

Disclosure or Ponzimonia?

During the “*Maintaining Market Integrity in Turbulent Times: Surveillance, Inspection and Enforcement for Securities*” forum that was recently held in Istanbul and co-organized by the U.S. Securities and Exchange Commission and the Capital Markets Board (the **CMB**) of Turkey, one of the most debated issues was the implementation and functioning of adequate public disclosure mechanisms used to prevent market manipulation and formation of *ponzi schemes*¹.

Under the Turkish capital markets scheme, the main piece of legislation with regards to the disclosure obligation of publicly-owned companies is the CMB Communiqué, Series VIII, No:54 on Principles Regarding Public Disclosure of Material Events (the **Communiqué**), which entered into force in February 2009. In an attempt to provide maximum protection for investors, the CMB has considered the European Union’s corresponding legislation together with the market players’ expectations while preparing the Communiqué.

1 Disclosure obligation

The Capital Markets Law No. 2499 (the **Law**) aims to ensure the secure, transparent and stable functioning of the capital markets and to protect investors’ rights and benefits. In line with the Law, the purpose of the Communiqué is to guarantee the transparent and fair functioning of the capital markets through prompt, complete and correct information disclosed to public. Accordingly, the Communiqué specifies the principles and procedures applicable to the disclosure of material events concerning the joint stock companies, whose capital markets instruments (*sermaye piyasasi araclari*) are traded on a stock exchange (*i.e.* listed companies). It is noteworthy that the Communiqué also applies to the companies whose transactions are temporarily or permanently suspended.

In addition, the Guideline Regarding Material Event Disclosures (the **Guideline**), also issued by the CMB in accordance with the Communiqué, is an implementation tool for practitioners to better apprehend and interpret the disclosure requirements imposed by the Turkish capital markets legislation. The material events listed in the Guideline are stipulated on a non-exhaustive basis. Accordingly, when deciding whether a certain event would constitute a material event within the scope of the Communiqué, each case should be assessed on its own merits. It should always be kept in mind that the spirit of both the Communiqué and the Guideline requires prompt, complete and correct information disclosed to public.

2 What is a Material Event?

Pursuant to Article 4 of the Communiqué, material events are cases leading to (i) insider information or (ii) continuous information.

2.1. Insider information (*icisel bilgi*):

“Insider information” means any information that (i) may affect the value of capital markets instruments and investors’ investment decisions and (ii) is not disclosed to public.

The Communiqué stipulates that a material event disclosure shall be made when insider information or changes in such information previously disclosed to public occur or are learned, without providing a full list of cases that may be qualified as insider information.

Listed companies are required to prepare and update a list of persons having regular access to insider information on their respective companies. Upon request, such list shall be forwarded to the CMB and/or the relevant stock exchange.

The Guideline includes a list of material events (*e.g.* external conditions indirectly affecting the listed company, any change in the managerial or auditing staff, mergers and acquisitions, changes in the

¹ For more details on the “*Ponzi scheme*” please see <http://www.sec.gov/answers/ponzi.htm> which defines it as “a type of illegal pyramid scheme named after Charles Ponzi, who duped thousands of New England residents into investing in a postage stamp speculation scheme back in the 1920s. (...) Decades later, the *Ponzi scheme* continues to work on the “*rob-Peter-to-pay-Paul*” principle, as money from new investors is used to pay off earlier investors until the whole scheme collapses.”

activities of such company) for advisory purposes. Furthermore, there are a number of sporadically located catch-all provisions in the Guideline to ensure that any and all information is disclosed and nothing remains aside.

A significant example is given under the heading titled “external conditions indirectly affecting the listed company”. Accordingly, any decision or statement of public institutions or private corporations that may have a direct or indirect impact on the listed company might be evaluated as insider information and thus disclosed to public.

The obligation to disclose insider information must be evaluated on a case-by-case basis by considering different variables such as the size and structure of the listed company, its field of activity, competition conditions, market expectations and any other related factors. In other words, there is no clear distinction on what to disclose and what to keep for insiders.

Finally, pursuant to the Communiqué, disclosure of insider information may be postponed under certain circumstances.

2.2 Continuous information (surekli bilgi)

“Continuous information” is defined as any information that is (i) not included in the definition of insider information and (ii) required to be disclosed to public in accordance with the Communiqué.

In the event of a change in the shareholding structure or the management control of a listed company as thoroughly described under the Communiqué, public disclosure shall be made. In this respect, the Communiqué provides the procedure applicable to the calculation of voting rights. Moreover, in the event that a listed company’s shares are deposited (e.g. to a custodian), the person(s) holding the deposit certificate is required to disclose such event to the public.

Among other cases referred to under the Communiqué, if a listed company, directly or indirectly, acquires or disposes of its own shares granting more than 1% of its voting rights or right to dividend, this company should inform the public of such transaction.

Apart from certain continuous information cases detailed in the Communiqué, there is not any concrete disclosure scheme determined either by the Communiqué or the Guideline. Since the CMB is the sole regulatory authority in this respect, practitioners are not in a position to advise on non-disclosure of an event that is not specifically enumerated in the applicable legislation and open to comment, unless the CMB gives a conclusive written opinion to the contrary.

3 How to disclose?

In principle, once a material event occurs or is learned, it shall be transmitted to the relevant stock exchange via the forms provided in the Guideline and by using the “fastest communication tool”. Nevertheless, some of the continuous information listed under the Communiqué shall be disclosed to the relevant stock exchange on the third business day following their occurrence until 9.00 am the latest.

Material events that are undetermined due to unascertained circumstances or conditions shall be disclosed to public by making a reference to the ambiguity. The said disclosure shall contain an estimated resolution date of the ambiguity and its conditions.

4 Sanctions

Pursuant to the Law, non-compliance with the Communiqué may result in an administrative fine ranging between TL 16,800 (approximately EUR 8,400) and TL 112,000 (approximately EUR 56,000)².

² Such amounts are updated each January in accordance with the revaluation rate determined and announced by the Ministry of Finance in Turkey.

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Apart from the above sanction, in the event of non-compliance with the public disclosure requirement, a listed company may be subject to penalties in accordance with the provisions of the stock exchange where it is listed. Precedents exist where the Istanbul Stock Exchange Board, in accordance with the Istanbul Stock Exchange Listing Regulation (*IMKB Kotasyon Yonetmeliği*), issued a warning (*uyarı*) against a listed company that failed to show necessary duty of care in complying with the public disclosure requirement. Besides, a substantial precaution that the Istanbul Stock Exchange may take in case of failure of a listed company to disclose a material event is to put the stock of such company on the Watch List Market (*gozalti pazarı*).

There are various precedents where the CMB issued penalties against legal entities and individuals for not complying with the obligation set forth under the Communiqué. In more recent decisions of the CMB given in 2009, the CMB punished non-compliance with the disclosure obligation that occurred in 2006 and 2007: (i) an administrative fine was issued against an individual for not complying with the disclosure obligation six times and (ii) an administrative fine was issued against an individual for a delay in disclosure of material events and incomplete disclosure of the same (*i.e.* disclosure did not contain the number of dismissed employees).

By taking into account the (i) spirit of the Communiqué and the Guideline, (ii) recent market turmoil, (iii) current global efforts to restructure the financial markets and (iv) delicacy of the regulatory authorities, it is highly recommended for listed companies to disclose any material event and any information which may adversely affect small investors or which may be considered as market manipulation.