, the period of such voluntary tender offer may be extended to match that of the competitive bid.

In case of a competitive bid, shareholders who have already accepted the offer made with the voluntary tender offer are entitled to rescind their acceptance, provided that such acceptance was made before the publication of the notification form of the competitive bid and that the actual transfer of shares pertaining to such acceptance has not been carried out yet.

II. SQUEEZE-OUT AND SELL-OUT OPTIONS

The Capital Markets Law No. 6362 (the CML) allows the majority shareholder(s) exceeding a certain shareholding percentage to squeeze-out the minority shareholders and the simultaneous triggering of minority shareholders' right of sell-out to the majority shareholders, the details of which are regulated under the Communiqué on Squeeze-out and Sell-out Rights (Serial II No.27.2) (Squeeze-out Communiqué).

a) Squeeze-out

Pursuant to the Squeeze-out Communiqué, the controlling shareholder holding 98% of the total voting rights of a publicly held company are entitled to squeeze-out the minority

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3 The Capital Markets Law No. 6362 is published in the official gazette no. 28513 on 30 December 2012 and came into effect on the same date.

4 The Squeeze-out Communiqué is published in the Official Gazette no. 29173 on 12 November 2014 and came into effect on the same date.
shareholders, provided that it reached the 98% following a tender offer or by any other means following the effective date of the Squeeze-out Communiqué (Controlling Shareholder). Should a shareholder who has acquired a controlling number of shares in a public company fail to reach the said 98% following the MTO, it is permitted to make as many voluntary tender offers as it may require to reach 98% ownership of the company to initiate the squeeze-out process. The direct and indirect shares held by the Controlling Shareholder shall be taken into account for calculation of the 98% ownership of the voting rights.

Upon becoming a Controlling Shareholder, application to the publicly held company must be made within three months, failing which, the right to squeeze-out will lapse. Such application must, inter alia, include a letter of guarantee from a bank evidence of a deposit to blocked account of the funds that will be used for payment of the purchase price, the calculation of which differs depending on whether the shares in question are listed. For listed shares the purchase price is the weighted average of the stock prices within the last thirty days prior to the disclosure of the Controlling Shareholder that the 98% threshold has been triggered. For non-listed shares the price is to be determined in light of the fair value principle, and a valuation report reflecting the price must be attached to the application.

Following the receipt of the squeeze-out application by the Company, the process is as follows:

1. the Company checks that the Controlling Shareholder reached or exceeded the 98% threshold;
2. the company evaluates/confirms the purchase price;
3. the board of directors adopts a resolution on cancellation of the shares of the minority shareholders and issuance of new shares to the Controlling Shareholder in a number corresponding to the cancelled shares;
4. the company applies to the CMB for the approval of the issuance certificate in relation to the newly issued shares; and
5. application is made to the Istanbul Stock Exchange for delisting in case of a publicly listed company.

b) Sell-out

Pursuant to the Squeeze-out Communiqué, following a triggering event for the squeeze-out right of a Controlling Shareholder, the minority shareholders have a right to put their shares to the Controlling Shareholder within the same three-month period as for

5 Shareholder(s) of a joint stock company representing at least 10% of the share capital (5% for publicly held joint stock company) is deemed as 'minority' and enjoy a certain degree of protection under the Turkish Commercial Code no. 6102 and CML. For the purposes of this section, we use 'minority' for the rest of the shareholders rather than representing at least 5% of the share capital of the publicly held joint stock company.

6 Note that pursuant to the Squeeze-out Communiqué temporary article 3; the limit of 98% will be applicable after 31 December 2017. During this transition period, a limit of 95% will apply until 31 December 2014 and from 1 January 2015 a limit of 97% will apply until 31 December 2017.
the squeeze-out right. The three-month period is not suspended even if the holdings of
the Controlling Shareholder fall below 98% within such period. The company will carry
out the process similar to the process referred to in ‘Squeeze-out’, above. The principles
for determination of the squeeze-out right apply mutatis mutandis to the sell-out price.

Following the complete exercise of the squeeze-out right or sell-out right and the
concentration of all shares in the hands of the Controlling Shareholder, a publicly held
company will be deregistered by the CMB.

The price for squeeze-out or sell-out pursuant to the Squeeze-out Communiqué
must be paid in full in Turkish lira.