New Era for Material Transactions and Exit Right

Authors: Gönenç Gürkaynak, Esq., Nazlı Nil Yukaruç and Büşra Üstüntaş, ELIG Gürkaynak Attorneys-at-Law

I. General Overview

The Law No. 7222 regarding Amendments to the Banking Law and Certain Other Laws ("**Law No. 7222**") entered into force on February 25, 2020 with its publication in the Official Gazette on the same date. Among other things, the Law No. 7222 has introduced novelties on the material transactions and exit right mainly regulated under the Capital Markets Law No. 6362. The Communiqué No. II-23.3 on Material Transactions and Exit Right ("**Communiqué**") entered into force on June 27, 2020 upon its publication in the Official Gazette on the same date, abolishing the Communiqué No. II-23.1 on Common Principles Regarding Material Transactions and Exit Right ("**Abolished Communiqué**").

Purpose of the Communiqué is to determine the procedures and principals regarding the material transactions, the procedures to be pursued while exercising the exit right and the price to be applied; the procedures and principles on offering exiting shareholders' shares to other shareholders or investors as well as transactions that do not trigger the exit right; and exceptions to these determinations. In this article, our aim is to summarize significant provisions of the Communiqué.

II. What Are the Material Transactions?

The Communiqué re-determines material transactions of publicly-held companies and excludes certain transactions which were deemed material under the Abolished Communiqué. Accordingly, the following transactions will be deemed material transactions according to Article 4 of the Communiqué:

- Certain mergers and spin-offs stipulated in the Communiqué;
- Changing the type of the company;
- Transferring assets or carrying out transactions that have the consequences as the transfer of the assets, or establishment of limited rights in rem in favour of a third person on the assets of the publicly-held companies, provided that they satisfy the materiality criteria specified in the Communiqué;
- Adopting a new privilege or changing the scope and subject of the current privileges.

While the materiality criterion was 50% under the Abolished Communiqué, as per Article 6 of the Communiqué, the materiality criterion is now satisfied when the following ratios exceed 75%:

- the ratio between the value of the assets in question to the total value of the assets of the publicly-held companies, according to the latest financial statements announced to the public; or
- the ratio between the amount of the transaction to the value of the company calculated based on the arithmetic average of the daily adjusted weighted average stock exchange prices in the last six months; or
- the ratio between the financial value gained from the transferred assets to the total of the income items affecting the net profit/loss for the continuing operations period, according to the latest financial statements announced to the public.

The Communiqué authorizes the Capital Markets Board ("**Board**") to classify certain transactions as material transactions even if they are not listed under the Communiqué, if these transactions modify principal activities or ordinary course of business of the publicly-held companies and thus affect investors' investment decisions. In addition, transactions stipulated as material transactions in other regulations of the Board are also subject to the provisions of the Communiqué.

As said above, the Communiqué re-determines the scope of the material transactions and removes some of the transactions listed as material transactions under the Abolished Communiqué. In this regard, transactions such as delisting from the stock exchange, dissolution of the publicly-held companies, changes of the subject of the activities through the amendment of the articles of association, acquisition of assets from the related parties are longer deemed material transactions.

Similarly, all mergers and spin-offs were considered as material transactions in the Abolished Communiqué. However, now only certain mergers and spin-offs are deemed material and thus fall under the scope of the Communiqué.

III. Determination of Shareholders Having the Exit Right

According to Article 11 of the Communiqué, shareholders that have a shareholding in the company as of the dates specified in the Communiqué, and who have attended the general assembly meeting and voted negatively on the agenda item related to the material transactions and recorded their oppositions, have an exit right by selling their shares to the company.

IV. The Exercise Price of Exit Right

Unlike the Abolished Communiqué, fair price method is introduced for the exercise of exit right in the companies shares of which are traded on the stock exchange. Accordingly, the exit price of shares in such companies is as follows:

- The arithmetic average of the daily adjusted weighted average trading prices for the last one month prior to the disclosure date for the companies whose shares are traded on Borsa İstanbul A.Ş.'s Star Market.
- For other companies, the arithmetic average of the daily adjusted weighted average trading prices for the last six months prior to the disclosure date.

The exit price for publicly-held companies shares of which are not traded on the stock exchange are calculated in line with the valuation report. However, if there are any developments affecting value of the publicly-held company between the valuation report date and the general assembly meeting date, additional valuation reports must be prepared.

V. Offering Shares Subject to Exit Right to Other Shareholders or Investors

With the Communiqué, the board of directors is granted with an option to offer the shares subject to exit right to other shareholders or investors before the shares are acquired by the relevant publicly-held company. Article 13/2 of the Communiqué stipulates that the shares subject to exit right shall be distributed to all shareholders or investors who wish to purchase the shares on a pro rata basis, so that there would be no inequality between them. In case there are agreements between such other shareholders or investors, the shares subject to exit right shall be distributed in accordance with these agreements. Shares which are not requested to be purchased by shareholders or investors will be acquired by the relevant publicly-held company.

VI. Cases That Do Not Trigger Exit Right and Exemptions

With the new Communiqué, the Board is now entitled to grant an exemption to the companies from the obligation to exercise the exit right for certain transactions such as transactions carried out for relief from financial stress or intragroup mergers.

In addition to the existing transactions that do not trigger the exit right, the Communiqué lists rescue mergers and sale of publicly-held company's assets with the buy-back right to the banks as the transactions that do not trigger the exit right. With these new additions, it is aimed for publicly-held companies to perform transactions which are necessary for the continuity of their transactions. In order to encourage public offerings, the Communiqué also classifies the transactions of selling affiliates' shares through public offerings as the cases that do not trigger exit right.

VI. Conclusion

The provisions of the Capital Markets Law related to material transactions and exit right were amended in the first quarter of 2020. Thus, changes to the secondary legislation on this matter had become a necessity for market players. Considering this, the Board drafted the Communiqué and submitted it to public consultation in March 2020. Thereafter, the Communiqué, prepared in line with the Capital Markets Law and market needs, entered into force in June 2020 and abolished the former communiqué. The new Communiqué has re-determined the material transactions and raised the materiality criteria among other novelties. The Communiqué has also changed the cases which do not trigger the exit right and exemptions have also been regulated with entry into force of the new Communiqué.

Article contact: Gönenç Gürkaynak, Esq. Email: gonenc.gurkaynak@elig.com

(First published by Mondaq on August 31, 2020)