

Laying the groundwork

Kerem Turunç of TURUNÇ describes some of the recent changes to Turkish securities regulation

Turkey's new capital markets law (CML) has been in effect since December 2012. Since then, the Turkish Capital Markets Board (CMB), Turkey's securities regulator, has been busy promulgating secondary legislation under the CML and released a significant number of communiqués in 2013 and early 2014, thereby replacing corresponding communiqués issued under the previous law. Below is a discussion of some of the communiqués that are of particular relevance for foreign investors and issuers looking at Turkish capital markets.

Communiqué on Foreign Capital Markets Instruments and Depositary Receipts, and Foreign Investment Funds

The Communiqué on foreign capital markets instruments (*Yabancı Sermaye Piyasası Araçları ve Depo Sertifikaları ile Yabancı Yatırım Fonu Payları Tebliği*) sets forth, among other things, the disclosure rules applicable to the public offering of foreign securities and depositary receipts. It also includes an overhaul of ongoing disclosure obligations of foreign issuers, including with respect to financial statements and audit reports. The communiqué was issued in October 2013 and is in effect except for most of its provisions relating to foreign investment funds, which will become effective in July 2014.

An attractive feature of the communiqué is that it allows foreign capital markets instruments to be denominated in Turkish liras or in a foreign currency for which the Turkish Central Bank announces a daily exchange rate. Interest, principal and dividend payments can also be made in one of these currencies or in Turkish liras.

With respect to disclosure requirements in offerings of foreign capital markets instruments, as a general rule, issuers must follow the disclosure rules applicable to the issuance of corresponding or similar instruments by Turkish issuers. There are, however, additional disclosure obligations for foreign capital markets instruments. For example, the foreign issuer or depositary institution, as applicable, must make declarations to the effect that: (i) the holders of the instruments in Turkey have the same rights with respect to the issued securities as holders outside of Turkey; (ii) the issuance into Turkey of the instruments, and the use of rights associated with such instruments by Turkish holders, are not restricted by the home country of the issuer; (iii) there are no transfer restrictions on the securities being offered; and (iv) any disputes relating to the terms of the issued instruments and their issuance will be subject to Turkish substantive and procedural law, and that Turkish courts will have jurisdiction over such disputes. In private placements, however, there is no requirement to be subject to Turkish law or to the jurisdiction of Turkish courts. Disclosure must also be made on the rules applicable to the issuer and the issued instruments in the issuer's home country, along with a declaration by the issuer or the depositary as to compliance with applicable formational, operational and issuance rules. The disclosure documents must also include information on any existing exchange listings of the instruments being offered.

In addition to the disclosure obligations, foreign issuers must also submit certain documents to the CMB as part of the offering process. These documents include, among other things, copies of prospectuses and other offering documents issued outside of Turkey, copies of all documents to be executed in relation to the issuance of the instruments in Turkey, and information on all parties involved in the offering process. However, these information furnishing requirements do not apply to private placements. A significantly costly and time consuming requirement is that all documents required in connection with the offering of foreign capital markets instruments must be submitted

in Turkish. The CMB would do well to relax this requirement with respect to information furnished only to the CMB and not to investors, and accept English-language versions of such documents.

In addition to disclosure and information furnishing rules during the offering process, foreign issuers are also subject to ongoing disclosure obligations. These obligations are identical to the ongoing disclosure obligations applicable to issuers of Turkish securities, with certain modifications and limited exemptions with respect to financial reporting and audit requirements (although financial statements must in any case be presented in Turkish liras by foreign issuers), as well as deference to the home country rules applicable to financial and governance rights attached to the securities. For example, foreign issuers are exempt from CMB's corporate governance and dividend distribution requirements except in cases deemed necessary by the CMB. Also, with respect to tender offer rules, any home country triggering rules that are more investor-friendly will apply over corresponding Turkish rules.

Tender Offer Communiqué

The Tender Offer Communiqué (*Pay Alım Teklifi Tebliği*), released in January 2014, sets out the rules applicable to mandatory and voluntary tender offers.

In line with prior rules and international practice, any person or persons acting together who acquire control of a public company's management (whether by a majority share acquisition or through preferred shares) must commence a tender offer for the remainder of the shares. Exemptions to the mandatory tender offer requirements are provided in cases, among others, where control is acquired as a result of a voluntary tender offer, and where control is acquired through a contractual arrangement with the approval of the general assembly of shareholders, provided that dissenting shareholders were provided with redemption rights. The CMB can also grant individual exemptions from mandatory tender offer requirements in instances, among others, where the control shares are being acquired in order to provide financing to a public company in financial difficulty, and where the relevant shareholder undertakes to divest the triggering portion of its shares, provided the shareholder has not voted its controlling shares at any general assembly meeting and has not changed the structure of the board.

As a general rule, payment for the tendered shares must be made in cash in Turkish liras. However, subject to the approval of the tendering shareholder, part or all of the payment can be made with securities in exchange for the tendered shares. Such securities, however, must be listed. The CMB also has the right to request that the tender offer price be guaranteed by a domestic bank or other legal entity.

The tender offer period must commence within two months (previously 45 days) of the event that triggered the tender offer obligation subject to the authority of the CMB to grant an exten-

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sion. If the offer is not completed within the prescribed periods, persons subject to the tender offer obligation can be fined up to the total value of the shares that are subject to the tender offer, and their voting rights get suspended automatically.

A novelty of the communiqué is that it specifically permits competing voluntary tender offers by third parties. In an effort to maximise value for minority shareholders, the communiqué provides that if the expiration date of the competing offer is later than that of the original offer, the original offeror can extend its offer period to match the expiration of the competing offer.

Squeeze-Out Communiqué

Through the CML and the squeeze-out communiqué (*Ortaklıktan Çıkarma ve Satma Hakları Tebliği*), squeeze-outs in public companies became possible for the first time in Turkey. Pursuant to the communiqué, if the voting rights held by a shareholder (or a group of shareholders acting together) reaches 95% through a tender offer or otherwise, then the controlling shareholder will have the right to squeeze out the minority shareholders.

The communiqué was released in January 2014 and will become effective in July 2014. However, no squeeze-out rights (or corresponding put rights) will be triggered upon the communiqué's effectiveness for shareholders already in possession of 95% or more of a public company's voting rights. Instead, such shareholders will need to make an additional purchase for the squeeze-out right to be vested. Furthermore, the controlling shareholder, upon reaching 95% or making an additional purchase, has the right to squeeze out the minority only within a three-month period after the triggering purchase, after which period it loses the right until and unless it makes additional purchases. During the same three-month period, the minority shareholders have the right to put their shares to the controlling shareholder. If used, the put must include all shares held by the relevant minority shareholder.

For listed companies, the squeeze-out or put price, as applicable, will be the 30-day average of the weighted average price of the same class of shares on the stock exchange prior to the controlling shareholder reaching 95% or, if already above 95%, prior to the public announcement of the additional purchase by the controlling shareholder. For non-listed companies, the price will be determined through a valuation report.

It is worth noting that squeeze-outs and put rights cannot be used during the first two years after the initial listing of a company's shares on the stock exchange.

A new era

Most of the groundwork has now been laid for the new era of Turkish securities regulation. It will certainly take time for established practices to be developed under the CML and the new communiqués. For this to happen as quickly, effectively and consistently as possible, the private securities bar and other market participants will have to work in harmony over the next several years and

going forward. We must remember that the recent legislative changes are part of Turkey's goal to become a more important player in international finance. Towards that goal, further harmonisation of laws with international and EU standards will need to take place. Additionally, Turkey will need to increase the diversity of financial products and services offered to investors, strengthen the technological infrastructure available to market participants, and promote the listing of more domestic and foreign issuers on Borsa Istanbul. To that end, the landmark deal signed between Borsa Istanbul and NASDAQ OMX in December 2013, on which the author and his firm represented Borsa Istanbul, is a great source of excitement and anticipation. Pursuant to this deal, NASDAQ OMX

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will deliver its most advanced and complete set of technologies relating to trading, clearing, market surveillance and risk management, covering all asset classes, as well as advisory services to Borsa Istanbul, which aims to become a capital markets hub for the Eurasia region.

With the help of all these legislative and infrastructural changes, Turkish capital markets, which are still largely untapped, are almost certainly going to be much more active in the coming years.



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About the author

Kerem Turunç is a partner based in the Istanbul office of TURUNÇ, a full-service corporate law firm, established in 1990, with offices in Istanbul, Izmir and Ankara.

Turunç is an expert in international and domestic securities offerings, with extensive experience in public and private transactions including IPOs, secondary offerings, rights issues, high-yield and investment-grade bonds, convertible bonds, special purpose acquisition companies (SPACs), and block trades, representing issuers and underwriters across a variety of jurisdictions in Europe, North America, Latin America and Asia.

Among his many deals are HSBC's £12.5 billion rights issue, the largest rights issue without government support on record in the UK at the time, and Liberty Acquisition Holdings Corp's IPO, the first IPO by a SPAC to exceed \$1 billion. He also advises extensively on M&A transactions. Among his numerous M&A deals is the groundbreaking acquisition of Mey Içki by TPG Capital. Turunç also regularly advises companies on corporate governance matters.

Before joining TURUNÇ, he worked in the New York and London offices of Cleary Gottlieb Steen & Hamilton.

Turunç received his JD from the University of Virginia School of Law where he was a Dean's Scholar, and his BA, with distinction, from Yale University. He is an adjunct professor at Yeditepe University and has also lectured at Harvard Law School, Kadir Has University Faculty of Law and New York University.