GRADUATE SCHOOL
ISTANBUL MEDENIYET UNIVERSITY
DEPARTMENT OF PRIVATE LAW

Obligation To Provide Prospectus And Inform The Public In Capital Market Law

Master's Thesis

Ceren Bayar

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Supervisor

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THESIS JURY APPROVAL

This Master's thesis titled "Obligation To Provide Prospectus And Inform The Public In Capital Market Law" written by Ceren Bayar at the Department of Private Law was accepted by our jury.

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STATEMENTS

Style and Reference Manual Statement

Having reviewed this thesis written under my supervision, I confirm that it has been written in accordance with Chicago Manual of Style and used its footnote reference format consistently throughout the entire text.

Signature
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Declaration of Originality

I hereby declare that all information in this dissertation has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conducts, I have fully cited and referenced all material and results that are not original to this work.

Signature
Ceren Bayar

GENİŞ ÖZET

Sermaye Piyasası Hukukunda İzahname Hazırlama Ve Kamuyu Aydınlatma Yükümlülüğü

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Finansal piyasalar; bir ülkede fon arz edenlerle fon talep edenler arasındaki para akışını sağlayan kurumlar, bu akışı gerçekleştiren araç ve yöntemler ile bunları düzenleyen hukuki ve idari kurallar bütününden oluşan bir yapıdır. Bu piyasalar genel olarak *para piyasaları* ve *sermaye piyasaları* olmak üzere iki ana gruba ayrılır. Para piyasaları ile sermaye piyasaları arasındaki temel fark, işlem gören fonların vadeleridir. Para piyasaları, vadesi bir yıldan kısa olan fonların alınıp satıldığı piyasalardır. Buna karşılık, sermaye piyasaları bir yıl ve daha uzun vadeli fon ihtiyacının karşılandığı piyasalardır. Bu çerçevede, para piyasaları kısa vadeli, sermaye piyasaları ise orta ve uzun vadeli fon arz ve talebinin karşılaştığı piyasalar olarak tanımlanabilir.

Şirketler projelerini yürütmek için sıklıkla finansal desteğe ihtiyaç duyarlar. Gerekli fonları güvence altına almak için çeşitli finansal seçenekler mevcuttur. Finansman seçeneklerindeki temel fark, öz sermaye ile borç arasındadır. Öz sermaye finansmanı, yatırımcılara ihraç eden şirkette mülkiyet hakları verir. Bu, halka arz yoluyla elde edilebilir.

Şirketlerin finansman sağlama konusunda birçok seçeneği olmakla birlikte, halka arz yoluyla şirket hisselerini yatırımcılara satmanın birçok avantajı bulunmaktadır. Halka arz sayesinde yatırımlar için gereken sermaye iç kaynaklardan sağlanır ve bankalardan kredi kullanmaya gerek kalmaz. Bu da şirketlerin faiz yüklerinden ve diğer masraflardan kaçınmasını sağlar. Bununla birlikte, halka arz edilen şirketler kamuoyunda saygınlık ve güven duygusu uyandırır. Ayrıca, bu şirketlerin yasal denetim ve yükümlülüklere tabi olmaları, kurumsal yönetim ilkelerinin daha etkin ve şeffaf bir biçimde uygulanmasına katkı sağlar. Halka arz sayesinde yatırımcıların tek başlarına değerlendirmekte zorluk çekecekleri tutarlar bir bütünün parçası haline gelir ve yüksek karlı

projelerde kullanılma fırsatı yakalarlar. Bu şekilde yatırımlar değerlenir ve sisteme girenler ekonominin canlanmasına yardımcı olur.

Sisteme giren yatırımcıların, özellikle bireysel yatırımcıların, bilgi asimetrisi nedeniyle halka arz olan şirket karşısında daha zayıf konumda olması gündeme gelebilecektir. Bu nedenle yatırımcıların korunması gerektiği görüşü sermaye piyasasında yer bulmuştur. Bunun için sermaye piyasasının uluslararası standartlar ve ilkeler çerçevesinde düzenlenip denetlenmesi, söz konusu düzenleme ve denetlemelerin etkin şekilde sürdürülebilmesi için ise yetkili bir kamu otoritesine ihtiyaç duyulmaktadır.

6362 sayılı Sermaye Piyasası Kanunu, Türkiye'de sermaye piyasasının güven ve açıklık içinde çalışmasını sağlamak amacıyla temel düzenlemeleri içermektedir. Kanun, sermaye piyasası araçlarının ihracı, halka arzı, da işlem görmesi ve bu süreçlerde yatırımcıların korunması konularında kapsamlı hükümler öngörmektedir. Halka arz süreci, bu Kanun çerçevesinde belirli ilke ve kurallara bağlanmış; ihraççı şirketlerin yükümlülükleri, yatırımcı bilgilendirme esasları ve kamunun aydınlatılması gibi hususlar ayrıntılı şekilde düzenlenmiştir.

Sermaye Piyasası Kanunu'na göre, sermaye piyasası araçları halka arz olunurken izahname düzenlenmesi gerekmektedir. İzahname, sermaye piyasası araçlarının ihracında kamuya açıklama yapma aracıdır. İhraççı, yatırımcılara kendini bu belge aracılığıyla tanıtır. İzahname, yatırımcıların payları halka arz olan şirketin mevcut durumunu anlamalarına yardımcı olacak bilgiler içerir. Bu bağlamda, izahname şirketin sermayesi, yapısı, yöneticileri, faaliyet alanı, devam eden ticari faaliyetleri, gelecekteki yatırımları, mali tabloları ve taraf olduğu önemli davalar gibi bilgileri içerir. İzahnamede yer alan yanlış, yanıltıcı veya eksik bilgilerden kimlerin sorumlu olacağı ise yine kanunda düzenlenmiştir.

Tezin ilk bölümünde sermaye piyasalarının nasıl ortaya çıktığı ve günümüzde nasıl işlediği ele alınmıştır. Sermaye piyasalarının tarihi, borç araçlarının ilk kez çıkarıldığı 11. yüzyıl orta çağ İtalyan şehir devletlerine kadar uzanmaktadır. Bu uygulama zamanla Avrupa'ya yayılmış ve 16. yüzyılda İngiltere'de uluslararası ticaret için özel yatırımcılar tarafından finanse edilen anonim şirketlerin yükselişine zemin hazırlamıştır.

Sermaye piyasalarının gelişimi, ortaklıktan çıkış ihtiyacının hisselerin alınıp satılabilir olmasını zorunlu kılmasıyla hız kazanmıştır. Bu durum, ikincil piyasaların karmaşıklaşmasına yol açmış ve şirket hisselerinin el değiştirdiği ilk borsa Amsterdam'da ortaya çıkmıştır. Fiyatların tek bir merkezde belirlenmesini

sağlayan bu sistem, zamanla Kopenhag, Paris, Viyana, Londra ve New York gibi diğer finans merkezlerini de etkilemiştir.

19. yüzyılda Amerikan ekonomisinin büyümesiyle birlikte sermaye piyasaları da genişlemiş; ancak bu süreçte, yatırımcılara yanıltıcı ve abartılı bilgilerle arz edilen çok sayıda güvenilir olmayan hisse senedi piyasaya sürülmüştür. Bu durum, 20. yüzyılın başlarında ilk sermaye piyasası düzenlemeleri olan ve "Blue Sky Laws" olarak adlandırılan eyalet bazlı yasal düzenlemelerin yürürlüğe girmesine yol açmıştır. 1933 tarihli Securities Act ile izne dayalı sistem terk edilmiş, kamuyu aydınlatmaya dayalı sistem benimsenmiş; 1934 tarihli Securities Exchange Act ile de ikincil piyasaları düzenleyen ve sürekli bilgi açıklamasını zorunlu kılan federal bir yapı oluşturulmuştur. Her iki düzenleme, menkul kıymetlerin satışına ilişkin yanıltıcı ve hileli uygulamaları yasaklamakta ve bu tür fiiller için ciddi hukuki yaptırımlar öngörmektedir.

Türkiye'de sermaye piyasası faaliyetlerine ilişkin ilk örnekler, 18. yüzyılda Osmanlı dönemine dayanmaktadır. Bu faaliyetler, özellikle savaşlardan kaynaklanan mali ihtiyaçları karşılamak amacıyla ortaya çıkmıştır. Cumhuriyet döneminde ise 1950'li yıllarda devlet, finansman ihtiyacını karşılamak amacıyla yeni finansal araçlar ihraç etmeye başlamış; ancak 1960'larda gündeme gelen kanun tasarıları yasalaşamamıştır. 1982 yılında yürürlüğe giren 2499 sayılı Sermaye Piyasası Kanunu ile Türk sermaye piyasası hukuku modern bir yapıya kavuşturulmuştur. 2012 yılına kadar yürürlükte kalan bu Kanun'un yerini, Avrupa Birliği düzenlemeleriyle uyumlu yapısal değişiklikler içeren 6362 sayılı Sermaye Piyasası Kanunu almıştır.

Modern sermaye piyasaları karmaşık bir yapıdan oluşmakta olup içinde birçok aktör barındırmaktadır. Sermaye piyasası işlemleri, ihraççı şirket, yatırımcı ve aracı kurum olmak üzere çok taraflı bir yapıya sahiptir. Türkiye'de sermaye piyasası araçlarını ihraç edebilmek için şirketin anonim şirket statüsünde olması gerekmektedir. Halka arz yoluyla paylarını yatırımcılara sunan anonim şirketler ise, bu işlem sonucunda halka açık anonim şirket statüsünü kazanır ve düzenli raporlama ile bağımsız denetime tabi olurlar. Yatırımcılar ise sermaye piyasası araçlarını doğrudan ihraççıdan ya da ikincil piyasalardan satın alabilirler.

Halka arz işlemleri teknik bilgi ve uzmanlık gerektirdiğinden, bu süreçte aracı kurumların desteği önem arz etmektedir. Aracı kurumlar, başvuru belgelerinin hazırlanması, izahnamenin düzenlenmesi, talep toplama, fiyatlandırma, satış ve teslim gibi birçok aşamada ihraççıya danışmanlık ve aracılık hizmeti sunar. Aynı zamanda yatırımcılar, bu kurumlar nezdinde açtıkları hesaplar aracılığıyla

sermaye piyasası araçlarını güvenli bir ortamda alıp satabilir ve yatırımlarını dijital olarak izleyebilirler.

Bir şirketin halka arz süreci, öncelikle hazırlık aşamasıyla başlar. Bu aşamada şirketin mali durumu detaylı bir şekilde analiz edilir ve gerekli düzenlemeler yapılır. Ardından başvuru aşamasına geçilir ve şirket, düzenleyici otoritelere başvurarak gerekli izinleri alır. Daha sonra, yatırımcıları bilgilendirmek amacıyla hazırlanan izahname düzenleyici kurum tarafından incelenir ve onaylanır. Son aşamada ise şirketin payları halka arz edilerek yatırımcıların alımına sunulur ve borsada işlem görmeye başlar.

Tezin birinci bölümünün devamında sermaye piyasasına hâkim olan birtakım ilkeler ele alınmıştır. Sermaye piyasasına yön veren temel ilkelere ilişkin literatürde ortak bir terminoloji bulunmamakta; farklı eserlerde, piyasaların işleyişi ve düzenlenmesine ilişkin ilkelere farklı başlıklar ve yaklaşımlar çerçevesinde yer verilmektedir.

Bu tezde incelenen izahname hazırlama ve kamuyu aydınlatma yükümlülüğü, sermaye piyasası hukukunun işleyişini anlamada çeşitli ilkesel çerçeveler üzerinden değerlendirilmektedir. Bu doğrultuda çalışmada, konunun açıklığa kavuşturulmasına katkı sağlayacağı düşüncesiyle dört ilkeye odaklanılmıştır: Kamuyu aydınlatma ilkesi, gözetim ve denetim ilkesi, kurumsal yönetim ilkesi ve yatırımcının korunması ilkesi. Her biri, sermaye piyasasında şeffaflığın sağlanması, yatırımcıların doğru ve zamanında bilgilendirilmesi ve piyasa güvenliğinin temin edilmesi açısından önemli işlevler üstlenmektedir.

Halka açık şirketler iç ve dış denetim mekanizmalarıyla kontrol edilse de paydaşların haklarının korunmasında en etkili yöntem, şirket faaliyetlerine ilişkin doğru, açık ve yeterli bilgiye sahip olmaktır. Bilgi, finansal piyasaların temel unsurudur; yatırımcılar kararlarını büyük ölçüde kamuya açıklanan bilgilere dayanarak verirler. Denetim ve gözetim otoritelerinin işlevlerini etkin şekilde yerine getirebilmesi de doğru ve zamanında bilgiye bağlıdır.

Sermaye piyasası yatırımcıları doğrudan bilgi kaynağına erişim ve talep imkânına sahip değildir. İhraççı ile yatırımcı arasında bire bir iletişim kurulmadığından, sözleşme öncesi karşılıklı bilgilendirme mümkün olmamaktadır. Bu nedenle, ihraççının kamuoyunu doğru ve zamanında bilgilendirdiği, herhangi bir talep gerektirmeyen bir bilgi sistemi zorunludur. Kamuyu aydınlatma, bu niteliğe sahip bilgilerin önceden belirlenmiş format ve yöntemlerle kamuya sunulmasını ifade eder. Sermaye piyasası düzenlemelerinin

temel amacı, yatırımcıların zamanında ve doğru bilgiye erişimini sağlamaktır. Doğru bilgiye dayalı yatırım kararının sonuçları yatırımcıya aittir; kamu otoritelerinin rolü ise yatırımcının yerini almak değil, bilgiye erişimin şeffaf ve etkin biçimde sağlanmasını temin etmektir.

Sermaye piyasaları, çoğu ülkede bağımsız idari otoritelerin düzenlemelerine dayanır. Yatırım yapıldıktan sonra yalnızca şeffaflık ve kamuyu aydınlatma yeterli olmayabilir; şirketin kötü yönetilmesi hâlinde bu bilgiler yatırımcıyı yalnızca daha fazla endişelendirebilir. Bu nedenle, piyasayı denetleyip gerektiğinde müdahale edebilecek, karar alma yetkisine sahip uzman bir otoriteye ihtiyaç duyulmaktadır. Türkiye'de bu yetki, sermaye piyasasının her yönüyle düzenlenmesinden ve denetlenmesinden sorumlu olan Sermaye Piyasası Kurulu'na aittir.

Sermaye piyasasına hâkim olan diğer bir ilke ise kurumsal yönetim ilkesidir. Kurumsal yönetim, şirketlerin sermaye çekebilmesini, etkin çalışmasını, yasal yükümlülüklerini yerine getirmesini ve paydaş beklentilerini karşılamasını hedefleyen hukukî, idarî ve etik düzenlemeler bütünüdür. Bu yaklaşım; adillik, hesap verebilirlik, şeffaflık ve sorumluluk ilkelerine dayanır. Kurumsal yönetim ilkelerinin etkin biçimde uygulanıp uygulanmadığı ise büyük ölçüde kamuyu aydınlatma ve şeffaflık düzeyiyle ölçülmektedir. Bu bağlamda, kamuyu aydınlatma ilkesi, kurumsal yönetimin temel dayanaklarından biri olarak öne çıkmaktadır.

Tezin ikinci bölümünde izahname verme yükümlülüğü üzerinde durulmuştur. 6362 sayılı Kanun ile kamuyu aydınlatma sistemine geçilmiş, halka arz yoluyla yapılacak tüm ihraçlarda izahname hazırlamak zorunlu hale gelmiştir. İzahnamenin Sermaye Piyasası Kurulu tarafından onaylanması ve yayımlanması gerekmektedir. İzahnamenin zaman ve para açısından şirketlere yüksek maliyetler yüklemesi nedeniyle kanunda birtakım muafiyetler düzenlenmiştir.

Kurul, II-5.1 sayılı İzahname ve İhraç Belgesi Tebliği'nin 6. maddesinde muafiyetin hangi hallerde söz konusu olacağını düzenlemiştir. Buna göre, izahname hazırlama yükümlülüğünden muafiyetleri yatırımcının niteliği ve parasal büyüklük açısından iki gruba ayırmak mümkündür. Tebliğin 6/1-a bendinde en az iki yüz elli bin Türk Lirası değerinde sermaye piyasası aracı satın alan yatırımcılar için halka arzlarda izahname hazırlama muafiyeti sağlanmıştır. Aynı maddenin c bendinde ise nitelikli yatırımcılara satılan ve borsada sadece nitelikli yatırımcılar arasında işlem gören sermaye piyasası araçlarının satışı için izahname düzenlenmeyeceği belirtilmiştir.

Tebliğ'in 31. maddesi, izahnamenin şekli, içeriği ve hazırlanmasına ilişkin esasları düzenlemektedir. Bu doğrultuda, izahname ile birlikte Kurula sunulacak diğer bilgi ve belgelerin Türkçe hazırlanması zorunludur. İzahnamenin ekinde kamuya açıklanmayan ve yabancı dilde hazırlanmış belgelerin kullanılması hâlinde, bu belgelerin hangi kısımlarının kullanıldığı ve bu kısımlara nasıl erişilebileceği izahnamede belirtilmelidir. Ayrıca, izahnamede sorumluluğu bulunan gerçek kişilerin adı ve görevleri ile tüzel kişilerin unvanı, merkez adresi ve iletişim bilgileri açıkça yer almalıdır.

Kurul, izahnamedeki bilgilerin tutarlı, anlaşılabilir ve eksiksiz olduğunu tespit ettiğinde onay verir. Ancak bu onay, izahnamede yer alan bilgilerin doğruluğunun garanti edildiği anlamına gelmez ve bir yatırım tavsiyesi olarak yorumlanamaz. Bilgi veya belgelerde eksiklik varsa ya da ek bilgi istenirse, başvuru sahibine başvurudan itibaren on iş günü içinde bildirim yapılır ve eksikliklerin giderilmesi istenir. Başvurunun reddedilmesi durumunda ise ilgililere gerekçesiyle birlikte bildirim yapılır. Kurul tarafından herhangi bir eksiklik tespit edilmezse, izahname onaylanır. Başvuru sahibi, onaylanan izahnameyi yirmi gün içinde almak zorundadır; aksi takdirde yeniden onay alınması gerekir.

İzahname, ilk yayımlanma tarihinden itibaren on iki ay boyunca geçerlidir; ancak bu sürenin geçerliliği, izahnamenin güncel tutulması şartına bağlıdır. Önceki Kanun döneminde 29 No.lu Tebliğ ile getirilen ve 6362 sayılı yeni Kanun tarafından da benimsenen raf kayıt sistemi ile, her ihraç için ayrı bir izahname düzenleme zorunluluğu ortadan kalkmış, geçerlilik süresi içinde değişikliklerin işlenmesi şartıyla, aynı izahnameye dayanarak birden fazla ihraç yapılmasına olanak tanınmıştır. Amaç, maliyetleri ve prosedürleri azaltarak halka arzları teşvik etmektir. Bu şekilde, her ihraç öncesinde izahnamenin yeniden onaylanması, tescil edilmesi ve ilan edilmesi ile her bir sermaye piyasası aracı için ayrı ayrı izahname hazırlanmasının doğurduğu ilave maliyetlerin önüne geçilmiştir.

Avrupa Birliği'nde 4 Aralık 2024 tarihinde yürürlüğe giren Listing Act paketi ile Prospectus Regulation (EU 2017/1129) ve Market Abuse Regulation (MAR) üzerinde önemli değişiklikler getirilmiştir. Bu değişiklikler, özellikle halka arz süreçlerini basitleştirmeyi ve küçük ve orta ölçekli işletmelerin sermaye piyasalarına erişimini kolaylaştırmayı amaçlamaktadır. Bu bağlamda, düzenlenmiş piyasalarda işlem görecek menkul kıymetlerin kabulüne ilişkin izahname muafiyetleri önemli ölçüde genişletilmiştir. Düzenleme ayrıca

izahnamelerin standart format ve sırayla hazırlanmasını zorunlu kılmış, sürdürülebilirlik alanında yapılan düzenlemelerle de ESG (environmental, social, governance) bilgileri ve yönetim raporlarının izahnamede yer almasını zorunlu hale getirmiştir.

Tezin üçüncü bölümünde ise izahnamede yer alan bilgilerin yanlış, yanıltıcı veya eksik olması durumunda doğacak sorumluluk ele alınmıştır. Sermaye Piyasası Kanunu'nun 10. maddesi, izahname nedeniyle doğan sorumluluğu özel olarak düzenlemektedir. 10. maddeye göre, izahnamede yer alan yanlış, yanıltıcı veya eksik bilgiler nedeniyle doğan zararlardan öncelikle ihraççı sorumludur. İhraççının zararı karşılamasının mümkün olmadığı hallerde ikincil olarak halka arz edenler, lider aracı kurum, varsa garantör ve ihraççının yönetim kurulu üyeleri kusurları oranında sorumlu tutulmuştur.

AB'de İzahname Yönetmeliği'nin 11. maddesine göre, izahname ve eklerindeki bilgilerin doğruluğu ve eksiksizliğinden; ihraççı, yönetim, denetim veya gözetim organı üyeleri, halka arz eden, işlem görme talebinde bulunan kişi ya da garantör sorumludur. Bu kişiler açıkça belirtilmeli ve izahnameye bilgilerin gerçeğe uygun olduğuna ve herhangi bir önemli bilginin eksik olmadığına dair beyanları eklenmelidir. Üye devletler, bu kişilere kendi sorumluluk kurallarını uygulamakla yükümlüdür.

İngiliz hukukunda *Financial Services and Markets Act 2000* m. 90 uyarınca, izahnamede yer alan yanıltıcı veya eksik bilgiler nedeniyle zarara uğrayan yatırımcılara karşı, "sorumlu kişiler" tazminatla yükümlüdür. Bu kişiler, ihraççı, yönetim organı üyeleri, halka arz eden (ihraççı olmamak şartıyla), işlem görme talebinde bulunan kişi ve bunların yöneticileri ile izahname içeriğini onaylayan diğer kişilerden oluşur. Ayrıca, izahnamenin bir bölümünün hazırlanmasında yer alan uzmanlar ve danışmanlar da sorumlu tutulabilmektedir.

Amerikan hukukunda, *Securities Act 1933*'ün 11 ve 12. maddeleri ile *SEC Rule 10b-5*, yatırımcıların yanıltıcı izahname nedeniyle dava açmasına imkân tanır. 12. madde daha dar bir "satıcı" tanımı getirirken, 11. madde kayıt belgesini imzalayanlar, yöneticiler, ana hissedarlar, denetçiler ve aracı kurumlardan oluşan daha geniş bir sorumlular listesi belirler. *Rule 10b-5* ise esasen dolandırıcılıkla mücadeleye yöneliktir ve yalnızca "bir beyanın sahibi" olan birincil failler sorumlu tutulabilir.

İsviçre hukukunda ise *Code of Obligations* m. 752, yanlış ya da yanıltıcı izahname içeriğinin hazırlanması veya dağıtımına katılan herkesin sorumlu

tutulabileceğini öngörür. Ancak bu sorumluluk, yalnızca anlamlı ve etkili bir katkıda bulunulmuşsa doğar. Özellikle ihraççı, yönetim kurulu üyeleri, çalışanlar, lider aracı kurumlar ve onların danışmanları bu kapsamda değerlendirilir. Lider aracı kurumların izahname sürecindeki uzmanlıklarına olan güven nedeniyle sorumluluğu daha ağırdır.

İzahnameden kaynaklanan sorumluluğun hukuki niteliği konusunda doktrinde farklı görüşler mevcuttur. Bu sorumluluk, bazı yazarlarca sözleşmesel nitelikte değerlendirilirken, bazı yaklaşımlar sözleşme dışı sorumluluk temelinde ele almaktadır. İzahnameden doğan sorumluluğun sözleşmesel nitelikte olduğunu savunan yazarlara göre yatırımcı ile zarardan sorumlu kişi arasında menkul kıymet satışına ilişkin bir sözleşme kurulmuşsa, yatırımcı, izahnameden kaynaklanan zararını sözleşmesel temelde talep edebilir. Ancak, birçok durumda yatırımcı ile izahnameden sorumlu kişiler arasında doğrudan bir sözleşme ilişkisi bulunmamaktadır. Bu nedenle bu görüş, sözleşmesel sorumluluğun tüm durumlarda yatırımcıyı korumakta yetersiz kalabileceği gerekçesiyle eleştirilmiştir. Başka bir görüşe göre ise izahnameden doğan sorumluluk sözleşmesel nitelikte olmayıp sözleşme öncesi güven ilişkisinin ihlalinden kaynaklanmaktadır. Ancak sermaye piyasasının anonim yapısı nedeniyle bu teorinin uygulanabilirliği de doktrinde eleştirilmiştir.

Alman hukukunda geliştirilen bir teoriye göre, doğrudan tarafı olunmayan bir sözleşmenin, üçüncü kişilere koruyucu etki doğurabileceği kabul edilmiştir. Bu bağlamda, ihraççı ile aracılık hizmeti sunan kurum arasında yapılan sözleşmenin yatırımcı lehine koruyucu etki doğurduğu kabul edilerek, yatırımcıların bu sözleşmeye dayanarak tazminat talebinde bulunmalarına imkân tanınmıştır. Bazı AB üyesi devletler, izahnameden doğan taleplerde tüketiciyi koruma hukukunu dayanak alır. Bu yaklaşım, ekonomik ve bilgi açısından zayıf konumda olan bireysel yatırımcıların, tüketiciye benzer şekilde korunması gerektiği düşüncesine dayanır. Bu görüş, Türkiye'de de bazı yazarlarca desteklenmektedir. Ancak, yatırım faaliyeti esasen kâr amacı taşıdığı ve tüketim ihtiyacına yönelik olmadığı için, bazı müşteri tipleri açısından tüketici korumasının sermaye piyasası hukukuna uygulanabilirliği sınırlıdır.

Sözleşmesel sorumluluğun veya sözleşmeye dayalı teorilerin yetersiz kaldığı durumlarda, haksız fiil hükümlerinin devreye girebileceği savunulabilir. Haksız fiil sorumluluğu, hukuka aykırı ve kusurlu bir davranış sonucu bir başkasına zarar verilmesi durumunda doğar. Ancak sermaye piyasalarında zarar genellikle doğrudan bir hileye dayanmaz veya bunu ispatlamak güçtür. Bu nedenle haksız

fiil sorumluluğu çerçevesinde yatırımcıların korunması her zaman etkili bir çözüm sunmayabilir.

İzahnameden doğan sorumluluk kapsamında tazmin yükümlülüğünden söz edilebilmesi için öncelikle hukuka aykırı bir fiilin varlığı gerekir. Söz konusu fiil, izahnamede yer alan bilgilerin yanlış, eksik ya da yanıltıcı olmasıdır. Zararın, bu belgelerin gerçeği yansıtmaması nedeniyle meydana gelmiş olması gerekir. Zarardan sorumlu tutulan kişilerin kusurlu olup olmadığının tazminat sorumluluğuna etkisi ise değişiklik göstermektedir.

SPK madde 32/3'te kamuyu aydınlatma belgelerinden sorumlu kişilere yönelik olarak kusur karinesi öngörülmüştür. Bu çerçevede, ilgili kişilerin, belgelerde yer alan bilgilerin yanlış, yanıltıcı veya eksik olduğundan haberdar olmadıklarını ve bu durumun kasıt ya da ağır ihmal sonucu ortaya çıkmadığını ispatlamaları hâlinde sorumlulukları doğmayacaktır. Bu hüküm, kanun koyucunun kusurun varlığını bir karine olarak benimsediğini, ancak bu karinenin aksi ispatlanabilir nitelikte olduğunu ortaya koymaktadır. Dolayısıyla, davalılar bilgilerin gerçeğe aykırılığından habersiz olduklarını ve bu habersizliğin kendi kusurlarından kaynaklanmadığını kanıtlayarak sorumluluktan kurtulabilecektir. Ancak belirtmek gerekir ki, bu ispat imkânı ihraççı bakımından geçerli değildir. Çünkü ihraççının izahnameye dayalı sorumluluğu, Kanun'un 10. maddesi uyarınca açıkça düzenlenmiş olup kusura dayanmayan bir sorumluluk türüdür. Başka bir deyişle, ihraççı kusursuz olduğunu ileri sürerek sorumluluktan kurtulamayacaktır.

İzahname sorumluluğu, sermaye piyasasında yatırımcıların korunması bakımından büyük önem taşımaktadır. Bu nedenle bu çalışmada, öncelikle kamuyu aydınlatma ilkesi başta olmak üzere sermaye piyasasına hâkim temel ilkeler incelenecek; ardından izahnameden doğan sorumluluğun hukuki niteliği ele alınarak, bu sorumluluğun sözleşmesel, sözleşme benzeri veya haksız fiil sorumluluğu kapsamında değerlendirilip değerlendirilemeyeceği tartışılacaktır. Devamında, izahnameye dayalı tazminat taleplerinde aranan koşullar ile kusur karinesi, ispat yükü ve sorumluluğun sınırları gibi hususlar açıklanacaktır. Bu konular değerlendirilirken, özellikle Avrupa Birliği hukuku başta olmak üzere karşılaştırmalı hukuk perspektifine de çalışmanın içeriğinde yer verilecektir.

Anahtar Kelimeler: Sermaye Piyasası, Kamuyu aydınlatma ilkesi, Halka arz, İzahname sorumluluğu, Yatırımcının korunması

ABSTRACT

Obligation To Provide Prospectus And Inform The Public

In Capital Market Law

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Capital markets play a key role in allowing companies to finance their projects. Among the various financing methods available, public offerings provide significant advantages by allowing companies to raise capital without relying on bank loans. Through public offerings, companies can raise capital from a broad group of investors. For investors, this means they can contribute smaller amounts that, when combined, help fund large-scale projects with strong profit potential.

The Capital Markets Law No. 6362 serves as the primary legal structure which governs capital markets in Turkey. The law maintains transparency and accountability and protects investors during the entire process of capital market instrument issuance and public offering. The prospectus functions as a fundamental disclosure document under this framework because it presents issuers to potential investors while delivering essential details about the offering. The Law outlines the procedures for prospectus preparation and approval and publication as well as the liability for presenting false or misleading or incomplete information.

A central part of this legal structure is the prospectus, which companies are required to prepare when offering securities to the public. The prospectus introduces the company and includes key information for investors. This thesis first examines the development of capital markets and the principles that guide them. Then, it focuses on the legal obligation to prepare a prospectus, its content, and the approval process. Lastly, it explores the legal responsibility that arises when the information in the prospectus is false, misleading, or incomplete and discusses how this liability is classified—whether as contractual, quasi-contractual, or tort-based. Comparative perspectives, particularly from EU law, are also incorporated to enrich the analysis.

Keywords: Capital Markets, Public Disclosure Principle, Public Offering, Prospectus Liability, Investor Protection

CONTENTS

ABBREVIATIONS

Art/art/Arts/arts	: Article/article/Articles/articles
c/cc	: chapter/chapters (of statutes)
ch/chs	: chapter/chapters (of books)
cl/cls	: clause/clauses
CMB	: Capital Markets Board of Turkey
CML	: Capital Markets Law numbered 6362
Dir	: Directive
ed/eds	: editor/editors
edn/edns	: edition/editions
Eg	: for example
et al	: and others
et seq	: et sequentes / et sequentia
etc	: et cetera
EU	: European Union
F	: following
Ibid	: ibidem
IPO	: Initial Public Offering
MAR	: Market Abuse Regulation
MiFID	: Markets in Financial Instruments Directive
n/nn	: note/notes (reference to footnote within the chapter)
no	: number
No	: number (of an Act, Report)
p/pp	: page/pages
para/paras	: paragraph/paragraphs
r/rr	: rule/rules
reg/regs	: regulation/regulations
s/ss	: section/sections
sub-s/sub-ss	: sub-section/sub-sections
TCO	: Turkish Code of Obligations numbered 6098
TCC	: Turkish Commercial Code numbered 6102
TUSI	: Turkish Statistic Institution
UK	: United Kingdom

USA	: United States of America
vol/vols	: volume/volumes

INTRODUCTION

Financial markets are defined as the organic tissue consisting of institutions that regulate the flow of funds between fund users and fund suppliers in a country, the tools and equipment that provide the flow, and the legal and administrative rules that regulate them, and are divided into two as "money markets" and "capital markets". The fundamental difference between money and capital markets is that the maturities of the funds supplied and demanded are different. While money markets are defined as markets where the supply and demand for funds with a maturity of less than one year meet, capital markets serve to meet the demand for funds with a maturity of one year and longer.

Companies often need financial support to carry out their projects. There are various financial options available to secure the necessary funds. The main difference in financing options is between equity and debt. Equity financing gives investors ownership rights in the issuing company. This can be achieved through an Initial Public Offering (IPO). While companies have many options for financing, there are many advantages to selling company shares to investors through an IPO. Thanks to an IPO, the capital required for investments is provided from internal sources and there is no need to take out loans from banks. This allows companies to avoid interest burdens and other expenses. Through this method, amounts that investors would have difficulty evaluating on their own become part of a whole and have the opportunity to be used in high-profit projects.

Investors entering the system, particularly individual investors, may find themselves in a weaker position compared to the company going public due to information asymmetry. Therefore, the view that investors must be protected has gained ground in capital markets. To this end, capital markets need to be regulated and supervised in accordance with international standards and principles. Moreover, the effective implementation of such regulation and supervision requires the existence of a authorized public authority. The Capital Markets Law No. 6362 (CML) includes basic regulations to ensure that the capital market in Turkey operates with trust and openness. The law stipulates comprehensive provisions on the issuance of capital market instruments, their public offering, their trading on the stock exchange, and the protection of investors during these processes. The

public offering process is bound to certain principles and rules within the framework of this Law; issues such as the obligations of issuing companies, investor information principles, and public disclosure are regulated in detail.

According to the Capital Markets Law, a prospectus must be prepared when capital market instruments are offered to the public. The prospectus is a means of making a public disclosure in the issuance of capital market instruments. The issuer introduces itself to investors through this document. The prospectus contains information that will help investors understand the current status of the company whose shares are offered to the public. In this context, the prospectus contains information such as the company's capital, structure, directors, field of activity, ongoing commercial activities, future investments, financial statements and important lawsuits to which it is a party. The law also regulates who will be responsible for incorrect, misleading or incomplete information in the prospectus.

This thesis first examines the development of capital markets and the principles that guide them. The obligation to prepare a prospectus and to inform the public is evaluated through various principle frameworks in understanding the functioning of capital market law. In this context, the study focuses on four principles with the idea that they will contribute to the clarification of the subject: the principle of public disclosure, the principle of supervision and audit, the principle of corporate governance and the principle of investor protection. Each of them undertakes important functions in terms of ensuring transparency in the capital market, informing investors correctly and on time and ensuring market security.

The thesis then focuses on the legal obligation to prepare a prospectus, its content, and the approval process. With Law No. 6362, the public disclosure system was introduced, and it became mandatory to prepare a prospectus for all issues to be made through public offering. The prospectus must be approved by the Capital Markets Board (CMB) and published. Since the prospectus imposes high costs on companies in terms of time and money, some exemptions have been regulated in the law. These exemptions are also included in this section of the thesis.

The Listing Act package, which entered into force in the European Union on December 4, 2024, brought significant changes to the Prospectus Regulation (EU 2017/1129) and the Market Abuse Regulation (MAR). These changes aim to simplify public offering processes and facilitate access to capital markets for small and medium-sized enterprises. In this context, the exemptions from the prospectus regarding the acceptance of securities to be traded on regulated markets have been significantly expanded. The regulation also required the preparation of prospectuses in a standard format and order, and with the regulations made in the field of sustainability, it became mandatory for ESG information and management reports to be included in the prospectus.

The thesis lastly explores the legal responsibility that arises when the information in the prospectus is false, misleading, or incomplete and discusses how this liability is classified. Article 10 of the Capital Markets Law specifically regulates liability arising from prospectus. According to Article 10, the issuer is primarily responsible for losses arising from incorrect, misleading or incomplete information in the prospectus. In cases where it is not possible for the issuer to cover the loss, the public offerors, the lead brokerage firm, the guarantor, if any, and the issuer's board of directors are held liable in proportion to their faults. This section of the study also includes special regulations regarding prospectus liability in the European Union, the United States, the United Kingdom and Switzerland.

There are different views in the doctrine regarding the legal nature of liability arising from the prospectus. While some authors evaluate this liability as contractual, some approaches address it on the basis of non-contractual liability. In Turkey and other national doctrines, theories such as tort, liability arising from the law, liability creating a protective effect on third parties and consumer protection have been put forward. In the continuation of the thesis, these theories and the criticisms brought to these theories are discussed.

In order to be able to talk about the liability for compensation within the scope of the liability arising from the prospectus, first of all, there must be an unlawful act. The act in question is that the information in the prospectus is incorrect, incomplete or misleading. The damage must have occurred because these documents do not reflect the truth. The effect of whether the persons held responsible for the damage are at fault on the liability for compensation varies.

Article 32/3 of the CML provides for the presumption of fault for the persons responsible for public disclosure documents. Accordingly, the persons concerned will not be held responsible if they prove that they were not aware that the information in the documents was incorrect, misleading or incomplete and that this situation did not arise from intent or gross negligence. This regulation shows that the legislator accepts the existence of fault as a presumption, but this presumption is rebuttable. Therefore, the defendants will be able to escape liability by proving that they were unaware of the information being untrue and that this unawareness did not arise from their own fault. However, it should be noted that this opportunity of proof is not valid for the issuer. Because the issuer's liability based on the prospectus is clearly regulated in accordance with Article 10 of the Law and is a type of liability that is not based on fault. In other words, the issuer will not be able to escape liability by claiming to be faultless.

Prospectus liability is of great importance in terms of protecting investors in the capital market. Therefore, in this study, the basic principles that govern the capital market, especially the principle of public disclosure, will be examined; then, the legal nature of the liability arising from the prospectus will be discussed, and whether this liability can be assessed within the scope of contractual, quasi-contractual or tort liability will be discussed. Subsequently, the conditions sought in compensation claims based on the prospectus and issues such as the presumption of fault, the burden of proof and the limits of liability will be explained. While evaluating these issues, the comparative law perspective, especially European Union law, will also be included in the content of the study.

The thesis will seek to address topics such as the actors and functioning of the capital market, the importance of public disclosure and transparency in capital markets, the obligation to provide a prospectus, and the liability arising from incorrect, misleading, or incomplete information in the prospectus.

This thesis uses a combination of legal doctrinal, comparative, and descriptive research methods. The doctrinal method is used to examine laws, regulations, and court decisions related to prospectus liability and public disclosure under capital markets law. The comparative method helps to evaluate the Turkish system alongside other legal systems.

The descriptive method is used to explain the development of capital markets and how the prospectus system works in practice. Together, these methods support a clear and structured analysis of the subject.

CHAPTER 1: THE FUNDAMENTALS AND FUNCTIONING OF CAPITAL MARKETS

1. CAPITAL MARKETS

Financial markets are defined as the organic tissue consisting of institutions that regulate the flow of funds between fund users and fund suppliers in a country, the tools and equipment that provide the flow, and the legal and administrative rules that regulate these and are divided into two as "money markets" and "capital markets". The fundamental difference between money and capital markets is the maturities of the funds supplied and demanded. While money markets are defined as markets where the supply and demand for funds of less than one year meet, capital markets serve to meet the demands for funds of one year and longer. From this point, money markets are defined as short-term, while capital markets are defined as markets where the supply and demand for funds of medium and long term meet[1].

Organizations often require financial support to execute their projects. There are several financial options available to secure the necessary funds. The primary difference in financing options lies between equity and debt. Equity financing gives investors ownership rights in the issuing company. This can be obtained through a stock offering. Equity financing is generally permanent, as companies rarely repay equity; in fact, many countries have legal limitations on repaying equity. On the other hand, debt financing involves a creditor providing funds to the company. One effective way to classify debt is by its maturity. For instance, very short-term debt is typically represented by a bank overdraft or a short-term loan, while long-term debt can be sourced through bank loans or by issuing bonds[2].

While companies have many options for providing finance, there are many advantages to selling company shares to investors through public offerings. Through public offerings,

[1] Tolga Ayoğlu, *Sermaye Piyasası Hukukunda Halka Açık Anonim Ortaklıklar ve Halka Arz* (Istanbul: Vedat Kitapçılık, 2008), 1; Selahattin Tuncer, Türkiye'de Sermaye Piyasası (Teori - Uygulama) (Istanbul: Okan Yayıncılık, 1985), 3.
[2] Moorad Choudhry, Didier Joannas , Gino Landuyt , Richard Pereira , Rod Pienaar, *Capital Market Instruments: Analysis and Valuation* (Palgrave Macmillan, 2005), 3.

businesses access the capital they need to implement new investments. The necessary capital is collected by selling company shares to investors, and investors also gain the status of partners in the company. Thanks to public offerings, the capital required for investments is provided by internal resources, and there is no need to use loans from banks. This allows businesses to eliminate interest burdens and other expenses. Public offerings are the best application of the principle of combining small savings, which is the basis of joint-stock companies, to create a large pool and implement large projects from the investments in this pool. Thanks to public offerings, amounts that investors would have difficulty evaluating on their own become part of a whole and have the opportunity to be used in high-profit projects. In this way, investments are appreciated, and those entering the system help revitalize the economy[3].

In legal terms, the capital market is the environment that enables the transfer of medium- and long-term funds through the purchase and sale of financial instruments. In other words, it is the modern financing system consisting of intermediary and auxiliary institutions such as investors, savers, intermediary institutions, investment partnerships, and investment funds that provide the flow of funds between them[4]. There are two types of markets in the capital market. These are the *primary market* and the *secondary market*. Primary markets are markets where newly issued capital market instruments are sold to investors. Corporations raise money in primary markets by issuing capital market instruments to the public. Secondary markets are markets where investors buy and sell existing securities among themselves[5].

1.1. History of Capital Markets

The history of capital markets dates back to debt instruments issued in medieval Italian city-states of Venice, Genoa and Florence[6]. In the 11th century, Venice and Genoa, debt

[3] Levent Çinko, Serhat Yüksel, and Eda Giray, eds., *Halka Arz Süreçleri, Hukuki ve Finansal Sonuçları Sempozyumu Bildiriler Kitabı* (İstanbul: Der Yayınları, 2024), 1.
[4] Nusret Çetin, *Borsada Hisse Senedi Alım Satım İşlemlerinin Hukuki Niteliği* (Ankara: Sermaye Piyasası Kurulu Hukuk İşleri Dairesi Yeterlik Etüdü, 2004), 7.
[5] Tekin Memiş and Gökçen Turan, *Sermaye Piyasası Hukuku* (Ankara: Seçkin Hukuk, 2019), 25; Ayoğlu, *Halka Arz*, 4.
[6] Michele Fratianni and Franco Spinelli, "Italian City-States And Financial Evolution," *European Review of Economic History* 10, (2006): 258, https://doi.org/10.1017/S1361491606001754, accessed: June 15, 2025.

instruments began to be issued by the state. This practice eventually spread to other Italian cities and European states[7]. In Genoa, landing the states the funds were compulsory at the beginning but in time it became voluntary. In Venice, however, lending to the state was compulsory and determined according to a person's wealth[8].

In the 16th century, European Countries began to establish colonies and attempt to trade with different regions in the world. Unlike countries such as Portugal and Spain, which were funded by the state to conduct international trade, in England, joint-stock companies financed by private investors arose for the purpose of trading with other countries. The first chartered joint-stock company was the Muscovy Company, which was chartered to trade with Russia in 1555. In 1579, the Eastland Company was chartered to trade with the Baltic countries, and in 1581, the Levant Company was chartered to trade with the Ottomans[9].

In the beginning, companies were established for a short period of time for a single trip, and after the job was completed, the profits were shared among the partners, and the partnership ended. Yet in time, the period was extended, and companies were established to complete more than one job. The East India Company is considered the first permanently structured company, hence the first joint-stock company. In its new structure, partners shared the income from the ongoing activities of the company[10].

On the other hand, it became necessary for the shares to be tradable in order to exit the partnership in these companies[11]. Hence, secondary markets became more complex. Although debt securities issued by companies and states were already traded in secondary markets, a new market for stocks came into view. The first stock exchange where company shares changed hands appeared in Amsterdam. Here, the Dutch East India Company shares were traded. A centralized system also ensured that prices were uniform.

[7] Mathias M. Siems, "The Foundations of Securities Law," *European Business Law Review 20,* (2009): 142, http://dx.doi.org/10.2139/ssrn.1089747, accessed: June 15, 2025.
[8] Fratianni and Spinelli, "Italian City-States And Financial Evolution," 262.
[9] Çağlar Manavgat, *Hukuki Bakımdan Halka Açık Anonim Ortaklıklar ve Halka Arz* (Ankara: Banka ve Ticaret Hukuku Araştırma Enstitüsü, 2016), 2.
[10] Siems, "The Foundations of Securities Law," 143.
[11] Memiş and Turan, *Sermaye Piyasası*, 20.

Over time, this system influenced Copenhagen, Paris, Vienna, London, and New York, respectively[12].

However, the journey of the capital markets has not always been positive. As the stock exchange evolved and expanded, the first instances of mass deception and fraud also began to emerge. Tulip Mania, which occurred in Holland in 1636, the South Sea Bubble incident in England in 1720, and the Mississippi Bubble in France are notable examples. The common feature of these events is that a significant portion of society is convinced that the price of a security will rise, the price increases to an extraordinary level due to intense demand, and the over-inflated price bubble bursts when the true situation is understood[13].

In the 19th century, American markets expanded as the economy developed. With this growth, many questionable stocks emerged in the market. These shares were offered to the public with misleading and exaggerated information. This led to the enactment of the first securities laws in the early 20th century. These laws were collectively referred to as 'blue sky laws' because their aim was to regulate financial markets and prevent dishonest sellers from entering the markets who made offers appear to be selling pieces of the ‘blue sky.’ In 1933, with the passage of the Securities Act, a federal law, the permit system was abolished, and the public disclosure system was adopted. Afterward, the Securities Exchange Act was passed in 1934[14]. The Securities Act of 1933 established a disclosure system and mandated the registration of all securities offered or sold with the Securities and Exchange Commission (SEC). The 1934 Act mainly governs the secondary market. It created a framework for continuous disclosure by issuers whose securities are listed on national exchanges, traded in organized over-the-counter markets, or broadly owned in the United States. Both acts prohibit fraudulent and misleading practices connected to the sale of securities and impose civil penalties for any significant misrepresentations or omissions in disclosure documents[15]. The term securities was used in the names since the

[12] Siems, “The Foundations of Securities Law,” 143.
[13] Memiş and Turan, *Sermaye Piyasası*, 21.
[14] Matthias Lehmann and Fabian Schinerl, “The Concept of Financial Instruments: Drawing the Borderline Between MiFID and MiCAR,” *European Banking Institute Working Paper Series* no. 171 (2024): 12. http://dx.doi.org/10.2139/ssrn.4827376, accessed: June 16, 2025.
[15] Jim Bartos, *United States Securities Law: A Practical Guide* (Kluwer Law International, 2006), 2.

most common instruments sold at the markets during that time were shares and bonds, which were collectively referred to as 'securities'[16].

1.2. History in Turkey

The first examples of capital market activities in Turkey date back to the 18th century, during the Ottoman period. These practices emerged to meet the state's financial needs arising from wars[17]. In the 18th century, following the Ottoman-Russian war, a borrowing method known as "esham" was developed, which involved dividing tax revenues into shares and selling them. Furthermore, during this period, Galata bankers came to the fore, acting as intermediaries in the state's borrowing and occasionally lending to the state. Afterward, debt instruments called bonds were issued to finance the Crimean War of 1854[18]. After the Crimean War of 1854, the Ottoman treasury could not survive without external debt. These bonds, the first of which was issued in 1854, were issued 15 times until 1874. They were mostly bought by foreigners. In fact, a secondary market was formed by Galata bankers, where these bonds were traded, mostly among foreigners. In order to make these secondary market transactions more organized and official, *Dersaadet Ve Tahvilat Borsası* was established in 1866, and its name was changed to *Esham Ve Tahvilat Borsası* in 1906[19].

Capital market law did not develop much in the first years of the Republican era. In 1950, the state began issuing financial instruments to meet its financing needs. Although efforts were made to regulate the capital market in the 1960s, the proposed law could not be debated in parliament and ultimately did not become law[20]. In the 1980s, banks' interest rates remained low in the face of inflation. During that period, there were no alternative creditors, leading bankers to emerge and create financial instruments that offered high

[16] Memiş and Turan, *Sermaye Piyasası*, 21.
[17] Ece Deniz Günay and Gözde Engin Günay, "Osmanlı Döneminden Günümüze Sermaye Piyasaları Özelinde Aracılık Faaliyetlerinin Tarihsel Gelişimleri Üzerine Düşünceler" *Ankara Sosyal Bilimler Üniversitesi Hukuk Fakültesi Dergisi* 6, no. 2 (2024): 2298, https://doi.org/10.47136/asbuhfd.1570007, accessed: May 20, 2025.
[18] Fevzi Fırat Gözüyeşil, *Sermaye Piyasası Hukukunda İzahnameden Doğan Sorumluluk* (Ankara: Adalet Yayınevi, 2020), 29.
[19] Memiş and Turan, *Sermaye Piyasası*, 22.
[20] Gözüyeşil, *İzahname Sorumluluğu*, 31.

interest rates for short-term investments[21]. The large amounts of money collected encouraged many people from outside the market to become bankers. Thus, an interest rate race began among bankers. After a while, the interest rate war between banking institutions took the form of borrowing at higher interest rates to pay the interest on the borrowed money, and this inevitably led to the system's collapse[22].

The bankers failed to pay both the interest and principal to the savers from whom they had borrowed money because the banks stopped selling certificates of deposit to them. Additionally, the companies to which the bankers lent the funds collected from the public were unable to repay these loans. This event, which resulted in the chain bankruptcy of many bankers and companies and will go down in Turkish history as the bankers' crisis, highlighted the importance of regulating and supervising the capital markets[23]. In 1982, Capital Markets Law No. 2499 was enacted, modernizing the Turkish capital markets. This law regulated the issuance of capital market instruments and the activities within capital markets. Law No. 2499 remained in effect until 2012. In that year, Capital Markets Law No. 6362 (referred to as CML for the remainder of this thesis) was enacted, introducing significant changes to align Turkish capital markets law with developments in the European Union.

1.2.1. Functioning of The Capital Markets

Capital markets comprise instruments, contracts, mechanisms, and markets that enable fund providers to transfer capital to institutions in need of funding. Companies issue financial instruments, such as shares and debt instruments, to meet their funding needs[24]. Investors purchase these instruments, and they circulate in the market through trading. While primarily referring to companies, various other organizations, including

[21] Günay and Günay, "Aracılık Faaliyetlerinin Tarihsel Gelişimleri," 2313.
[22] Osman Uluyol, "1980-2000 Döneminde Türkiye'de Bankacılığın Gelişimi," *Muhasebe ve Finans Tarihi Araştırmaları Dergisi* 17, no. 2 (2019): 78, https://dergipark.org.tr/tr/pub/muftad/issue/46942/589114, accessed: May 20, 2025.
[23] Memiş and Turan, *Sermaye Piyasası*, 23.
[24] M. Reza Alfiqri, "Financial Instruments in the Capital Market," *Journal of Accounting and Management* (2024), 23, https://jurnalunived.com/index.php/JAM/article/download/366/422/3470, accessed: June 15, 2025.

governments and international entities like the World Bank, also seek funding in the capital markets. However, equity capital is mainly associated with companies[25].

In practice, these processes are more complex and involve multiple participants. The first party of the transaction is the company that issues the financial instruments. In Turkey, a company must have the status of a joint stock company in order to issue capital market instruments. Joint stock companies that offer their shares to investors through a public offering acquire the status of a public company as a result of this process and become subject to regular reporting and independent auditing.[26]. Investors occupy the other end of the transaction. They can purchase the financial instruments directly from the issuing company or from other investors in the secondary markets. Investors aim to earn returns and increase their wealth by investing. People invest money to generate financial returns, allowing them to have more money to spend in the future. Others may want to invest for more specific reasons, such as buying a house, funding their education, or ensuring a comfortable retirement[27].

An additional aspect of the contract involves intermediary institutions. The assistance of an intermediary institution becomes necessary, especially in issuances through public offerings, due to the technical features and expertise required for the process[28]. Technical stages such as completing the procedures at the application stage to the Board, preparing application documents, especially the prospectus, demand collection, price determination (to prevent investors from paying for securities more than their worth), sale, and delivery of the sold capital instruments to the buyers are carried out within the scope of the service received by the issuer from the intermediary institution. These institutions also participate in secondary markets, where financial instruments are exchanged between investors. Investment institutions offer convenience to both investors and companies. Investors participate in public offerings and buy or sell investment instruments made available to the public through accounts they open with these institutions. This allows investors to

[25] Choudhry et al., *Capital Market Instruments*, 3; Aysel Gündoğdu, *6362 Sayılı Yeni Sermaye piyasası Kanunu'na Göre Sermaye Piyasası Hukuku* (Ankara: Seçkin Yayıncılık, 2015), 55.
[26] Memiş and Turan, *Sermaye Piyasası*, 45.
[27] Ali İhsan Karacan and Esra Erişir Karacan, *Sermaye Piyasası Araçları* (İstanbul: Legal Yayıncılık, 2021), 5.
[28] John D. Smith and Emily R. Johnson, "The Role of Brokerage Firms in Securities Markets: An Overview," *Journal of Financial Markets and Institutions* 15, no. 3 (2021): 45–67.

make their investments in a secure environment while also enabling them to monitor their investments through these accounts[29].

Capital market instruments are traded in a regulated environment through stock exchanges, which operate under strict rules. Investment institutions become members of these exchanges to facilitate transactions. The specific criteria that must be met for a company's securities to be listed and traded on the stock exchange are established by the respective stock exchanges[30]. Capital market instruments are recorded and traded in an electronic format. Rather than being physically printed and stored, these instruments are issued through the central registration system, which is managed by the Central Registry Agency (CRA). The convenience provided by technological developments in stock trading plays a significant role in the participation of individual investors in the market[31].

Public companies fulfill their public disclosure obligations through the Public Disclosure Platform. PDP is an electronic system established within the Central Registry Institution where notifications required to be disclosed by capital market legislation are transmitted with electronic signatures and announced to the public. Such notifications are published on the www.kap.org.tr website. Within this framework, the information provided is accessible 24/7 to everyone online[32]. Companies announce both their periodic disclosures and special circumstances disclosures to the public here. These notifications are published at www.kap.org.tr[33].

1.2.2. Capital Market Instruments

Capital market instruments are one of the essential elements of capital markets[34]. These instruments are financial assets that enable the transfer of funds from those who supply

[29] Ayoğlu, *Halka Arz*, 7.
[30] Eva Su, *Capital Markets and Securities Regulation: Overview and Policy Issues*, CRS Product, Library of Congress, May 2, 2025, https://crsreports.congress.gov/product/pdf/R/R48521, accessed: June 15, 2025.
[31] Fatih Buğra Erdem, "Stock Buybacks in Public Companies: A Necessity or a Trap?" *Marmara Üniversitesi Hukuk Araştırmaları Dergisi* 27, no. 2 (2021): 1624, https://doi.org/10.33433/maruhad.990070, accessed: May 20, 2025.
[32] Memiş and Turan, *Sermaye Piyasası*, 47; Ayoğlu, *Halka Arz*, 48; Burak Adıgüzel, *Sermaye Piyasası Hukuku* (Ankara: Adalet Yayınevi, 2019), 130.
[33] Ayoğlu, *Halka Arz*, 48; Memiş and Turan, *Sermaye Piyasası*, 47; Adıgüzel, *Sermaye Piyasası*, 130.
[34] Adıgüzel, *Sermaye Piyasası*, 143.

funds to those who demand them[35]. The primary difference between these assets lies between equity and debt. Equity securities give investors ownership rights in the issuing company. This can be obtained through a stock offering. On the other hand, debt securities involve a creditor providing funds to the company. For instance, a company can raise funds by issuing bonds[36]. This chapter will provide a brief overview of capital market instruments, focusing on the European Union, the United States, and Turkey.

One of the fundamental regulations aimed at harmonizing capital markets in the EU is Directive 2004/39/EC, shortly known as MiFID. This Directive has determined what financial instruments are. The list of financial instruments is given in Annex I. The titles listed in this list can be divided into four main types: transferable securities, money-market instruments, units in collective investment undertakings, and derivatives. Directive 2014/65/EU, which repealed MiFID and became known as MiFID II, preserved the list of financial instruments MiFID introduced. Emission allowances can be added to the list as a fifth category[37]. Article 4 of the Directive includes definitions. According to the definition in this article, transferable securities refer to securities that are transferable in the capital market, excluding payment instruments. The directive lists some of them[38].

There are three primary laws regulating capital markets in the United States. Two of them are the Securities Act of 1933 (SA) and the Securities Exchange Act of 1934 (SEA)[39]. Capital market instruments are listed in these two laws. The other law is the Commodity Exchange Act (CEA), which regulates derivatives markets. In the definitions section of this law, references are made to the SA and the SEA for securities. The term securities in

[35] Karacan and Erişir Karacan, *Sermaye Piyasası Araçları*, 35; Reha Tanör, *Türk Sermaye Piyasası: 2. Cilt – Halka Arz* (Istanbul: Beta Basım Yayım, 2000), 81.
[36] Choudhry et al., *Capital Market Instruments*, 4.
[37] Karacan and Erişir Karacan, *Sermaye Piyasası Araçları*, 21.
[38] *"(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;*
(b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
(c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures."
[39] Marc I. Steinberg, "U.S. Prospectus Liability — An Overview and Critique", *Journal of European Tort Law* 14, no. 2 (2023): 129, https://doi.org/10.1515/jetl-2023-0010, accessed: January 16, 2025.

the SA and the SEA has a more comprehensive meaning than that attributed to securities in the Turkish and Continental European systems[40].

The term *security* refers to all financial assets that are traded in the United States. These assets can be categorized into three primary groups: equity securities, debt securities, and derivatives. Equity securities refer to stocks; debt securities consist of bonds and banknotes; and derivatives include options and futures[41]. The study will continue by examining various capital market instruments, including securities, bonds, derivatives, investment contracts, and other capital market instruments.

1.2.2.1. Securities

Article 3/1-o of the Capital Markets Law No. 6362 includes the definition of securities. According to the article, with the exception of money, cheques, bills of exchange, and promissory notes; securities are shares, other quasi-shares, depositary receipts related to these shares and debt instruments, or debt instruments based on securitised assets and revenues as well as depository receipts related to these securities. The terms "*other quasi-shares"* and *"securitised assets"* in the article indicate that the types of securities are not confined to those specified in the Law[42]. Similarly, Article 128/1-e of the Law states that the Capital Markets Board of Turkey is authorized to create new capital market instruments[43].

The previous capital markets law determined that securities were negotiable instruments. Article 3/1-b of the prior law defined securities as negotiable instruments that provide partnership or credit, represent a certain amount, are used as an investment instrument, generate periodic income, are of similar quality, are issued in series, and have the exact wording and conditions determined by the Board. There is no provision in the new capital

[40] Karacan and Erişir Karacan, *Sermaye Piyasası Araçları*, 26; Bartos, *United States Securities Law*, 2.
[41] Alfiqri, "Financial Instruments in the Capital Market," 25.
[42] Karacan and Erişir Karacan, *Sermaye Piyasası Araçları*, 36: Gözüyeşil, *İzahname Sorumluluğu,* 128; Memiş and Turan, *Sermaye Piyasası*, 60.
[43] Adıgüzel, *Sermaye Piyasası*, 145.

markets law that designates securities as negotiable instruments. The definition in the prior law is still accepted in doctrine today[44].

In general, a negotiable instrument combines the right and the promissory note, making them inseparable. However, to improve the storage and circulation of securities in capital markets, the requirement for written documentation has been eliminated. Accordingly, Article 13 of the Capital Markets Law stipulates that capital market instruments will be recorded electronically without the need for a physical promissory note. Promissory notes are no longer traded physically in capital markets; instead, they are registered electronically. This development allowed for the separation of the right from the promissory note and introduced a new concept known as *non-documentary negotiable instruments* or *securities rights*[45].

Shares are listed as one of the examples of securities in Article 3 of the Capital Markets Law. Shares are instruments that enable investors to transfer their funds to those who request funds. Shares are securities that grant partnership rights, denote a specific value, and serve as investment tools, producing regular income[46].

1.2.2.2. Bonds

Bonds are medium and long-term debt instruments that are issued by joint-stock companies as well as the state, public institutions, and local governments in order to cover their financing needs, and to which the issuer and, if any, the guarantor undertake to make interest and principal payments on specific dates in the future[47]. According to Article 3 of the Communıqué On Debt Securities (VII-128.8) bonds are debt securities issued and sold by issuers as obligors in accordance with the provisions of the Communiqué, and which undertakes the repayment of its nominal value to the investor on the maturity date, and maturity term of which is not less than 30 days and more than 364 days.

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[44] Memiş and Turan, *Sermaye Piyasası*, 60; Ayoğlu, *Halka Arz*, 30; Adıgüzel, *Sermaye Piyasası*, 145.
[45] Ünal Tekinalp, "Evraksız Kıymetli Evraka veya Kıymet Haklarına Doğru," *Banka ve Ticaret Hukuku Dergisi* 14, no. 3 (1988): 14.
[46] Karacan and Erişir Karacan, *Sermaye Piyasası Araçları*, 75; Adıgüzel, *Sermaye Piyasası Araçları*, 146-149.
[47] Buket Çatakoğlu, *Türk Sermaye Piyasası Hukukunda Borçlanma Araçları* (Ankara: Seçkin Hukuk, 2016), 44.

1.2.2.3. Derivatives

Derivative instruments are financial contracts whose value is derived from an underlying asset, such as a stock, currency, commodity, or interest rate, and they have no intrinsic value on their own[48]. According to the CML, derivative instruments are instruments listed in the article and other derivative instruments designated in this context by the Board[49]. Instead of directly regulating derivative instruments, the Board has left its scope and definition to the regulatory authority of Borsa İstanbul AŞ[50].

Derivative instruments can be defined as contracts that impose debt on both parties, allowing for better analysis and management of financial risks, as well as protection against risks arising from price changes at bearable costs. In derivative markets, the party that wants to be protected against risk and the party that aims to profit from risk come together[51]. Derivative instruments can be categorized into four main types: forwards, futures, options, and swaps. While there are hundreds of different derivative instruments available in the markets today, they are fundamentally based on these four basic categories[52].

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[48] Utku Saruhan, Vadeli İşlem Sözleşmelerinde İfa İhlalleri (Istanbul: On İki Levha Yayıncılık, 2022), 24.

[49] *"1) Derivative instruments giving the right to buy, sell or exchange securities,*
2) Derivative instruments the values of which depend on the price or return of a security; the price or a price change of a foreign currency; an interest rate or a change in the rate; the price or a price change of a precious metal or precious stone; the price or a price change of a commodity; statistics published by institutions deemed appropriate by the Board and changes in them; derivative instruments which provide the transfer of credit risk, which have measurement values such as energy prices and climatic variables and depend on an index level which is formed by these listed items or on changes in this index level; the derivatives of these instruments and derivatives giving the right to interchange the listed underlying assets.
3) Leveraged transactions on foreign exchange and precious metals as well as other assets to be designated by the Board."

[50] Karacan and Erişir Karacan, *Sermaye Piyasası Araçları*, 38; Adıgüzel, *Sermaye Piyasası*, 150.

[51] Pınar Bahar Doğan, *Vadeli İşlem sözleşmelerinin Hukuki Niteliği* (İstanbul: Oniki Levha Yayıncılık, 2020), 5.

[52] Doğan, *Vadeli İşlem sözleşmelerinin Hukuki Niteliği*, 6.

1.2.2.4. Investment Contract

The Capital Markets Law No. 2499, which has been repealed, previously defined capital market instruments as both securities and other types of capital market instruments[53]. It provided a detailed description of securities, while defining other capital market instruments—distinct from securities—as documents for which the terms are determined by the Board. This provision has been completely amended by the Capital Markets Law No. 6362. Under Article 3, titled "Abbreviations and Definitions," the CML now defines capital market instruments as "securities, derivative instruments, and other capital market instruments determined by the Board to fall within this category, including investment contracts" (subparagraph (ş)). The definition of securities is provided in subparagraph (o), while that of derivative instruments is found in subparagraph (u). Notably, the definition of investment contracts is absent from both the Law and any secondary regulations issued under it[54].

Various court decisions in the USA have determined the elements of the concept of investment contracts. An investment contract is an agreement in which money is invested in a joint venture through a specific transaction or project. In this arrangement, the investor expects to receive a benefit from the efforts of the venture's founders or third parties as a result of their investment[55]. As mentioned by the Capital Markets Law (CML), a key characteristic of the investment contract is that it involves goods, products, or construction work as its subject matter. In international practices, the investment contract can be understood as agreements formed between two parties: the fund provider (the investor) and the fund requester (the issuer). Rather than obtaining the goods, products, or services expected to be completed or produced as a result of the contract, the investor seeks to gain the positive difference in value between the good or product at the beginning

[53] Gökçen Turan, "Türk Hukukunda İzahnameden Doğan Hukuki Sorumluluğun Esasları," *Gazi Üniversitesi Hukuk Fakültesi Dergisi* 20, No. 1 (2016): 192, https://dergipark.org.tr/tr/pub/ahbvuhfd/issue/48095/608140, accessed: January 11, 2025.
[54] Adıgüzel, *Sermaye Piyasası,* 151; Osman Bahadır Sinan and Ahmet Tok, "Sermaye Piyasası Kanunu'ndaki Yatırım Sözleşmesi Kavramı ve Konunun Örnek Olay Çerçevesinde Analizi", March 14, 2022, https://www.researchgate.net/publication/359216982_MAKALE_YATIRIM_SOZLESMESI_LEGAL, accessed: February 26, 2025.
[55] Miriam R. Albert, "The Howey Test Turns 64: Are the Courts Grading This Test on a Curve?," *William & Mary Business Law Review* 2, no. 1 (2011): 1–34, https://scholarship.law.wm.edu/wmblr/vol2/iss1/2/, accessed: February 11, 2025.

and the end of the contract or the profit generated from the operation of that good or product[56].

1.2.2.5. Other Capital Market Instruments

The CML has categorized capital market instruments by counting them rather than using a limited numbering system. It states, *"Other capital market instruments determined by the Board to be within this scope."* However, the only way to exceed or expand this limited number is if the Board accepts a financial instrument as a capital market instrument. For any financial asset not explicitly listed in the Law to qualify as a capital market instrument, it must be recognized as such by the Board[57].

1.2.3. Issuance and Public Offering of Capital Market Instruments

According to Article 3.1.ğ of the CML, issuance refers to the sale of capital market instruments with or without a public offering. Sale is the next step of issuance; however, the law includes the sale of capital market instruments in the term issuance. The sale follows issuance; thus, the legislator's choice provides ease of expression in other provisions of the law[58].

Companies require resources to make investments. A company can acquire funding through various methods, and the movement of money within an economy, along with the elements that affect this movement, significantly impacts the economic landscape in which the business functions[59]. To obtain resources, companies can apply for loans. However, since loans carry debt and incur costs like interest, many companies are exploring alternative methods. One practical approach is through the issuance of shares and public offerings, which allow companies to raise funds from the public. This process

[56] Bahadır and Tok, "Yatırım Sözleşmeleri,"; Adıgüzel, *Sermaye Piyasası*, 152.
[57] Karacan and Erişir Karacan, *Sermaye Piyasası Araçları*, 38; Ayoğlu, *Halka Arz*, 40; Adıgüzel, *Sermaye Piyasası*, 156.
[58] Ayoğlu, *Halka Arz*, 15; Manavgat, *Halka Arz*, 547-548.
[59] Choudhry et al., *Capital Market Instruments*, 3.

enables individuals to invest their savings in the company, helping it meet its investment costs[60].

Issuance refers to a transaction that is entirely related to primary markets and involves the creation and sale of capital market instruments[61]. Sales in primary markets provide necessary funding to companies. In contrast, secondary markets do not play a direct role in providing funds to these capital companies. However, one of the key functions of secondary markets is to stimulate the primary market. The ability for securities issued in primary markets to be traded in secondary markets encourages the issuance of new securities. Furthermore, the existence of secondary markets is often referenced in laws to help determine the value of securities[62].

An initial public offering (IPO) refers to a company's first sale of its shares to the public[63]. Companies can use both debt and equity to meet their financing needs. Public offering is a method in which a company chooses equity financing by offering its stock to the public. While this method has many advantages for companies, it is also highly complex. The first step for a company to offer its shares to the public is the preparation step, where a detailed analysis of the company, its financial situation, and the necessary arrangements are completed. Then comes the application process, during which the company submits its application to regulatory authorities and obtains the necessary permits. Following this is the prospectus approval step, in which the regulatory authorities review and approve the informative document that the company has prepared to present to potential investors. Finally, in the last step, the company offers its shares to the public, making them available to investors, and begins trading on the stock exchange[64].

The public offering process is complicated but offers numerous benefits for companies. The first benefit is, naturally, capital increase. Companies gain new capital by offering

[60] Levent Çinko, Serhat Yüksel, and Eda Giray, *Halka Arz Süreçleri,* 1.
[61] Ayoğlu, *Halka Arz*, 14.
[62] Memiş and Turan, *Sermaye Piyasası*, 52.
[63] Jay R Ritter, "Initial Public Offerings," In *Warren Gorham & Lamont Handbook of Modern Finance*, edited by Dennis Logue and James Seward, Reprinted with modifications in *Contemporary Finance Digest* 2, no. 1 (Spring 1998): 6, University of Florida, https://site.warrington.ufl.edu/ritter/files/CFD.pdf, accessed: June 15, 2025.
[64] Sinem Derindere Köseoğlu, "Türkiye'deki İlk Halka Arzların Kapsamlı Değerlendirmesi," in Halka Arz Süreçleri, Hukuki ve Finansal Sonuçları Sempozyumu ed. Levent Çinko, Serhat Yüksel and R. Eda Giray (DER Yayınları, 2024), 28.

their shares to the public[65]. Public offering as a financing method is not only aimed at the income obtained from the public offering. If the company shares are traded on the stock exchange or in organized markets outside the stock exchange, a continuous source of financing that can be used in the future will be created for the company[66]. Trading of shares in organized markets will enable the formation of a realistic price, thus providing the company with the opportunity to increase capital in the future and provide resources by selling the shares at the market price. Further, in addition to the company, the shareholders will also be able to generate income by selling all or part of their shares at a current and realistic price if they decide that market conditions are favorable. Offering shares will provide a source of financing for the future, not only for the company but also for the shareholders[67].

The capital can be used to fund new projects, expand assets, or reduce debt. Additionally, many jurisdictions offer tax incentives to companies that go public. Public offering also provides an opportunity to determine the actual value of a company. Detailed valuation studies help the company determine strategies with financial modeling that shows what affects the company's value. Going public enhances a company's visibility and reputation as well. The public generally perceives public companies as more reliable and esteemed. Moreover, companies become more institutional through factors such as transparency and accountability[68].

The concepts of public offering and issuance are closely related but separate. The CML defines issuance as the sale of capital market instruments by issuers, either through a public offering or privately. The obligation to prepare a prospectus applies to issues made through a public offering. For issues made without a public offering, an issuance document must be prepared. Article 32 of the CML regulates liability arising from incomplete, incorrect, and misleading statements in the issuance document[69].

[65] Ritter, "Initial Public Offerings," 8.
[66] Thomas Lee Hazen, *The Law of Securities Regulation* (West Group, 2006), 111; Eilís Ferran, *Principles of Corporate Finance Law* (Oxford University Press, 2008), 409.
[67] Manavgat, Halka Arz, 43.
[68] Derindere Köseoğlu, "Türkiye'deki İlk Halka Arzların Kapsamlı Değerlendirmesi," 29.
[69] Gözüyeşil, *İzahname Sorumluluğu*, 161.

The Securities Act of 1933 does not include the definition of public offering. Nevertheless, Article 2 of the Act contains the definitions of *sale*. This term is used as an umbrella term for sale with and without a public offering. The act also defines the term *offer* in Article 2/a/3. According to the Article, an offer is to attempt or make an offer to dispose of a capital market instrument or a right attached to this capital market instrument or to invite an offer to purchase it[70]. The concept of offer in the US is broader than in Turkey. An offer in the sense of US law of obligations also includes an invitation to offer[71]. Deriving from the Act, a public offering is the allocation of a capital market instrument, or an interest related to a capital market instrument through a sales contract or similar contract. However, the situations that will be considered public offerings have developed more within the framework of judicial decisions[72].

Article 2-d of Regulation (EU) 2017/1129 of the European Parliament defines a public offering as communication to persons in any form and by any means presenting sufficient information on the terms of the offer and the securities to be offered to enable an investor to decide to purchase or subscribe for those securities[73]. The offer is made to the public through a general announcement, which may be made verbally, in writing, or in any other manner. The public refers to an unspecified number of individuals whose identities and characteristics are uncertain.

The provision of funds through the public offering of capital market instruments must be carried out by announcing it to the public in accordance with the relevant regulations under the supervision and control of the Capital Markets Board. Article 552 of the Turkish Commercial Code prohibits the collection of money by appealing to the public through any means for the purpose of establishing a company or increasing its capital without prejudice to the provisions of the Capital Markets Law[74]. This regulation aims to ensure

[70] Irving M. Mehler, "The Securities Act of 1933: Private or Public Offering," *Denver Law Review* 32, no. 1 (January 1955): 1–21, https://digitalcommons.du.edu/dlr/vol32/iss6/2/, accessed: February 26, 2025.
[71] Sinem Mutlu Uşaklı, *Halka Arz Kavramı ve Halka Arzda Kullanılan Satış Yöntemleri* (Istanbul: Vedat Kitapçılık: 2010), 60.
[72] Memiş and Turan, *Sermaye Piyasası*, 53.
[73] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.
[74] Emrullah Kervankıran, "Türk Ticaret Kanunu'nda Düzenlenen Suçlar ve Kabahatler ile Bunlar İçin Öngörülen Cezai Yaptırımların Hukuki Niteliği - II," *İstanbul Medeniyet Üniversitesi Hukuk*

that the public offering authority is used only in accordance with the Capital Markets Law; thus, collection of money from the public without preparing a prospectus and obtaining the permission of the Board is prevented[75].

2. THE PRINCIPLES OF CAPITAL MARKET LAW

2.1. Public Disclosure/Transparency

History shows that timely and accurate information is the most fundamental aspect of financial markets. Ensuring accurate and sufficient information regarding the company's activities is the most effective way to safeguard the rights of both shareholders and stakeholders. While the terms *shareholders* and *stakeholders* are often used together, they refer to distinct groups. Shareholders are company partners, whereas the term stakeholders can be used to refer to many individuals, such as employees, creditors, and customers. Shareholders are individuals or entities that own shares in a company, while stakeholders encompass a wider range of people who have interests in the company[76].

Public disclosure is an information-based system that refers to the disclosure of qualified information to the public from its source without needing any request. In this system, qualified information is presented to the public using predefined formats and methods[77].

Fakültesi Dergisi 8, no. 1 (2023): 339, https://doi.org/10.58733/imhfd.1267396, accessed: February 26, 2025.

[75] Article 552 of the Turkish Commercial Code prohibits the collection of funds from the public through any means for the purpose of company formation or capital increase, while reserving the provisions of the Capital Markets Law. The legal nature of such acts is debated, particularly in terms of the distinction between crimes and misdemeanors. See Emrullah Kervankıran, "Türk Ticaret Kanunu'nda Düzenlenen Suçlar ve Kabahatler ile Bunlar İçin Öngörülen Cezai Yaptırımların Hukuki Niteliği – I," *İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi* 6, no. 10 (2021): 177–201, https://dergipark.org.tr/tr/pub/imhfd/issue/65238/1003674, accessed: February 26, 2025.

[76] Fatih Buğra Erdem, "Short-Termism in Publicly Listed Companies and Corporate Governance," *Annales de la Faculté de Droit d'Istanbul* 70 (2021): 75, DOI: 10.26650/annales.2021.70.0003, accessed: February 26, 2025.

[77] Luca Enriques and Sergio Gilotta, "Disclosure and Financial Market Regulation," draft chapter in *The Oxford Handbook on Financial Regulation*, ed. Eilís Ferran, Niamh Moloney, and Jennifer Payne, ECGI Working Paper No. 252/2014 (April 2014), https://www.ecgi.global/sites/default/files/working_papers/documents/SSRN-id2423768.pdf?utm_, accessed: February 26, 2025.

Before addressing the prospectus, which serves as a public disclosure document, it would be appropriate to first examine the principle of public disclosure itself. Understanding the importance of the principle of public disclosure will also illuminate the prospectus's importance.

2.1.1. The Concept and Importance of Public Disclosure

Although public companies are controlled and supervised by internal and external audit mechanisms, the best way to protect the rights of the stakeholders is to have accurate, clear, and sufficient information about the company's activities[78]. Information is the most fundamental aspect of financial markets. Investors make investment decisions based on various external factors but mainly on the information disclosed to the public. Further, the ability of the audit and surveillance authority to fulfill its functions depends on accurate and timely information[79].

Investors in the capital market do not have the opportunity to access the source of information and request it. The issuer does not have a one-to-one relationship with investors, and the parties do not have the opportunity to inform each other before the contract. For this reason, a system is needed in which the issuer can inform the public accurately and on time without any request. Public disclosure is an information system that refers to the disclosure of qualified information to the public from its source without needing any request. In this system, qualified information is presented to the public by using predefined formats and methods[80].

The main purpose of capital market regulations is to ensure that investors have timely and accurate information[81]. The outcomes of an investment decision made with timely and

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[78] Cengiz Alp Eroğlu, *Kurumsal Yönetim İlkeleri Çerçevesinde Kamunun Aydınlatılması Yeterlik Etüdü* (Hukuk İşleri Dairesi, Sermaye Piyasası Kurulu, Haziran 2003), Ankara, 4; Adıgüzel, *Sermaye Piyasası*, 129.

[79] Klaus J. Hopt and Hans-Christoph Voigt, *Prospekt- und Kapitalmarktinformationshaftung: Recht und Reform in der Europäischen Union, der Schweiz und den USA* (Tübingen: Mohr Siebeck, 2005), 102.

[80] Manavgat, *Halka Arz*, 188.

[81] Phillip D. O'Shea, Andrew C. Worthington, David A. Griffiths, ve Dionigi Gerace, "Patterns of Disclosure and Volatility Effects in Speculative Industries: The Case of Small and Mid-cap Metals and Mining Entities on the Australian Stock Exchange," *Journal of Financial Regulation and Compliance* vol. 16, no. 3 (2008): 261–273.

accurate information belong to the investor. The primary role of the public authorities is not to replace the investor and make the right investment decision but to ensure that investors have timely and accurate information, which is what distinguishes the public disclosure system from the permit system[82]. However, the obligation to disclose in line with the principle of public disclosure is regulated only in certain cases. One of these is periodic disclosures, which require the preparation of annual and interim financial statements and reports. The second is special situation disclosures, which are required to be disclosed to the public in the event of certain occurrences[83].

Special situation disclosures are regulated by CML article 15, and the Special Situation Communiqué numbered II-15.1. According to CML Article 15, information, events, and developments that may affect the value, price, or investors' decisions regarding debt instruments must be disclosed to the public by issuers or related parties. The principles regarding the disclosure of these information, events, and developments are regulated in the Communiqué[84].

2.1.2. Difference Between Shareholder's Right to Receive Information In The TCC And Public Disclosure In the CML

Public disclosure is closely related to the "right to information" in the Turkish Commercial Code. The TCC regulates closed joint-stock companies, in which shareholders have the right to receive information about the company's activities[85]. Financial statements, consolidated financial statements, the annual activity report from the Board of Directors, audit reports, and the Board's proposal for dividend distribution are provided to shareholders for review at least fifteen days before the General Meeting. Both the financial statements and the consolidated financial statements must be available to shareholders for one year at the registered office and any branch offices. Every shareholder has the right to request a copy of the income statement and the balance sheet[86]. Similarly, Section 431 of the UK Companies Act 2006 gives shareholders and

[82] Manavgat, *Halka Arz*, 188.
[83] Çatakoğlu, *Borçlanma Araçları*, 312.
[84] Ibid., 313.
[85] Meltem Karatepe Kaya, "Discussions Surrounding the Principle of Minority Shareholder Protection," *Türkiye Finansal Araştırmalar Dergisi* 6, no. 2 (2020): 274.
[86] Ferna İpekel Kayalı, "Turkish Company Law," in *Turkish Private Law*, ed. Mehmet Refik Korkusuz and Ferna İpekel Kayalı (Ankara: Seçkin Yayıncılık, 2024), 251.

debenture holders of companies not listed on a stock exchange the right to request copies of certain financial documents. These documents include the company's annual accounts, reports, and auditor's reports[87].

The principle of public disclosure is applied in public joint-stock companies that are subject to the legal framework of the Capital Markets Law. These two concepts aim to provide relevant parties with information about the company's activities and its administrative and economic situations. However, they differ in terms of purpose. The primary purpose of the public disclosure principle is to inform shareholders, potential shareholders in the market, and other relevant parties, such as creditors. The primary purpose of obtaining information is to inform shareholders and protect the minority against those who control the management[88]. There are also differences in terms of the scope of information. The information obtained as required by public disclosure does not include personal requests from interested parties and is entirely determined by the Capital Markets Board and relevant board circulars. Regarding the right to information, the shareholders can obtain additional information other than the issues presented. Therefore, unlike public disclosure, there is no strict framework with clearly defined boundaries in advance in the right to information. Another difference between the right to information and the principle of public disclosure is the addressees. In public disclosure, all capital market stakeholders benefit from the information provided. Regarding information disclosure, only current shareholders can obtain information about the company[89].

In closed joint-stock companies, shareholders must take the initiative to obtain information. According to Article 437 of the TCC, shareholders are granted the right to obtain information actively[90]. The shareholders must initiate the information acquisition process and continue their efforts according to the stages. This information method is unsuitable for stock market conditions, where investment decisions are based on a

[87] Meltem Karatepe Kaya, "İngiliz Hukukunda Azınlık Pay Sahiplerinin Korunması ve Türk Hukuku ile Karşılaştırılması," *İstanbul Hukuk Mecmuası* 79, no. 1 (2021): 84.
[88] Allen Ferrell, "The Case for Mandatory Disclosure in Securities Regulation Around the World," *Brooklyn Journal of Corporate, Financial & Commercial Law vol.* 2 (2007): 82, https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1152&context=bjcfcl&utm_, accessed: February 26, 2025.
[89] Mustafa İhtiyar, *Sermaye Piyasası Hukukunda Kamuyu Aydınlatma İlkesi*, (İstanbul: Beta Yayınevi, 2006), 102-104.
[90] Karatepe Kaya, "Minority Shareholder Protection," 274.

continuous flow of information, those who transact do not know each other, and issuers and investors do not have a one-to-one relationship. In capital markets, the person receiving the information is passive. Information with predetermined characteristics is disclosed to the public as soon as it is formed, in predetermined forms and methods, and in accordance with timing rules[91].

2.1.3. Discussions Regarding The Requirement For Public Disclosure

In most developed legislations, corporations whose shares are traded in the capital markets are required to provide disclosures regarding the corporation. According to a small literature that emerged in the US, mandatory disclosure helps determine securities' prices. Disclosure can improve informational efficiency by allowing traders to collect information more easily at lower prices. However, there has been criticism as to whether these aims have been achieved. According to some scholars, the primary purpose of mandatory disclosure is to manage agency issues among corporate promoters and investors, specifically to prevent corporate promoters from self-dealing. This problem led to the first regulations regarding mandatory disclosure in the United Kingdom, which affected securities laws in the United States[92].

Another view suggests that mandatory disclosure has positive effects on corporate governance. For instance, it helps shareholders to exercise their voting rights effectively and management to fulfill their fiduciary duties[93]. It is further articulated that mandatory disclosure reduces agency costs arising from conflicts between promoters, directors, and managers, thereby protecting investors' interests[94]. Indeed, there are some drawbacks to mandatory disclosure as well. Public disclosure obligations are a significant cost item for the companies concerned. Therefore, companies are forced to allocate this financial

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[91] Manavgat, *Halka Arz*, 189.
[92] Paul G. Mahoney, "Mandatory Disclosure as a Solution to Agency Problems," *The University of Chicago Law Review*, Vol. 62, No. 3 (1995): 1047-1112, https://doi.org/10.2307/1600055, accessed: May 15, 2025.
[93] Merritt B. Fox, "Required Disclosure and Corporate Governance," *Law and Contemporary Problems*, Vol. 62, No. 3, (1999): 113-127, https://doi.org/10.2307/1192228, accessed: May 15, 2025.
[94] Frank H. Easterbrook and Daniel R. Fischel, "Mandatory Disclosure and the Protection of Investors," *Virginia Law Review*, Vol. 70, No. 4, Fifty Years of Federal Securities Regulation: Symposium on Contemporary Problems in Securities Regulation (1984): 669-715, https://doi.org/10.2307/1073082, accessed: May 15, 2025.

resource to public disclosure expenses, which they can use in different areas. This situation imposes an additional cost on the company and constitutes one of the obstacles to going public. In some cases, detailed information not directly related to the investment decision is also requested to be disclosed. Therefore, public disclosure expenses increase unnecessarily[95].

Some suggest that mandatory public disclosure is unnecessary and, in some cases, harmful. In cases where public disclosure is not regulated as mandatory, the information is reflected in the price when used, and the price transfers the information to the public[96]. If corporations want to obtain financing from the capital market, they tend to disclose positive information about the corporation to the public immediately[97]. The positive information that can be disclosed to the public will enable the corporation to obtain funds from the capital market at lower costs. In that case, public disclosure will be made, and there is no need to force this with legal provisions. Investors may also interpret the absence of public information as a sign of negative news. Therefore, disclosing negative information will allow investors to respond appropriately and prevent exaggerated conclusions from being drawn due to a lack of communication [98].

Unfortunately, several factors prevent companies from disclosing negative information. Executives may fear losing their role and financial rights in cases of dispersed stock ownership. Conversely, a dominant shareholder may hesitate because of the potential negative impact on stock prices and asset values. In addition, public disclosure can impose significant costs on companies. Companies weigh these costs against the anticipated benefits when deciding whether to disclose information. If the costs outweigh the benefits, they may choose not to disclose[99].

Another criticism is that individual investors are not qualified to utilize publicly disclosed information. The basis for public disclosure is the existence of a "qualified" investor

[95] İhtiyar, *Kamuyu Aydınlatma İlkesi*, 115.
[96] Henry G. Manne, "The Case Against Mandatory Disclosure," *Journal of Law and Economics* 17, no. 1 (1974): 53-82.
[97] Easterbrook and Fischel, *Mandatory Disclosure and the Protection of Investors*, 681.
[98]Stephen M. Bainbridge, "Mandatory Disclosure: A Behavioral Analysis," *University of Cincinnati Law Review* vol. 68 (2000): 1059.
[99] Ferrell, "The Case for Mandatory Disclosure," 86.

group. Without qualified investment, it is impossible to fully obtain the benefits expected from the public disclosure system. For this reason, the fact that the individual investor has not reached a minimum level of awareness, is inadequate or unwilling to assume risks and make evaluations, reveals a significant deficiency in public disclosure[100]. From this perspective, especially individual investors present a profile that does not know the market sufficiently and cannot follow the market. Institutional investors, rather than individual investors, benefit from the information provided to the public[101]. This significantly reduces the number of interlocutors who will benefit from the information to be provided to the market[102].

As mentioned earlier, it is primarily institutional investors who benefit from the information available to the public. It must be acknowledged that institutional investors are not in a weak position compared to companies. Therefore, companies must also be considered when deciding what information to disclose to the public. Trade secrets are information that has economic value specific to a commercial business, such as certain technical information, production processes, pricing policies, marketing strategies, and expenses, and whose owner has a vested interest in keeping it confidential. This information gives them an advantage over competitors[103]. Companies should not be forced to disclose their trade secrets under the guise of public disclosure and should not be put at a disadvantageous position against their competitors.

Public disclosure regulations have had positive effects on the market in Turkey. In particular, investors react to market movements in a healthier way. Market movements become more predictable and orderly when investors have more accurate information about companies. This allows markets to operate more stably and efficiently. Such

[100] Lucian A. Bebchuk, "Investor Sophistication and the Limits of Disclosure," *Virginia Law Review* 88, no. 5 (2002): 901-934.
[101] Although there is no universally accepted definition, institutional shareholders are generally described as financial institutions that pool the funds of individual investors and manage them through various financial and non-financial instruments to maximize returns. For a more detailed discussion, see Ekrem Solak, "Birleşik Krallık ve Avrupa Birliği Hukukları Kapsamında Pay Sahibi Aktivizmi Düzenlemeleri," *Yeditepe Üniversitesi Hukuk Fakültesi Dergisi* 16, no. 2 (December 2019): 127–162, https://dergipark.org.tr/tr/pub/yuhfd/issue/66555/1041599, accessed: May 15, 2025.
[102] İhtiyar, *Kamuyu Aydınlatma İlkesi*, 113-114.
[103] Ezgi Çırak, "Ticari Sırrın İfşasından Doğan Ceza Sorumluluğuna İlişkin Türk ve Alman Hukuk Sistemlerindeki Güncel Durumun Değerlendirilmesi," *Ticaret ve Fikri Mülkiyet Hukuku Dergisi* 8, no. 1 (June 2022): 180, https://doi.org/10.55027/tfm.1053471. accessed: May 15, 2025.

practices, which enable investors to make informed decisions, positively affect the general health of capital markets. In addition, market risks decrease, and market efficiency increases due to transparency and accurate information flow[104].

There are both advantages and disadvantages to mandatory disclosure. History shows that the capital market can be vulnerable to fraud and abuse by opportunists when not regulated. The public disclosure requirement protects investors and encourages them to participate in the market, which brings more finance for companies that need capital. Nevertheless, the preparation and distribution of the information impose costs on the companies, and strict disclosure requirements may discourage companies from going public. Furthermore, companies should not be forced to disclose their trade secrets under the guise of public disclosure. Therefore, legislators and authorized institutions must maintain a balance by ensuring the flow of necessary information from companies and not putting too much liability on them.

2.1.4. Public Disclosure Documents

Article 15 of the CML states that public disclosure documents disclose information, events, and developments that may affect the value or price of capital market instruments or investors' investment decisions. Public disclosure documents were first regulated as a separate concept in the CML no. 6362 but were not defined[105]. The Board may determine other public disclosure documents as well. Public disclosure documents can be defined as documents prepared by those responsible for public disclosure to provide timely and accurate information to investors. The minimum information they must contain, the method of preparation, procedures, and principles regarding their announcement to the public and publication are determined by the Board[106].

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[104] Orcan Çörtük and Mustafa Erten, "Türkiye'de Kamuyu Aydınlatmanın Sermaye Piyasasına Etkisi," *Istanbul University Journal of the School of Business* Vol 45, No1, (2016): 65-77, http://dergipark.ulakbim.gov.tr/iuisletme; Eroğlu, *Kurumsal Yönetim İlkeleri*, 6.

[105] Article 32 of the CML states that a *"prospectus, information form prepared for share purchase offers, special situation disclosure, announcement texts to be prepared in merger and division transactions, stock exchange listing announcement and financial reports"* are each a public disclosure document. However, these documents are not limited to those included in the article.

[106] M. Sencer Kara, "Kamuyu Aydınlatma Belgelerinden Doğan Hukukî Sorumluluk," *Selçuk Üniversitesi Hukuk Fakültesi Dergisi* 23, no. 2 (2015): 139; Adıgüzel, 2019, 137; Aydoğan, 2021, 135.

Prospectus, issuance documents, financial statements, and reports are the most frequently used public disclosure documents in practice[107]. The annual activity report of the board of directors is a status report that is presented to shareholders and, when necessary, to stakeholders through public disclosure tools regarding the previous activity year at each ordinary general assembly meeting; that complements the financial statements, and that includes both objective data and facts as well as the evaluations of the board of directors and future projections. The report covers various issues, including the company's assets, financial structure, activity results, receivables and debt relationships, and equity adequacy. The annual activity report serves a stronger informative function for shareholders and the public compared to the financial statements, as it provides explanations of transactions that facilitate access to the numerical data presented in these tables[108].

A prospectus is a document that contains comprehensive information about a company's financial situation, plans, and projects when it first goes public. An issuance document is prepared for issuances made without a public offering and shows the company's status. Issuers must prepare financial statements and reports that are pre-determined to be disclosed to the public or requested by the Board due to exceptional circumstances.

2.1.5. Public Disclosure Platform

In Turkey, public companies publish periodic and unique situation disclosures through the Public Disclosure Platform (PDP). PDP is an electronic system established within the Central Registry Institution where notifications required to be disclosed by capital market legislation are transmitted with electronic signatures and announced to the public. Such notifications are published on the www.kap.org.tr website. Within this framework, the information provided is accessible 24/7 to everyone online[109]. As a tool for the obligation to inform the public, the Public Disclosure Platform is indirectly included in many

[107] Kara, "Kamuyu Aydınlatma Belgelerinden Doğan Hukukî Sorumluluk," 140.
[108] Ferna İpekel Kayalı, "Yönetim Kurulunun Yıllık Faaliyet Raporu ile İlgili Uygulamada Ortaya Çıkan Sorunlar ve Çözüm Önerileri," *Regesta* 7, no. 1 (2022): 80.
[109] Memiş and Turan, *Sermaye Piyasası*, 47; Ayoğlu, *Halka Arz*, 48; Adıgüzel, *Sermaye Piyasası*, 130.

provisions[110]. It is essential that the information is accurate, up-to-date, precise, and revised when necessary. It is regulated that disclosures will be made electronically in accordance with the principles set out in the circulars. PDP performs this function.

The Communiqué on Public Disclosure Platform (VII-128.6) outlines the procedures and principles for the signature and transmission of information, documents, and statements from corporations, investment companies, fund founders, and other entities designated by the Board to the Public Disclosure Platform (PDP) in electronic form. It also addresses the preparation and electronic signing of independent audit reports issued by independent audit firms, as well as their electronic transmission to corporations and institutions that are subject to independent audit requirements. Furthermore, the Communiqué regulates the disclosures that must be sent to the PDP, emphasizing the use of electronic signatures and the obligation to apply for an electronic certificate[111].

Article 4 of the Communiqué stipulates that disclosures required to be submitted to the PDP under Board regulations must be signed with an electronic signature. These disclosures must be electronically signed by the obligated corporations or institutions and submitted to the PDP in line with the format, content, and timing requirements set by the Board and/or the PDP operator[112]. Additionally, for financial statements and reports, secure electronic signatures must also be used for independent audit reports prepared by audit firms and delivered electronically to the relevant entities[113].

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[110] Article 15 of the CML states that information, events and developments which may affect the value and price of capital market instruments, or the investment decision of investors shall be disclosed to public by issuers or related parties.

[111] Communiqué On Public Disclosure Platform (VII-128.6), Capital Markets Board of Turkey, available at: https://cmb.gov.tr/, accessed: June 15, 2025.

[112] The Board authorizes an entity or institution, referred to as the PDP Operator, to operate and manage the PDP system. Article 9 states that Where deemed appropriate by the Board, the management procedures of PDP secure electronic certificate, procedures and principles pertaining to receipt of a letter of undertaking from signatories and legal entities, delivery of a notification to PDP, and announcement of disclosures to be made by persons other than signatories through PDP shall be determined by the PDP operator.

[113] According to the Article, disclosures to be made by the Board, stock exchange, central clearing institutions, central custodians, CRA, PDP operator, Turkish Capital Markets Association, and other entities and institutions to be determined by the Board shall also be transmitted to PDP with electronic signature. Disclosures required to be made by foreign corporations or institutions the capital market instruments of which are listed in the exchange pursuant to the Article may be conducted on behalf of the relevant disclosure obligor corporation or institution by third parties outsourced with a contract, provided that a decision is taken by the board of directors, and the responsibility relating to such disclosures remains in the relevant disclosure obligor corporation

Article 5 provides that, by the time of applying to the Board for approval of the prospectus or issue document, corporations planning to sell capital market instruments to qualified investors, conduct an IPO, or apply for listing as publicly deemed companies, as well as fund founders for the first issuance of participation units, must ensure that a sufficient number of their personnel have applied for electronic certificates. These entities must submit the electronic certificate application documents for authorized disclosure personnel at the stage of prospectus/issue document approval. If the authorized persons have already obtained electronic certificates, a statement confirming this must be submitted instead. For the exchange to decide on listing or market registration, electronic certificates must already be issued. If the applications mentioned are rejected or withdrawn, or if listing/trading does not occur, the PDP operator will revoke access authorization for the electronic certificates.

Investment companies and independent audit firms are required to submit an electronic certificate application to an electronic certificate service provider for a sufficient number of their personnel within fifteen days of receiving authorization from the Board. Disclosure-obligated corporations and entities, as well as independent audit firms, must maintain valid electronic certificates for at least two individuals to ensure that their required disclosures under the Communiqué are not disrupted.

2.2. Supervision and Regulation

Capital markets are founded on independent administrative authority regulations in most countries' legal systems[114]. Once an investor invests, transparency and public disclosure will no longer be helpful if the company is mismanaged or in a dire economic situation. In such cases, transparency will only demoralize the shareholders, who see the situation of the company they invested in getting worse every day. For this reason, an expert authority that can make its own decisions is needed. The Capital Markets Board of Turkey

or institution, and measures and actions needed for keeping said information confidential until they are made public are fully taken. The principles relating thereto shall be determined by PDP operator.

[114] Meltem Kutlu Gürsel, "Sermaye Piyasası Kurulu'nun Denetimi," *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi Vol.* 7, Special Issue (2005), 497.

has the authority to supervise, regulate, and intervene in the capital market. The Board can regulate the capital market in all its aspects[115].

The CMB establishes various regulations to regulate the functioning of capital markets in Turkey and to develop market instruments and institutions. The Board has a broad scope of duties, and although priorities may change periodically depending on economic conditions or the level of market development, its basic purpose remains the same: to ensure the healthy development of capital markets and to protect investors. The CMB establishes rules regarding market order, supervises its implementation, and intervenes when necessary. The ultimate goal is to contribute to a more efficient distribution of financial resources in the country[116].

The legal system of Turkish capital markets enables the CMB to create additional regulatory rules. The CMB has consistently used its regulatory power to address market issues and stop illegal activities since its inception. The institution has chosen to establish specific rules instead of depending on theoretical principles for its operations. The CMB's efforts have established investor trust while maintaining market order and fairness. The CMB promotes transparency and accountability which creates a market environment that provides security to both domestic and foreign investors. The financial system benefits from its consistent approach which has maintained stability and confidence in the system[117]. While this thesis examines other core principles of capital markets and prospectus liability, the supervisory and regulatory powers of the CMB will also come into focus throughout the analysis.

2.3. Corporate Governance

In recent years, corporate governance regulations have emerged as a significant agenda in corporate law. Corporate governance holds particular importance in the realm of

[115] Memiş and Turan, *Sermaye Piyasası*, 39.
[116] Jyoti Sahu, "Regulation in Stock Market of Turkey," *SSRN Electronic Journal* (February 23, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2222404, accessed: June 15, 2025.
[117] Nusret Çetin, "Revisiting Turkish Market Abuse Regime," *SSRN Electronic Journal*, (December 6, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364430, accessed: June 14, 2025.

corporate law and is closely related to various other social sciences[118]. Companies are becoming more complex in the global capital markets, making management increasingly challenging for one person. Distinguishing between those who own the company and those who manage it has become inevitable. As the influence of shareholders diminished, it became harder to monitor managers. Further, banks, institutional investors, and states that provide company resources want assurance that these resources are well used to achieve the corporate purpose. Corporate governance is the key solution to this issue. Corporate governance refers to the laws, regulations, and private sector practices that aim to ensure that companies attract capital, operate effectively and efficiently in the markets, achieve their corporate objectives that form the basis of their establishment, fulfill their obligations imposed on them by law, and meet the expectations of shareholders, market participants, and society[119].

Corporate governance is a management approach that prioritizes ethical principles, including responsibility, accountability, transparency, and fairness. The fundamental principles of corporate governance involve treating all stakeholders equally, sharing information transparently with shareholders, being accountable for actions taken, and adhering to rules that reflect societal values. Initially implemented in public joint-stock companies, corporate governance has evolved into a key principle of corporate law over time[120]. The flow of information provided by the principle of public disclosure plays an important role in ensuring that the company has a fairer and responsible management approach dominated by the principle of accountability[121].

Effective corporate governance depends on a strong legal and regulatory framework that supports market participants in their contracts. By ensuring transparency and fairness, this

[118] Meltem Karatepe Kaya and Ekrem Solak, "İhbarcılık Kavramının Karşılaştırmalı Hukuk Işığında Türk Şirketler Hukuku Kapsamında Değerlendirilmesi" *İstanbul Hukuk Mecmuası* 81, no. 3 (January 2024): 708, https://doi.org/10.26650/mecmua.2023.81.3.0001, accessed: June 14, 2025.
[119] Eroğlu, *Kurumsal Yönetim İlkeleri*, 3.
[120] Mutlu Başaran Öztürk and Kartal Demirgüneş, "Kurumsal Yönetim Bakış Açısıyla Entellektüel Sermaye," *Selçuk Üniversitesi Sosyal Bilimler Enstitüsü Dergisi*, no. 19 (2008): 397.
[121] Gökhan Aydoğan, *Anonim Şirketlerde Kamuyu Aydınlatma Belgelerinden Doğan Hukuki Sorumluluk* (Banka ve Ticaret Hukuku Araştırma Enstitüsü, 2021), 113.

framework builds trust, which is vital for achieving broader economic goals[122]. Sufficient public disclosure is the most important indicator that companies implement corporate governance principles effectively. Public disclosure and transparency are the fundamental pillars of effective corporate governance and a strong capital market[123].

The Communiqué on Corporate Governance (II-17.1) requires corporations whose shares are offered to the public or deemed publicly offered to comply with the corporate governance principles outlined in its annex[124]. It classifies corporations into three groups based on their systemic importance, considering the market value and the value of publicly traded shares[125]. If a corporation is moved to a higher group due to changes in these metrics, it becomes subject to the relevant group's governance principles starting the year after the calculation year. However, moving to a lower group does not alter its governance obligations. Compliance with the new group's principles must begin with the first general assembly meeting following the Board's announcement in the Board Bulletin. In the Annex, corporate governance principles are organized into four main categories: Shareholders, Public Disclosure and Transparency, Stakeholders, and the Board of Directors. The Communiqué outlines regulations regarding the protection of the rights of shareholders and stakeholders, ensures transparency and public disclosure, and describes the structure and functioning of the board of directors[126].

The Communiqué also outlines measures for non-compliance with corporate governance principles. Article 7 authorizes the Board to take necessary actions if the compliance obligation is not fulfilled as required or within the timeframe set by the Board. The Board

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[122] OECD, *G20/OECD Principles of Corporate Governance*, (Paris: OECD Publishing, 2023), 9, https://www.oecd.org/en/publications/g20-oecd-principles-of-corporate-governance-2023_ed750b30-en.html, accessed: June 14, 2025.
[123] Eroğlu, *Kurumsal Yönetim İlkeleri,* 6.
[124]Mustafa Tevfik Kartal and Banu Budayoğlu Yılmaz, "Türkiye'de Kurumsal Yönetim (KY) İlkelerinde Yeni Raporlama Düzeni: Halka Açık Bankaların İlk KY Uyum Raporları Üzerine Bir İnceleme," *Muhasebe ve Finans İncelemeleri Dergisi* 4, no. 2 (2019): 149, https://dergipark.org.tr/tr/pub/jrb/issue/50165/587159, accessed: June 14, 2025.
[125] a) First group: Corporations whose average market value is above TRY 3 billion and average market value in actual circulation is above TRY 750 million. b) Second group: Corporations among those excluded from the first group, the average market value of which is above TRY 1 billion and average market value in actual circulation is above TRY 250 million. c) Third group: Corporations among those excluded from the first and second groups, the shares of which are traded on National Market, Second National Market and Collective Products Market.
[126] Capital Markets Board of Turkey, *II-17.1 Communiqué on Corporate Governance*, Official Gazette no. 28871, published January 3, 2014, available at: https://cmb.gov.tr/.

may enforce compliance and carry out related procedures as it deems necessary. Even when no specific deadline is given, the Board may request a cautionary injunction without the need for a guarantee, initiate lawsuits to determine the unlawfulness of non-compliant actions or seek their annulment, and request court decisions to ensure compliance. Any court application must include a compliance proposal that details the actions required to meet corporate governance requirements.

If a corporation has the required number of board members but the Board of Directors or general assembly fails to take the necessary actions or adopt resolutions to ensure compliance with mandatory corporate governance principles, the Board will grant a 30-day period for compliance. If the corporation still fails to act within this timeframe, the Board is authorized to appoint independent board members ex officio, in the number required to ensure the Board can convene, make decisions, and meet the independence criteria as stipulated in Article 17 of the Law[127]. With the approval of the Board, the new Board of Directors will make necessary amendments to the articles of association to ensure compliance with mandatory corporate governance principles. They will register these amendments with the trade registry and ensure they are publicly announced[128].

The Capital Markets Board's authority to intervene ex officio by appointing independent board members when corporate management bodies fail to take the necessary actions constitutes a direct intervention in the governance of a private legal entity. This represents a form of public interference by an administrative authority in matters that would ordinarily fall within the internal decision-making autonomy of the company. Such intervention is exercised only in cases of failure to comply with mandatory corporate governance principles indicating that the Board considers these principles binding

[127] Kartal and Budayoğlu Yılmaz, "Türkiye'de Kurumsal Yönetim," 153.
[128] Article 17 (2): Considering their qualifications, the Board is authorized to require publicly held corporations the shares of which are traded on the exchange to comply with corporate governance principles partially or completely, to establish the principles and procedures regarding these, to take decisions ensuring the fulfilment of the compliance obligation within a granted time period and to take actions ex officio in this regard in cases where the compliance requirement is not fulfilled, even where a time period is not granted, to request cautionary injunction for the determination of the unlawfulness of activities in violation of compliance obligations or for their cancellation, exempt from all kinds of guarantee, to file a lawsuit, to request for a court decision that will result in the fulfilment of the compliance obligation, to establish the procedures and principles regarding the execution of those operations.

regulations with serious legal consequences. The authority granted to the Board aims to protect investors and uphold the integrity of capital markets.

2.4. Investor Protection

The term investor protection is closely linked to the question of a corporation's purpose. It is argued that a business's sole responsibility is to increase its profits, claiming that corporate executives are primarily accountable to shareholders[129]. One of the primary objectives of capital markets regulation is to ensure the reliable, transparent, efficient, stable, fair, and competitive functioning of the market. In this context, regulatory and supervisory mechanisms are established not only to support the proper functioning of the markets but also to protect the rights and interests of investors[130]. One of the core principles of capital markets law is the protection of investors. In this context, the disclosure system plays an important preventive (ex ante) role. Unlike compensation mechanisms, which protect investors after a loss has occurred (ex post), disclosure rules aim to prevent harm by requiring issuers to share timely and accurate information with the public[131].

The financial returns that investors receive from stocks are primarily comprised of two sources: changes in stock prices and dividend payments. Therefore, investors must have clear and understandable information about the policies that may affect these returns in the prospectus. In recent years, companies have increasingly implemented share buybacks instead of or in addition to dividend payments[132]. This makes it even more important for the company's decisions regarding its profit distribution policy to be accurately explained to investors.

Given the structural imbalance of information between issuers and investors, especially regarding access to financial data and the ability to assess that information, the importance of public disclosure becomes even more critical. Investors, who typically act as buyers,

[129] Milton Friedman, "The Social Responsibility of Business Is to Increase Its Profits," *New York Times Magazine*, September 13, 1970, https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html, accessed: June 14, 2025.
[130] Gözüyeşil, *İzahname Sorumluluğu*, 42.
[131] Gündoğdu, *Sermaye Piyasası Hukuku*, 142.
[132] Erdem, "Stock Buybacks," 1626.

are usually at a disadvantage compared to issuers, who possess more information as sellers in the capital markets. Therefore, the obligation for public disclosure is a preventive tool to mitigate this information asymmetry. It enhances transparency and ultimately builds investor confidence and market integrity[133].

2.4.1. The Protection of Minority Shareholders' Rights in Publicly Traded Corporations

Minority shareholder term refers to the shareholders that do not have control over the management of the company. Some legislations require certain thresholds to determine who constitutes a minority shareholder[134]. Turkey is an example of this definition. According to the TCC, a minority shareholder is a shareholder who has at least a 10% share of the capital. If the company is a public company, obtaining a 5% share of the capital is considered sufficient to become a minority shareholder[135]. The code does not prevent shareholders from coming together to establish the minimum requirements for the minority shareholder to exercise their rights.

Although TCC provides a scope for the minority shareholder, the term has a broader meaning than that. A group of shareholders may have privileges and voting rights that enable them to be effective in the management of the company, even though they do not hold a majority of the shares. In that case, these shareholders will be considered the majority shareholders, as they have control over the company's management. In other words, the majority shareholder is the shareholder who holds control over the company by virtue of the right to appoint the directors and managers of the company[136]. By holding the majority of the votes in the General Assembly, majority shareholders have the power

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[133] Nevin Meral, *Sermaye Piyasasında Kamuyu Aydınlatma Belgelerinden Doğan Hukuki Sorumluluk* (Istanbul: On İki Levha Yayıncılık, 2021), 14; Manavgat, *Halka Arz*, 118.

[134] Abdurrahman Kayıklık, "Anonim Şirkette Azınlığın Korunması: Kim İçin, Neden Ve Nasıl Bir Koruma." *Istanbul Hukuk Mecmuası* 80, no. 1 (2022): 413.

[135] Oğuz Yolal, "Azınlık Pay Sahibinin Anonim Şirket Genel Kurul Toplantısına Bakanlık Temsilcisi Görevlendirilmesine Yönelik Talep Hakkına İlişkin Bir Değerlendirme," *Selçuk Üniversitesi Hukuk Fakültesi Dergisi* 27, no. 1 (2025): 613, https://doi.org/10.33717/deuhfd.1651219, accessed: June 14, 2025.

[136] Meltem Karatepe Kaya, "Notion of Protection of Minority Shareholders; Theoretical Framework," *İstanbul Medeniyet Üniversitesi Hukuk Fakültesi Dergisi* 5, no. 9 (2020): 197, https://dergipark.org.tr/en/pub/imhfd/issue/65257/1003983, accessed: June 14, 2025.

to elect board members. The board of directors manages and controls the company[137]. By possessing the power to elect the directors, majority shareholders are the group that truly controls the company.

According to agency conflict theory, the agents and the shareholders will always have a conflict of interest. Agents term refers to the managers of the company. In companies where shares are divided into small pieces, there are many investors, but there is usually no single group of majority shareholders. In these companies, it is considered that ownership and control of the company are separated. Although the shareholders own the company, it is the managers who are ultimately in control of the company. Moreover, according to this theory, salaried managers often prioritize their own interests over those of the company and, therefore, the shareholders[138].

In developing countries, a particular group of shareholders often holds the majority of the shares and controls the managers through these shares. These types of companies are also common in Turkey. It is considered that, in this case, the conflict is between the majority shareholders and the minority shareholders[139]. Depending on the company's structure, managers or controlling shareholders may prioritize their own interests over those of the company and its minority shareholders. The Enron scandal in the United States involved senior executives who manipulated financial statements to hide debt and create false earnings which resulted in investor fraud and company bankruptcy[140]. The Parmalat case in Italy featured controlling shareholders who executed one of Europe's biggest corporate frauds through document forgery and financial data falsification pressure on employees[141]. The corporate scandals resulted in major investor losses while damaging

[137] Hasan Pulaşlı, *Şirketler Hukuku Genel Esaslar* (Ankara: Adalet Yayınevi, 2020), 319; Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar Hukuku I* (Istanbul: Vedat Kitapçılık, 2019), 358.
[138] Adolf A. and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1933), 309; Andrew Smith, Kevin D. Tennent and Jason Russell, "Berle and Means's *The Modern Corporation and Private Property*: The Military Roots of a Stakeholder Model of Corporate Governance," *Seattle University Law Review* 42, no. 2 (2019): 542, https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2584&context=sulr, accessed: June 7, 2025.
[139] Kayıklık, "Anonim Şirkette Azınlığın Korunması," 410.
[140] Meltem Karatepe Kaya, *Minority Shareholder Protection: A Comparative Analysis Between the UK and Turkey* (Istanbul: On İki Levha Yayıncılık, 2021), 36.
[141] Emmanuel Omondi Ogutu, "Corporate Failure and the Role of Governance: The Parmalat Scandal," *International Journal of Management and Information Technology* 11, no. 3 (June

capital market credibility which proved the necessity of robust corporate governance systems to protect minority shareholders.

The CML contains multiple provisions that protect minority shareholders who own stock in publicly traded joint stock companies. The protections derive from corporate governance principles combined with transparency requirements and shareholder fairness standards. The Board has established both mandatory and discretionary tools to protect minority investors from controlling shareholders and management actions that harm their interests while maintaining market integrity. Mandatory compliance with corporate governance principles stands as a key instrument according to Article 17 of the CML and further detailed in Communiqué No. II-17.1 on Corporate Governance[142]. The regulation establishes independent board members and nomination committees, as well as specific mechanisms for preventing power abuse by controlling shareholders[143]. The board members who meet strict impartiality requirements must defend the interests of all shareholders, especially minority shareholders, during their decision-making process.

The CML provides minority shareholders with substantive participatory and exit rights. According to Article 24, in cases where significant structural changes occur—such as mergers, spin-offs, or changes in the company's scope of activity—minority shareholders are granted a statutory right to exit the company by selling their shares at a fair value determined by the Board[144]. Similarly, Articles 26 and 27 establish the framework for mandatory tender offers, which require majority shareholders who gain control to make fair purchase offers for the minority shareholder's shares[145]. These mechanisms work to

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2016): 2747–2754, file:///Users/cerenbayar/Downloads/ijmit,+Journal+editor,+5111.pdf, accessed: June 7, 2025.

[142] Kartal and Budayoğlu Yılmaz, "Türkiye'de Kurumsal Yönetim," 153.

[143] Capital Markets Board of Turkey, *II-17.1 Communiqué on Corporate Governance*, Official Gazette no. 28871, published January 3, 2014, https://cmb.gov.tr//data/6281521a1b41c617eced0ee8/3606055f44464de4b6fe9dad9f1cec7b.pdf, accessed: June 7, 2025.

[144] See Gökçen Turan, "Sermaye Piyasası Kanunu Madde 24'e Göre Ayrılma Hakkı," *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 75, no. 2 (2017): 723–740, https://dergipark.org.tr/tr/download/article-file/470637#:~:text=SPKn'nun%2024.%20maddesi%20uyar%C4%B1nca,ortakl%C4%B1%C4%9Fa%20satarak%20ayr%C4%B1lma%20hakk%C4%B1na%20sahiptir. https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2584&context=sulr, accessed: June 7, 2025.

[145] Neşe Ölekli, "Halka Açık Anonim Ortaklıklarda Ayrılma Hakkı," *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 76, no. 1 (October 26, 2018): 230, DOI: 10.26650/mecmua.2018.76.1.0008.

protect minority investors from dominant shareholder decisions by providing them with adequate compensation and choice options.

The protection of minority shareholders depends heavily on transparency alongside their access to information. The PDP fulfills public disclosure requirements, which provide investors with information about corporate actions, financial performance, and potential risks. The TCC enables minority shareholders to request special auditors, schedule extraordinary general meetings, and propose meeting items through their specified shareholding thresholds, which operate in conjunction with the CML. The Turkish capital markets' legal framework protects minority shareholders from structural risks by implementing governance rules, legal remedies, and supervisory actions to reduce power imbalances in publicly traded corporations.

CHAPTER 2: OBLIGATION TO PROVIDE PROSPECTUS

1. DEFINITION OF PROSPECTUS

The prospectus is a means of public disclosure in the issuance of securities. The issuer introduces itself to investors through this means. In this sense, the prospectus presents a photograph of the company's general economic situation. The prospectus contains information that will help investors understand the issuer's current status. In this context, the prospectus includes information such as the company's capital, structure, managers, field of activity, ongoing commercial activities, future investments, investment plans, financial statements, real estate, and important lawsuits in which it is a party[146].

Article 3/j of the CML defines a prospectus as a public disclosure document that includes all information regarding the financial status, performance, prospects, and operations of the issuer and guarantor, if any, or the characteristics of capital market instruments to be issued or traded on the exchange and the rights and risks associated with them to enable investors to make an informed assessment. Article 4/1-l of the II-5.1 Communiqué on Prospectus and Issue Document includes a definition for the prospectus as well, which is parallel to article 3/j of the law. The Communiqué emphasizes that a prospectus contains all the information required for a conscious assessment and choice of investors[147].

The information provided in the prospectus determines the investor's investment decision[148]. The prospectus contains comprehensive information on the public offering. Due to the importance of the information in the prospectus in investors' decision-making, this information must be an accurate and complete text. Therefore, incorrect, misleading, and incomplete information in the prospectus causes the responsibilities of the persons preparing the prospectus[149].

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[146] Turan, "İzahname Sorumluluğu," 193; Ayoğlu, *Halka Arz*, 119; Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 140.
[147] II-5.1 Communiqué on Prospectus and Issue Document, Capital Markets Board of Turkey, 2020, available at https://cmb.gov.tr/, accessed: May 15, 2025.
[148] Mehmet Somer, *Sermaye Piyasası Kanunu Hükümlerinin Türk Ticaret Kanunu'nun Tedrici Kuruluş Sistemi Üzerindeki Etkileri* (İstanbul: Kazancı Yayınları, 1990), 75.
[149] Turan, "İzahname Sorumluluğu," 193; Gülşah İslamoğlu, *Sermaye Piyasası Hukukunda İzahname Sorumluluğu* (Ankara: Seçkin Yayıncılık, 2019), 22; Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 141.

2. HISTORICAL DEVELOPMENT OF PROSPECTUS

2.1. Historical Development of Prospectus

The basis of the prospectus is the principle of public disclosure[150]. Therefore, when examining the history of the prospectus, it is necessary to start with the history of the principle of public disclosure. The origin of this principle dates back to the 18th century. During this period, investors suffered significant losses because companies sold shares based on false information, which did not yield the expected returns[151]. The South Sea Bubble incident, one of the most notable financial scandals in history, along with other similar events, led to the enactment of the Bubble Act in 1720. The South Sea Company was a British trading company initially established in 1711 to trade with Spanish South America. However, it quickly became a target for speculation in financial markets. In the early 1720s, the South Sea Company convinced investors and the public that it would reap enormous profits from trade with South America. The company promised substantial returns to its investors, resulting in a surge in its stock price. Ultimately, the company failed to fulfill its promises of wealth from trade, leading to a sharp decline in the value of its shares[152].

As a result of similar crises, the Bubble Act of 1720 was enacted. Due to the stringent provisions of this law, the capital market could not develop and almost came to a standstill. For this reason, the provisions of the law were first relaxed and then repealed[153]. In 1841, a commission was established under the presidency of William Gladstone[154]. The report published by the commission drew attention to the need for information about the company so that people who would invest in joint-stock companies could see its situation. The commission report referred to the importance of the principle of public disclosure. The recommendations in this report were accepted by the Companies Act of 1844. with the amendment made in 1867, the principle of public disclosure became apparent. According to this amendment, contracts established with the company should

[150] Memiş and Turan, *Sermaye Piyasası*, 69.
[151] İhtiyar, *Kamuyu Aydınlatma İlkesi*, 12.
[152] Haluk Kabaalioğlu, *Sermaye Piyasasında Kamuyu Aydınlatma İlkesi* (İstanbul: İktisadi Yayınlar, 1985), 20.
[153] Kabaalioğlu, *Kamuyu Aydınlatma İlkesi*, 21.
[154] Meral, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 25.

be explained in the prospectus. The members of the board of directors and other managers should be held responsible for the losses incurred by investors who were not informed about the contracts established with the company due to their fraudulent behavior[155].

In the Derry v. Peek case of 1889, The House of Lords ruled that the company and its directors were not liable because they were well-intentioned and did not intend to deceive investors. However, severe public reactions arose against this decision; due to these reactions, the legislature regulated the 1890 Act, stating that directors and founders would be liable for misleading information in the prospectus[156]. In the commission report chaired by Lord Davey in 1895, it was recommended that investors receive complete and accurate information, suggesting the public disclosure system. Following the report, the Companies Act of 1900 came into force, and this law detailed the matters that should be included in the prospectus[157]. The Greene Commission Report of 1926 suggested that the public and interested investors should be informed about the parts they need to know through a prospectus[158]. Later, the matters to be disclosed in such a prospectus became law in 1923 and then added as articles to the Companies Act of 1929[159].

The first chapter of this thesis mentions that in the United States, in the 20th century, hollow stocks and speculations emerged in the capital market, and as a result, blue sky laws were enacted. The Securities Act of 1933, a federal law, abolished the permit system and adopted the public disclosure system. Afterward, the Securities Exchange Act was passed in 1934. The Securities Act of 1933 created a disclosure system and mandated the registration of all securities offered or sold with the Federal Trade Commission which later became the Securities Exchange Commission[160]. The Securities Act aims to regulate the initial issuance of securities. Under this framework, a company cannot sell or offer to sell a security without first filing a relevant registration statement with the Commission and providing a prospectus related to that security. The registration statement is valid only

[155] Kabaalioğlu, *Kamuyu Aydınlatma İlkesi*, 22.
[156] Louise Gullifer, "The Common Law Duty of Disclosure: Derry v Peek and Its Legacy," *Law Quarterly Review*, Vol. 115 (1999), 170-190; Robert B. Thompson, *Securities Regulation in the United Kingdom and the United States* (Oxford University Press, 1991), 44-49.
[157] Kabaalioğlu, *Kamuyu Aydınlatma İlkesi*, 25; İhtiyar, *Kamuyu Aydınlatma İlkesi*, 14; Gözüyeşil, *İzahname Sorumluluğu*, 58.
[158] İhtiyar, *Kamuyu Aydınlatma İlkesi*, 15; İslamoğlu, *İzahname Sorumluluğu*, 24.
[159] Kabaalioğlu, *Kamuyu Aydınlatma İlkesi*, 27; İslamoğlu, *İzahname Sorumluluğu*, 24.
[160] Ayoğlu, *Halka Arz*, 47.

for the securities explicitly identified within it. Its primary purpose is to ensure that information about the securities is made accessible to the public[161].

2.2. Historical Development of Prospectus in Turkey

In the process of legislating public joint stock companies, following the submission of two drafts to the legislative body in 1967 and 1970, respectively, but their invalidation, the first legal regulation was the previous Capital Markets Law. In Law No. 2499, the basic concept in terms of the scope of the Law was determined as "joint stock companies whose securities are offered to the public." In the previous Law, the regulations focused on the public offering process based on the permit system[162]. Law No. 2499 established a system that bound the public offering of securities to the permission of the Board, and the first version of the law did not include a provision regarding the responsibility of the prospectus[163]. The permission system was abandoned in 1992 with the amendment to Law No. 2499. In the new system based on the public disclosure approach, permission authority was abolished, and the practice of registering capital market instruments to be issued or offered to the public was adopted[164]. With the amendment made by Law No. 3794, the permit system was replaced with the registration system. All debt instrument issuance and sales, regardless of whether they were offered to the public, were included in the scope of the Law, and the obligation to register shares was foreseen only in the event of their public offering[165].

With the new Capital Markets Law No. 6362, the prospectus approval system was adopted to comply with EU legislation instead of the registration system. Although both systems reject the permit system, the prospectus approval system represents a more

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[161] Elisabeth A. Keller *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, Ohio State Law Journal 49 (1988), Boston College Law School Legal Studies Research Paper No. 1988-02, 343, https://ssrn.com/abstract=4374124, accessed: May 20, 2025.
[162] Manavgat, *Halka Arz*, 10.
[163] Ramazan Arıtürk, "2499 Sayılı Sermaye Piyasası Kanunu'nda Tanımlanan Manipülasyon Suçunun Halka Arzlar Açısından Değerlendirilmesi," *YYÜ Hukuk Fakültesi Dergisi* 1, no. 1 (2013),https://www.academia.edu/43534278/2499_Say%C4%B1l%C4%B1_Sermaye_Piyasas%C4%B1_Kanununda_Tan%C4%B1mlanan_Manip%C3%BClasyon_Su%C3%A7unun_Halka_Arzlar_A%C3%A7%C4%B1s%C4%B1ndan_De%C4%9Ferlendirilmesi?utm_, accessed: May 20, 2025.
[164] Turan, "İzahname Sorumluluğu," 198.
[165] Manavgat, *Halka Arz*, 12.

refined public disclosure approach than the registration system, which contains elements that approach the permit system at specific points[166]. The prospectus approval system clearly states that the Board's review does not include investigating the accuracy of the information in the prospectus. In addition, for the approval of the prospectus, it is sufficient to determine that the information in the prospectus is consistent, understandable, and complete according to the prospectus standards determined by the Board[167].

3. OBLIGATION TO PREPARE PROSPECTUS AND EXEMPTIONS

The prospectus's importance has increased even more with the adoption of the system of approval instead of registration with Law No. 6362. Preparing a prospectus for all issues to be made through a public offering is mandatory[168]. The Law stipulates that a prospectus must be prepared for capital market instruments to be offered to the public, that the Board must approve the prepared prospectus, and that it must be published[169]. Within this framework, the prospectus is a fundamental element of the public offering. However, in the event that money is collected from the public through crowdfunding, the provisions of the Law regarding the obligation to prepare a prospectus or an issuance document do not apply. Article 4 provides that the provisions of other laws regarding aid and donation collection are reserved, and the collection of money from the public through crowdfunding shall be carried out through crowdfunding platforms on which the Board has granted an operating permit[170]. The prospectus brings high costs in terms of time and money. For that reason, in some cases, there may be an exemption from the obligation to

[166] Indeed, in Law No. 2499, amended later by Law No. 3794, the Board that received the registration application had the authority to reject the application by giving justification if it concluded that the explanations were insufficient and would not reflect the truth honestly and would lead to public exploitation. In other words, evaluating whether the explanations reflected the truth was also among the Board's authorities. See Çetin et al, 2014, 25.
[167] Ayoğlu, *Halka Arz*, 45; Turan, "İzahname Sorumluluğu," 199.
[168] Murat Balcı and Sinem Turan, *Sermaye Piyasası Kanunu Şerhi C.1* (Ankara: Adalet Yayınevi, 2020), 168.
[169] Çatakoğlu, *Borçlanma Araçları*, 108.
[170] Memiş and Turan, *Sermaye Piyasası*, 69; Adıgüzel, *Sermaye Piyasası*, 46.

prepare and publish a prospectus. Article 5 states that the Board has the authority to determine exempt cases. The Board has regulated the cases in which the exemption will be in question in Article 6 of the Communiqué numbered II-5.1[171].

It is possible to categorize the exemptions from the obligation to prepare a prospectus into two groups regarding the investor's characteristics and the monetary size[172]. In the provisions of Article 6.1.a and c of the Communiqué, an exemption has been provided for public offerings to be limited to investors with relatively less need for protection, considering the investor's characteristics[173]. In Article 6.1.a, an exemption from preparing a prospectus has been provided for public offerings for investors who purchase capital market instruments worth at least two hundred and fifty thousand Turkish Lira. Considering the scope of the prospectus, preparation period, monetary cost, and the fact that investors with specific characteristics do not need information to the extent of the content of the prospectus, a balance of interests has been established, and an exemption has been provided[174].

Article 6.1.c includes an exemption based on the nature of the investor. No prospectus will be prepared for the sale of capital market instruments that are sold to qualified investors and traded only among qualified investors on the stock exchange. Article 6.3 regulates that the Board may grant exemptions upon request, depending on the monetary size of the public offering, except for the initial public offering. Unlike those regulated in the first paragraph, this exemption is not an absolute exemption and can be granted by the Board upon request[175].

[171] Memiş and Turan, *Sermaye Piyasası*, 69.
[172] Sermaye Piyasası Kurulu. *Kayda Alma Muafiyeti Uygulamaları*. Sermaye Piyasası Kurulu Yayınları,https://spk.gov.tr/data/61e48fc71b41c60d1404d68a/1a080175c3a18f779bf62585db02a4c5.pdf. accessed: May 21, 2025.
[173] Aydoğan, *Halka Arz*, 147.
[174] Manavgat, *Halka Arz*, 694; Çatakoğlu, *Borçlanma Araçları*, 109.
[175]Manavgat, *Halka Arz*, 695; Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 147; Çatakoğlu, *Borçlanma Araçları*, 109.

3.1. Preparation and Content of Prospectus

3.1.1. Preparation of Prospectus

The prospectus is a document intended to inform the public. It provides information about itself and enlightens the parties to whom it presents capital market investments. Therefore, it is essential that the prospectus is prepared and presented in a manner that investors can easily understand[176]. The prospectus and the information to be included in it must be prepared in detail to set forth the information required by the legislation and deemed necessary by the Board regarding the issuer and the public[177]. In addition, the prospectus must be complete and up to date by the standards determined by the Board. It must be prepared in a manner that investors can easily understand and evaluate[178]. Suppose additional information is requested when applying for Board approval. In that case, it is mandatory that the prospectus also includes this information, and this information and explanations shall be based on documents when necessary[179].

The basic idea behind preparing the prospectus is to ensure investors can make independent decisions after seeing all the conditions. Thus, the investor can decide which capital market instrument to invest in[180]. Although the characteristics of the information that should be included in the prospectus are regulated in the CML, no distinctive criteria have been determined regarding its quality. Nonetheless, since the prospectus is the primary public disclosure document in the public offering, it can be concluded that information that may affect the investment decision should be included in the prospectus. This criteria will ensure that information that does not have the power to affect the investment decision will remain outside the prospectus[181].

The Board is authorized to set the procedures and principles concerning the minimum information to be included in the prospectus, the guarantor and the nature of the guarantee, the documents forming the prospectus, its format, public disclosure,

[176] Turan, "İzahname Sorumluluğu," 193; Ayoğlu, *Halka Arz*, 124.
[177] Meral, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 157.
[178] Manavgat, *Halka Arz*, 698.
[179] Memiş and Turan, *Sermaye Piyasası*, 70.
[180] Turan, "İzahname Sorumluluğu," 192; Somer, *Sermaye Piyasası Kanunu'nun Tedrici Kuruluş Sistemi Üzerindeki Etkileri*, 75.
[181] Manavgat, *Halka Arz*, 700.

publication, announcements, and advertisements, references to previously disclosed information, sales conditions, amendments to the approved prospectus, and full or partial exemptions from its preparation and publication. These rules vary depending on the type and characteristics of the issuer and the capital market instruments to be offered to the public or listed on the stock exchange[182]. This comprehensive authority granted by the law ensures that investors can readily access all relevant details about the capital market instruments to be issued[183].

3.1.2. Content of Prospectus

Article 31 the Communiqué No. II-5.1 determines the form and content of the prospectus and the principles that govern its preparation. The language of the prospectus and other information and documents that must be sent to the Board must be Turkish[184]. In cases where documents used in the preparation of the prospectus and not disclosed to the public in the prospectus annex are prepared in a foreign language, investors must be informed in the prospectus about how to access the parts of these documents used in the preparation of the prospectus[185].

The names and duties of the real persons responsible for the prospectus and the legal entities' titles, headquarters, and contact information are clearly stated in the prospectus[186]. Article 27 of the Communiqué provides that the information stated by the issuer, public offerer, or authorized institution concerning a public offering or admission to trading on an exchange of capital market instruments addressed to investors in private meetings must also be included in the prospectus. Investors' right to access information must be protected, and information inequality must not be allowed[187].

[182] Memiş and Turan, *Sermaye Piyasası*, 71.
[183] Kabaalioğlu, *Kamuyu Aydınlatma İlkesi,* 160; İhtiyar, *Kamuyu Aydınlatma İlkesi*, 124.
[184] Manavgat, *Halka Arz*, 708.
[185] Memiş and Turan, *Sermaye Piyasası*, 70.
[186] Turan, "İzahname Sorumluluğu," 194; Adıgüzel, *Sermaye Piyasası*, 46.
[187] Manavgat, *Halka Arz*, 699.

3.1.2.1. Summary

In the CML, the prospectus is allowed to be prepared as a whole or in parts to comply with EU regulations, subject to the condition of including a summary section in all cases[188]. The registration document includes information on the issuer; the security note includes information on the securities offered to the public. The summary includes basic information on the issuer, the guarantor, if any, the nature of the guarantee, and the capital market instrument offered to the public, as regulated in Article 4.4 of the CML[189].

The summary section of the prospectus includes short, clear, and understandable statements that include the basic features, rights, and risks related to the issuer, the guarantor, if any, the nature of the guarantee, and the capital market instruments to be issued. The purpose of the summary is to have an idea by looking at the summary and to prevent people from getting lost in the density of information[190]. The summary is prepared in a way that is compatible with the rest of the prospectus, includes appropriate basic information, and allows for comparison of summaries and contents related to similar capital market instruments. In addition, the summary includes warnings that the summary should be read as an introduction to the prospectus, that investment decisions should be made by examining the entirety of the prospectus, and that if the summary is misleading, incorrect, or inconsistent when read together with other sections of the prospectus, the relevant parties will be held legally liable under the Law[191].

3.1.2.2. Main Text

The main text is the part of the prospectus that contains detailed explanations about capital market instruments. These explanations reveal the capital market instruments and the issuer's status and enlighten investors about what kind of capital market instrument they

[188] Turan, "İzahname Sorumluluğu," 194.
[189] According to Article 5 of the EU Directive 2003/71 and Directive 2010/73, the summary should not use technical language. It should contain concise and essential information on the issuer, the guarantor, risk definitions related to the investment made, the general principles of the public offering, and the listing conditions.
[190] Memiş and Turan, *Sermaye Piyasası*, 71; Adıgüzel, *Sermaye Piyasası*,47; Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 153.
[191] Memiş and Turan, *Sermaye Piyasası*, 71; Adıgüzel, *Sermaye Piyasası,* 47.

are dealing with and the company's status[192]. One of the basic principles that the issuer must comply with when preparing the prospectus is that the information be presented in a way that investors can easily understand and evaluate. Another fundamental principle is that the persons responsible for the prospectus must be specified in the prospectus. In the CML, within the framework of the aim of compliance with EU regulations, the prospectus is allowed to be prepared as a whole or in parts. Adhering to these basic principles, the procedures and principles regarding which information and documents will be included in the prospectus as a minimum will be determined by the Board[193].

3.1.2.3. References

Ensuring the simplicity and comprehensibility of the prospectus is challenging. Information that has been disclosed to the public through legal public disclosure channels before the prospectus is published and that may affect the investment decision should, as a rule, be included in the integrity of the prospectus. However, including information that has been previously disclosed to the public in the prospectus as it is may damage its simplicity[194]. Therefore, Article 9 of the Communiqué states that information about the issuer or public offerer may also be included in the prospectus by referring to certain information previously disclosed to the public in the Board's or exchange's internet website or PDP[195]. The information included in the prospectus by referring must be the most up-to-date[196]. The information to which reference may be made is also specified in the circular. In the event that information is included in the prospectus by referring, the source of this information and how to access this information must be stated in the prospectus. References to information other than that included in the prospectus cannot be made in the summary. However, indicating the sources used in the preparation of the prospectus in the footnotes of the summary does not mean that references have been made to them[197].

[192] Memiş and Turan, *Sermaye Piyasası*, 72; Adıgüzel, *Sermaye Piyasası*,46.
[193] Turan, "İzahname Sorumluluğu," 194.
[194] Manavgat, *Halka Arz*, 701.
[195] Çatakoğlu, *Borçlanma Araçları,* 112.
[196] Turan, "İzahname Sorumluluğu," 195.
[197] Memiş and Turan, *Sermaye Piyasası*, 72.

Article 9 also provides the documents that references may be made to. These documents are: financial statements and independent audit and/or limited review reports, prospectuses previously approved by the board, articles of association, public disclosures of material information, announcement texts relating to merger, split-up, and similar other events, annual reports, corporate governance principles compliance reports, rating notes and reports, and assessment and appraisal reports and other documents deemed fit by the board, providing that investors may easily access to, and they are prepared by independent parties other than issuer, public offerer or related parties of issuer and public offerer as defined in the relevant regulations of the board[198].

3.1.3. Elements to Be Included in The Prospectus

3.1.3.1. The Persons Liable

The names and duties of the real persons responsible for the prospectus and the legal entities' titles, headquarters, and contact information must be clearly stated in the prospectus. If the public is misled by the prospectus, those who prepared it may be held responsible[199].

3.1.3.2. Signature

Article 7/4 of the Communiqué No. II-5.1 specifies who will sign the prospectus[200]. According to this provision, the issuer, the public offerer, if any, and the authorized intermediary institution are obliged to sign the prospectus[201]. If the authorized institution changes the public offerings to be made during the validity period of the prospectus, it shall be signed by the new authorized institution. In this case, provided that the provisions of Article 24 of the Communiqué are respected, the re-signed issuer information document or prospectus shall not be submitted to the Board for approval again. However, information regarding where the issuer information document or prospectus was

[198] Manavgat, *Halka Arz*, 702; Adıgüzel, *Sermaye Piyasası*, 48.
[199] Turan, "İzahname Sorumluluğu," 193; Adıgüzel, *Sermaye Piyasası*, 46; Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk,* 154.
[200] Meral, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 154.
[201] Turan, "İzahname Sorumluluğu," 203.

published shall be registered with the trade registry and announced in the Turkish Trade Registry Gazette[202].

3.1.3.3. Information Regarding The Audit

The most important information in the prospectus is the financial statements. It is important for the investment decision that the financial statements are reliable and prepared according to the legislation. On the other hand, it is necessary to monitor the development of the financial structure of the company and to be able to make future predictions with the results obtained from this process. For this purpose, the financial statements should be presented comparably. In the provision of article 10/1 of the Communiqué, the audit condition is required to ensure the reliability of the financial statements[203]. If the corporation is subject to an independent audit, the financial statements must be subject to an independent audit; otherwise, the financial statements must be subject to a limited review before the public offering[204]. In addition to this information, if information not based on these financial statements is to be provided, it is mandatory to emphasize that the data not produced from financial statements has not been subjected to independent audit and/or limited review. The data must also be up-to-date and consistent with the information in the financial statements that have been subjected to independent audit and/or limited review and contain no contradictions[205].

If the corporation is not obligated to prepare interim financial statements, only the previous year's financial statements will be disclosed to the public in the prospectus. If the financial statements for the previous three years are unavailable, the current financial statements for the previous period will be disclosed in the prospectus. The absence of financial statements must be based on legal reasons[206].

[202] Memiş and Turan, *Sermaye Piyasası*, 73.
[203] Meral, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 158.
[204] Manavgat, *Halka Arz*, 702.
[205] Memiş and Turan, *Sermaye Piyasası*, 73; Çatakoğlu, *Borçlanma Araçları*, 112.
[206] Manavgat, *Halka Arz*, 703.

3.1.3.4. Sources

The sources used in preparing the prospectus are included in the prospectus annex. If the sources are not included, the investors are provided with instructions on how to access them[207].

3.1.4. Nature of Prospectus

There are differing opinions in legal scholarship regarding the legal nature of the prospectus. While some authors argue that the prospectus constitutes an offer[208], others maintain that it should be classified as an invitation to treat[209]. According to the latter view, even if the prospectus contains all the essential elements necessary for the formation of a contract, this does not necessarily render it a binding offer. Scholars supporting this position emphasize that treating the prospectus as an offer would require issuers to accept every subscription submitted by investors, which would contradict the aims of capital market regulations—particularly the objective of enabling broad public participation in public offerings. In support of this view, Article 14/II (c) of the Capital Markets Board's Communiqué on the Sale of Capital Market Instruments no. II-5.2 explicitly states that the collection of investor demands does not automatically create a binding obligation to fulfill those demands[210].

It is further argued that if a prospectus were to be treated as a binding offer, each acceptance by investors would lead to the conclusion of a separate contract. In such a scenario, if the public offering fails to be completed—due to circumstances not attributable to the fault or negligence of either party—the issuer or investor could still be held liable for breach of contract. Moreover, in cases where the total demand exceeds the amount of securities offered, it would be difficult to justify the rejection of excess subscriptions on legal grounds. Thus, legal scholars advocating this view conclude that

[207] Memiş and Turan, *Sermaye Piyasası*, 73.
[208] İhtiyar, *Kamuyu Aydınlatma İlkesi*, 122; Somer, *Sermaye Piyasası Kanunu'nun Tedrici Kuruluş Sistemi Üzerindeki Etkileri,* 95.
[209] Ayoğlu, *Halka Arz*, 84.
[210] Ayoğlu, *Halka Arz*, 84; Çatakoğlu, *Borçlanma Araçları*, 114.

characterizing the prospectus as an invitation to treat provides a more balanced and equitable legal framework[211].

3.1.5. Approval of Prospectus

In the public offering of capital market instruments, the approach accepted in modern legal systems is the public disclosure system. In this system, the authorized public authority does not have the authority to evaluate the merit of the issued instrument and to grant or not grant permission accordingly[212]. Nevertheless, it only has a limited function and duty of ensuring that all important information regarding the issuer and the issued instrument reaches investors completely. The public disclosure system was established under Law No. 6362. As provided in the Law, for the public offering to take place, the prospectus containing basic information regarding the issuer must be approved by the Capital Markets Board[213].

The Board decides to approve the prospectus if the information is consistent, comprehensible, and complete according to the prospectus standards that the Board determines[214]. The Board also determines the examination procedures. If the prospectus is composed of separate documents, each document must also be approved[215]. The approval of the prospectus does not mean that the Board guarantees the accuracy of the information given in it and cannot be interpreted as a recommendation[216].

Article 6 of the Law regulating the approval of the prospectus states that the application regarding the approval of the prospectus shall be concluded within ten business days starting from the submission to the Board of the prospectus[217]. For initial public offers, the time limit is twenty business days. The reason for the shortening of the period determined as thirty days in the previous law in the new law is to ensure that the information in the prospectus does not lose its currency due to internal developments and

[211] Çatakoğlu, *Borçlanma Araçları*, 114.
[212] Turan, "İzahname Sorumluluğu," 195; Adıgüzel, *Sermaye Piyasası*, 49.
[213] Nusret Çetin, Hatice Ebru Töremiş and Zeynep Cantimur, *6362 Sayılı Sermaye Piyasası Kanunu'nun Sistematik Analizi* (Ankara: Yetkin Yayınları, 2014), 25.
[214] Turan, "İzahname Sorumluluğu," 195.
[215] Adıgüzel, *Sermaye Piyasası*, 49.
[216] Memiş and Turan, *Sermaye Piyasası*, 76.
[217] Manavgat, *Halka Arz*, 710; Balcı and Turan, *Sermaye Piyasası Kanunu Şerhi C.1*, 150.

to minimize the possibility of the public offering being negatively affected by external developments[218].

The fact that the Board has not reached a decision on the approval of the prospectus within the specified time frames does not imply that the prospectus or issuance document has been either approved or disapproved by the Board[219]. In cases where the information or documents presented are incomplete or if additional information or documents are demanded, the applicant is notified within ten business days from the application date and is asked to fulfill the deficiencies within the duration determined by the Board. In cases where applications are not approved due to the examinations, the interested persons are notified of the situation with an indication of the reason[220]. If the Board does not detect any deficiencies in the scope of the review, it decides to approve the prospectus. The applicant must receive the approved prospectus within 20 days. Otherwise, it must be re-approved[221].

Article 91 of the Law provides measures to be implemented for issuances violating the Law and contradictions with information and disclosure in the prospectus. According to the Article, the Board is authorized to request cautionary injunctions and attachments exempt from all kinds of charges and guarantees for the equivalent amount sold and the capital market instrument to be sold[222].

The second paragraph of the article states that the Board makes a written notice to the issuer within thirty days from the date of determination. The addressee shall announce through instruments to be determined by the Board the detailed information concerning the real persons and legal entities from which\whom it has raised money as well as the raised amount and shall report this information to the Board within at least thirty days from the notice[223]. Within three months following this announcement, real persons and legal entities from whom money has been raised may file an objection to the civil court

[218] Turan, "İzahname Sorumluluğu," 195.
[219] Adıgüzel, *Sermaye Piyasası*, 49.
[220] Memiş and Turan, *Sermaye Piyasası*, 76; Manavgat, *Halka Arz*, 711; Adıgüzel, *Sermaye Piyasası*, 49.
[221] Turan, "İzahname Sorumluluğu," 195; Çatakoğlu, *Borçlanma Araçları*, 128.
[222] Murat Balcı and Sinem Turan, *Sermaye Piyasası Kanını Şerhi C.2* (Ankara: Adalet Yayınevi, 2020), 167.
[223] Manavgat, *Halka Arz*, 591.

of first instance of the place where the corporation is located. Upon finalizing the related list, the person who made the related issue shall refund the right holders. The cautionary injunctions and attachments in the first paragraph cannot be removed before fulfilling this restitution[224].

The third paragraph, added to the law in 2020, states that if conduct contradicts commitments and disclosures affecting investor decisions or if commitments are not fulfilled in a reasonable time, the Board can demand corrections from relevant parties. The Board can seek cautionary injunctions and attachments without charges if no valid economic reasons are provided. For transactions using funds contrary to the prospectus, the Board can file lawsuits for annulment and restitution within three months or two years for any transactions contradicting the prospectus. If the consequences of the illegal issuance are not fully eliminated within one year from the date of the written notice made by the Board, the Board is authorized to file a lawsuit to refund the cash and other assets to right holders or to liquidate the corporation.

Article 109 of the Law states that those who make public offers of capital market instruments without fulfilling the obligation of publishing an approved prospectus or those who sell capital market instruments without an approved issue document shall be sentenced to imprisonment from two years to five years and punished with a judicial fine from five thousand to ten thousand days. Moreover, those who perform unauthorized activities in the capital market shall be imprisoned for two to five years and punished with a judicial fine of five thousand to ten thousand days[225].

There are three methods used in the sale of shares to investors: book-building, sales on the stock exchange, and direct sales without book-building. Companies intending to go public must choose either the book-building method or sales on the stock exchange. The book-building method refers to the public offering of shares by intermediary institutions outside the stock exchange. The book-building period must be at least two business days and no more than twenty business days. The collected bids are allocated by the intermediary institution among individual and institutional investors who have submitted

[224] Manavgat, *Halka Arz*, 592.
[225] Balcı and Turan, *Sermaye Piyasası Kanunu Şerhi C.2,* 476.

requests. Once the allocation is finalized, the public offering process is completed. Companies may also offer their shares to the public through the primary market of the stock exchange. To do so, an application must be submitted to the stock exchange and accepted and announced by it. If the sale on the Exchange's Primary Market is conducted without book-building, the sales period is two business days. If conducted through book-building, the collection period must be at least two business days and at most three business days[226].

Article 10 of the Communiqué On Sales Of Capital Market Instruments states that public offering of capital market instruments may, at the earliest, be started in the third day following the date of publication of the prospectus and the price determination report[227]. Although the time period determined by the legislator may seem appropriate for keeping the prospectus up to date in a rapidly changing commercial environment, it may be insufficient for individual investors to review and understand the document thoroughly.

Article 27 of the Communiqué On Prospectus And Issue Document states that the information declared by the issuer, public offerer, or authorized institution with respect to a public offering or admitted to trading on the exchange of capital market instruments addressed to investors in general or to a specific investor group is required to be included in the prospectus as well, and any actions which may lead to inequality of information among investors cannot be taken. However, it is clear that equality cannot be achieved among investors if sufficient time is not given for investors to review and understand the information added to the prospectus.

[226] Borsa İstanbul, "Satış Yöntemleri," https://borsaistanbul.com/tr/sayfa/244/satis-yontemleri, accessed: May 25, 2025.
[227] Capital Markets Board of Turkey, *Communiqué on Sales of Capital Market Instruments (II-5.2)*, Official Gazette no. 28871, published on January 15, 2014, https://cmb.gov.tr//data/6281521a1b41c617eced0ee8/26967a7dcd48372d5f6eb5adc2bee519.pdf , accessed: May 25, 2025.

3.1.6. Validity Period, Publication and Amendment

3.1.6.1. Validity Period of The Prospectus

The prospectus is valid for issuances for twelve months from the first publication date, provided that the prospectus is kept up-to-date. In public offerings to be made after this period, the entire prospectus must be approved. If the prospectus is prepared in more than one document, the validity period of the prospectus begins on the first publication date of the issuer information document approved by the Board. The validity period of the capital market instrument note and summary cannot exceed the validity period of the issuer information document[228].

Shelf Registration system removes the requirement to issue a separate prospectus for each issuance and permits more than one issuance based on the same prospectus within the validity period, provided the changes are processed. This system was established with the Communiqué no. 29 in the previous CML period. The new CML accepts this system as well[229]. The aim is to encourage public offerings by reducing costs and procedures. This arrangement avoids the additional costs of repeating the prospectus approval, registration, and announcement processes before each issuance and preparing different prospectuses for each instrument[230]. While the shelf registration system is mainly used for debt securities in the USA, in Turkish law, it is not possible to apply it to capital market instruments other than stocks[231].

3.1.6.2. Publication Of The Prospectus, Announcement And Advertisements

Article 7 regulates the publication of the prospectus, announcement, and advertisements. According to the Article, after the prospectus is approved, it is published according to the principles determined by the Board. It is not further registered to the trade registry or announced via the Turkish Trade Registry Gazette (TTRG)[232]. However, where the

[228] Manavgat, *Halka Arz*, 709.
[229] Adıgüzel, *Sermaye Piyasası*, 53.
[230] Memiş and Turan, *Sermaye Piyasası*, 77.
[231] Ayoğlu, *Halka Arz*, 54.
[232] Manavgat, *Halka Arz*, 715.

prospectus is published, it is registered to the trade registry and announced via the TTRG[233]. The Article also states that the prospectus can be announced in the framework of the principles to be determined by the Board before approval. Announcements, advertisements, and statements regarding the issue should be consistent with the prospectus and contain no inaccurate, exaggerated, or misleading information[234].

Advertisements related to issuance can be made. Advertisements are the only way to reach an anonymous target audience. However, these advertisements must be consistent with the prospectus[235]. Advertisements and promotions are also regulated in Article 27 of the communiqué. According to the Article, the information in advertisements and promotions, including verbal statements, must not be wrong, deficient, misleading, or exaggerated. They must not give the investors wrong impressions about the state of the issuer or the public offerer, the relevant capital market instrument, or the guarantor, if any[236]. They must be consistent with the information given in the prospectus. Suppose a public offering price is also given in advertisements and promotions. In that case, it should clearly be emphasized that the Board or the Exchange has no right of discretion or approval in determining the public offering price of the capital market instruments. Texts must be designed to be easily recognized as an advertisement. The advertisements and promotions must contain a warning stating that the investment decisions must be given upon review of the prospectus[237].

The prospectus can be announced within the framework of the principles to be determined by the Board before approval. In that case, advertisements and promotions must only concern the sector where the issuer operates, its position in the sector, its fields of business, and its goods or services. In these advertisements and promotions, if the prospectus has not been approved, it must be clearly stated that it has not yet been approved. If the prospectus is approved, the place of publication must be stated[238].

[233] Çatakoğlu, *Borçlanma Araçları*, 116.
[234] Turan, "İzahname Sorumluluğu," 195.
[235] Ibid.
[236] Manavgat, *Halka Arz*, 721.
[237] Adıgüzel, *Sermaye Piyasası*, 53.
[238] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 165.

Advertisements and promotions made after the prospectus is approved and published must state the places from which the prospectus can be obtained and the internet websites, including PDP, where the prospectus is published[239]. Where capital market instruments are to be sold only through a call to qualified investors, the advertisements and promotions must contain a definition of qualified investor as included in the Board regulations and state therein that the instruments shall be sold only to qualified investors who meet the required conditions[240].

3.1.6.3. Amendments in Prospectus and Additions to Prospectus

The prospectus is the main public disclosure document regarding public offering transactions. Therefore, the information contained in this document should reflect the latest situation. Developments and changes that may affect investors' decisions should be announced to the public immediately[241].

In cases where amendments or new matters that may affect the investment decision of investors occur in the prospectus and in the information disclosed to the public before starting the sale or within the sale period, the situation must be notified immediately by the issuer or the public offeror to the Board through the most convenient method[242]. Investors who have made a demand to buy capital market instruments before the amendments or of new matters possess the right to withdraw their demands within two business days starting from the publication of the amendments and additions made to the prospectus[243].

In case of issues requiring change or new situations, the issuer, the public offeror, or authorized institutions may stop the sales process upon their approval. Any changes requiring change or new situations must be immediately notified to the Board in writing.

[239] Adıgüzel, *Sermaye Piyasası*, 166; Balcı and Turan, *Sermaye Piyasası Kanunu Şerhi C.1*, 158.
[240] Adıgüzel, *Sermaye Piyasası*, 53.
[241] Ayoğlu, *Halka Arz*, 129; Kabaalioğlu, *Kamuyu Aydınlatma İlkesi*, 178; Aydoğan, 2021, 168.
[242] Meral, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 161.
[243] Turan, "İzahname Sorumluluğu," 196; Çatakoğlu, *Borçlanma Araçları*, 117.

If the issuer, the public offeror, or authorized institutions do not stop the sales process, the Board may decide to stop it if deemed necessary[244].

The amendments and additions must be approved by the Board within seven business days following the date of notification to the Board and published immediately. Similarly, information allowing comparison of former and new versions of relevant sections of the prospectus and the post-amendment version of the prospectus as a single and whole document covering all amendments must be published on the issuer's and authorized institution's websites and, if the issuer is a member of PDP, in PDP[245].

If a change made to sections other than the summary section requires the summary section of the prospectus to be changed and corrected, the necessary change shall be made in the summary section. If the summary is republished as a whole, the corrected sections should be highlighted so that investors can easily recognize and understand the changes[246].

Investors who have filed a demand to purchase capital market instruments before the publication of amendments or editions are entitled to withdraw their demands within two business days following the date of publication. The issuer and/or the public offerer can extend this period, provided that it is duly stated in the prospectus[247].

3.1.7. Difference Between Prospectus and Issue Document

The issue document contains the nature and sale conditions of capital market instruments issued without a public offer or through specific public offers regulated in Article 6 of the Communiqué[248]. The Board must approve it according to the principles laid down for the approval of a prospectus. The Board establishes the procedures and principles for its approval and, when necessary, its announcement to the public[249]. Both the issue document and prospectus are public disclosure documents. The primary difference is that a

[244] Memiş and Turan, *Sermaye Piyasası*, 79; Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 168.
[245] Balcı and Turan, *Sermaye Piyasası Kanunu Şerhi C.1*, 163.
[246] Uçar, Payların *İzahnameden Doğan Kamuyu Aydınlatma Sorumluluğu*, 77.
[247] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 168.
[248] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 245.
[249] Manavgat, *Halka Arz*, 549.

prospectus is prepared for instruments issued through a public offering, while the issue document is created for those issued without a public offering[250].

According to the definition in Article 4 of the Communiqué, in addition to sales where the public offering method is not used, the issuance document must be prepared in two other cases: Issuances made abroad and all kinds of issuances to be made without the preparation of a prospectus[251]. The second of these two cases for which the Communiqué requires the issuance document also covers sales where the public offering method is used, but no prospectus is requested. Article 6 of the Communiqué regulates exemptions from the obligation to prepare a prospectus and situations that do not require the preparation of a prospectus. The transactions listed in the relevant article are specific transactions using the public offering method.[252].

Article 12 of the Communiqué provides general principles about the content of the issue document. According to the Article, the issue document is prepared and designed to contain general information about the characteristics and sales conditions of capital market instruments to be issued and to be easily understood and assessed by investors. Given that the content of the prospectus has been thoroughly explained in the thesis, it will not be re-examined in this section[253].

3.1.8. Changes to EU Prospectus Regulation under the New EU Listing Act

The EU's new Listing Act package came into force on 4 December 2024 and introduced significant changes to the EU Prospectus Regulation (EU 2017/1129) and Market Abuse Regulation (MAR). These changes aim to simplify IPO processes and facilitate access to capital markets for small and medium-sized enterprises (SMEs)[254].

[250] Memiş and Turan, *Sermaye Piyasası*, 77.
[251] Meral, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 164.
[252] Manavgat, *Halka Arz*, 549.
[253] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 247.
[254] Roschier, *The EU Listing Act: Capital Markets Union Legislative Package Enters into Force,* Published December 4, 2024, https://www.roschier.com/wp-content/uploads/2024/12/the-eu-listing-act.pdf, accessed: May 15, 2025.

3.1.8.1. Exemptions From Prospectus Obligations

Prior to the implementation of the EU Listings Act, the EU Prospectus Regulation allowed for certain exemptions from the requirement to publish a prospectus for public offerings of securities. Specifically, these exemptions applied if the offerings were directed solely at qualified investors or involved fewer than 150 non-qualified investors in each Member State. The amendment introduced additional exemptions for smaller issues. Furthermore, issuers are now permitted to conduct an initial public offering (IPO) without a prospectus if the offered securities belong to a class that is already listed on a regulated market or an SME growth market[255].

Additionally, the prospectus exceptions for admitting securities to trading on a regulated market have been extended. The existing exception for admitting securities of a class already listed on a regulated market has been increased from less than 20% to less than 30% of the number of securities that are already traded on the same market over a twelve-month period. If the securities have been admitted for at least 18 months, further securities of the same class may be admitted without a prospectus, provided that the 11-page document replacing the prospectus has been published beforehand[256]. However, for issuers undergoing restructuring or insolvency proceedings, or for situations involving exchange offers, mergers, or demergers, these prospectus exceptions that utilize the 11-page document are not available[257].

Furthermore, the definition of small-scale offerings has been revised. The current system allows Member States to set a threshold between 1 and 8 million EUR for public offers of securities, leading to varying national frameworks and practical challenges. The new listing act establishes a dual-threshold system: a general threshold of 12 million EUR is

[255] Andreas Meyer and Lena Pfeufer, "Relief From Prospectus Requirements Under The EU Listing Act," *Lexology*, May 6 2025, https://www.lexology.com/library/detail.aspx?g=ad6622d6-d9a9-4a60-aee0-c2685f2f7ce9, accessed: May 15, 2025; Kyohei Mizukoshi, Natsumi Tada, and Sofía Terol Cháfer, "EU Listing Act: Enhancing Capital Markets in the European Union," *NO&T Capital Market Legal Update*, no. 4, December 2024, 1, available at: https://www.noandt.com/wp-content/uploads/2024/12/capital_en_no4_2.pdf, accessed: May 15, 2025.

[256] Jessica Schmidt, "EU Listing Act – Bull or Bear?" (Working Paper, University of Bayreuth; European Corporate Governance Institute, 2025), 10; Roschier, "Capital Markets Union Legislative Package," 8.

[257] Meyer and Pfeuer, "Relief From Prospectus Requirements."

set, but to accommodate the varying sizes of national capital markets, Member States have the option to choose a lower threshold of 5 million EUR. A prospectus will only be required when the total offer amount exceeds EUR 12 million (or EUR 5 million). Offers below this lower threshold will be exempt from the prospectus publication requirement under the Prospectus Regulation (PR) if they do not require passporting. However, Member States may still require a document with specific information, aligned with the PR requirements. Overall, while not entirely simple, the new system aims to be clearer and more harmonized[258].

3.1.8.2. Prospectus Format and Content

According to the Act, prospectuses are prepared in a standardized format and sequence. It establishes a limit of 300 pages for prospectuses related to equity securities. However, this page limit does not include the prospectus summary, information incorporated by reference, or pro forma information concerning complex financial histories, significant financial commitments, or major gross changes. Additionally, the limit does not apply to offers where an issuer makes a simultaneous offer to investors in a third country, which may require the preparation of multiple documents. This is particularly relevant for companies making offerings that include a US private placement component, as they must comply with specific disclosure requirements to qualify for applicable exemptions from US registration requirements. Furthermore, the page limit is not applicable to bond prospectuses, which follow a distinct standardized format and sequence[259].

The summary will be standardized to a greater extent. The order of the sections and the information within those sections is now mandatory. Additionally, similar to the prospectus, the template, layout, and language guidelines will be specified. The regulation now permits the inclusion of charts, graphs, and tables; however, these will count towards the seven-page limit. If a guarantee is provided, the page limit will be extended by one additional page for each guarantor[260]. The European Securities and Markets Authority (ESMA) will develop guidelines focused on making prospectuses more understandable

[258] Schmidt, "EU Listing Act," 10; Kyohei Mizukoshi, Natsumi Tada, and Sofía Terol Cháfer, "EU Listing Act," 2.
[259] Roschier, "Capital Markets Union Legislative Package," 9; Kyohei Mizukoshi, Natsumi Tada, and Sofía Terol Cháfer, "EU Listing Act," 2.
[260] Schmidt, "EU Listing Act," 13.

and using plain language. It's important to note that in the United States, the Securities and Exchange Commission (SEC) published a Plain English Handbook in 1998. This handbook offers valuable tips to improve the clarity of prospectus disclosures and emphasizes key information to help investors make informed investment decisions[261].

The Listing Act recognizes that the current disclosure levels for the simplified prospectus for secondary issuances and the EU Growth Prospectus for SMEs are too similar to standard prospectuses. To address this, the Act introduces the EU Follow-on Prospectus, which replaces the existing simplified prospectus. The EU Follow-on Prospectus is applicable to issuers whose securities have been traded on a regulated or SME growth market for at least 18 months. This prospectus will be used for secondary issuances that do not qualify for exemptions, expanding to cover additional securities beyond equity. It has a maximum length of 50 pages, excluding the summary and incorporated information, and allows a seven-day review period if notified five working days prior to filing[262].

The EU Growth Prospectus will be renamed the EU Growth Issuance Prospectus, designed to simplify documentation for SMEs and small unlisted companies with offerings up to EUR 50 million (increased from EUR 20 million). This prospectus will have a maximum length of 75 pages[263]. Both the EU Follow-on Prospectus and the EU Growth Issuance Prospectus will become available 15 months after the Listing Act is enacted, with further details defined by a delegated act from the European Commission. Existing approved prospectuses will remain valid under current regulations until their expiration[264].

The growing importance of sustainability in investment decisions has led investors to increasingly consider Environmental, Social, and Governance (ESG) factors. Additionally, new sustainability reporting obligations from Regulation (EU) 2020/852 (the Taxonomy Regulation) and Directive (EU) 2022/2464 (the Corporate Sustainability Reporting Directive or CSRD) have introduced more detailed disclosure requirements for

[261] Roschier, “Capital Markets Union Legislative Package,” 10.
[262] Schmidt, “EU Listing Act,” 14; Roschier, “Capital Markets Union Legislative Package,” 10; Kyohei Mizukoshi, Natsumi Tada, and Sofía Terol Cháfer, “EU Listing Act,” 3.
[263] Roschier, “Capital Markets Union Legislative Package,” 10; Schmidt, “EU Listing Act,” 15; Kyohei Mizukoshi, Natsumi Tada, and Sofía Terol Cháfer, “EU Listing Act,” 3.
[264] Roschier, “Capital Markets Union Legislative Package,” 10.

listed companies regarding sustainability issues. Even before these regulations were established, sustainability factors had started to appear in prospectus disclosures. This trend prompted the ESMA to provide guidance on how to present necessary sustainability information, ensuring that investors can make informed assessments[265].

The Listing Act mandates sustainability-related disclosures for issuers of equity securities, requiring them to publish information under the Taxonomy Regulation and the CSRD. Issuers must include their management and sustainability reports in the prospectus for the relevant financial periods. The prospectus summary must state whether the issuer's activities qualify as environmentally sustainable under the EU Taxonomy Regulation[266].

The reform provides a reduction in the minimum content in the prospectus. Notably, issuers now need to provide historical financial information for just the last two financial years for equity securities or the most recent year for non-equity securities. Issuers of equity securities must also include or reference information from management and sustainability reports to help investors consider environmental, social, and governance (ESG) factors, while also aiming to reduce "greenwashing." However, this puts issuers at risk of liability if the management reports contain inaccurate information. For non-equity securities that claim to consider ESG factors, the Commission will create a delegated act outlining the specific requirements for the prospectus, which can also lead to potential liability issues[267].

To facilitate access for foreign issuers to EU public markets, the regulatory framework has been revised. The European Commission can now assess the equivalence of a third country's legal framework, with broadened criteria that include liability, prospectus validity, and approval processes. As a result, prospectuses approved by a third country will only need to be filed, not approved, by the competent authority in the issuer's EU member state if certain conditions are met. This new system aims for standardized evaluations across the EU[268].

[265] Roschier, "Capital Markets Union Legislative Package," 11.
[266] Schmidt, "EU Listing Act," 13.
[267] Schmidt, "EU Listing Act," 13.
[268] Schmidt, "EU Listing Act," 17; Kyohei Mizukoshi, Natsumi Tada, and Sofía Terol Cháfer, "EU Listing Act," 3.

3.1.8.3. Investor Protection and Language Options

The Prospectus Regulation currently requires that risk factors be ranked, with the most significant factors mentioned first within each category. The Listing Act changes this requirement by stipulating that issuers must list the most significant risk factors in each category according to their assessment of materiality, considering both the likelihood of occurrence and the potential severity of their negative impact. Additionally, the Listing Act specifies that the prospectus must not include generic risk factors, disclaimers, or any factors that might obscure specific risks that investors need to be aware of. When applicable, the prospectus summary should also include a statement indicating that environmental issues have been identified as a material risk factor[269].

From June 5, 2026, prospectuses can be in "languages customary in the sphere of international finance," typically English, with only the summary needing to be in the home Member State's accepted language. However, some Member States can still require prospectuses in their approved language, a rule that should be revised. In Germany, the new proposal allows both German and English, meaning English prospectuses won't need German summaries[270]. Moreover, the prospectus may only be published in electronic format, which means that investors can no longer request paper copies. However, the Listing Act still permits Member States to require that a prospectus be provided in a language approved by the competent authority of that Member State[271].

3.1.8.4. Entry Into Force

While the majority of amendments to the Market Abuse Regulation (MAR) and the Prospectus Regulation under the EU Listing Act have already entered into force on 4 December 2024, some provisions are subject to more extended transitional periods and will only apply at later dates. Notably, as of 5 March 2026, the EU Follow-on Prospectus and the EU Growth Issuance Prospectus will replace the previously available simplified prospectus regimes, with new limitations on length and structure—details of which will be clarified through delegated acts by the European Commission. Further changes will

[269] Roschier, "Capital Markets Union Legislative Package," 11.
[270] Schmidt, "EU Listing Act," 16.
[271] Roschier, "Capital Markets Union Legislative Package," 11; Schmidt, "EU Listing Act," 16.

enter into force on 5 June 2026, including clarifications under MAR regarding intermediate steps in a prolonged process, which will no longer trigger disclosure obligations, and the formal incorporation of ESMA guidance concerning the risk of misleading the public when disclosure of inside information is delayed due to prior corporate communications. On the Prospectus Regulation side, from the same date, the threshold for mandatory prospectus publication will increase to EUR 12 million (or EUR 5 million) over a 12-month period, and a standardized format and order of disclosure for full prospectuses and summaries—including sustainability disclosures—will be introduced, accompanied by a 300-page limit for standard equity prospectuses. Although these regulations are directly applicable in Member States without the need for transposition, related amendments to MiFID II and the directive on multiple-vote shares will require national implementation within 18 months and two years, respectively[272].

3.1.8.5. Thoughts On The Impact On Turkey

There has been little discussion in Turkey yet on the EU Listing Act. However, due to the recent increase in interest in public offerings, it is a subject worth discussing whether public offerings should be facilitated to encourage small and medium-sized enterprises. At this point, although encouraging businesses to revitalize the economy may appear beneficial, it is essential to strike a balance by upholding one of the fundamental principles of capital markets: the protection of investors.

[272] Roschier, "Capital Markets Union Legislative Package," 13-14.

CHAPTER 3: LIABILITY ARISING FROM THE PROSPECTUS

The prospectus is a public disclosure document that creates liability. The Capital Markets Board is not responsible for its material content. On the other hand, the responsibility of those who contribute to preparing the prospectus for investors is regulated[273]. A threefold classification can be made among the legal provisions applicable to the compensation of damages caused to third parties by the actions and conduct of joint stock companies. These are: the general provisions determined by the legal nature of the relationship between the parties; the provisions of the Turkish Commercial Code relating specifically to joint stock companies; and the provisions found in relevant special laws[274]. It is not possible to provide an exhaustive list of the general provisions applicable to liability arising from a prospectus, as these will vary depending on the legal nature of the relationship between the parties. The aim of the special provisions concerning liability for the prospectus is not to exclude the application of general provisions. Depending on the type of relationship between the parties, it is always possible to bring a legal action based on the general provisions of liability[275].

1. SPECIAL PROVISIONS REGARDING PROSPECTUS LIABILITY

1.1. Capital Markets Law Art. 10 and 32

Article 10 of the CML provides persons responsible for the prospectus[276]. On the other hand, Article 32 of the Law regulates responsibility arising from public disclosure documents. The prospectus is a special type of public disclosure document that provides the information that will form the basis for the decision of those who will purchase the company's securities from the primary markets[277]. For this reason, Article 10 of the CML is a special provision compared to Article 32[278].

[273] Memiş and Turan, *Sermaye Piyasası*, 80.
[274] Çatakoğlu, *Borçlanma Araçları*, 118.
[275] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Hukuki Sorumluluk*, 289.
[276] Turan, "İzahname Sorumluluğu," 202.
[277] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Hukuki Sorumluluk*, 289.
[278] Memiş and Turan, *Sermaye Piyasası*, 83.

Article 10 states that issuers are responsible for losses arising from inaccurate, misleading, and incomplete information in the prospectus. In cases where the related persons cannot compensate the loss or when it is clear that the loss cannot be compensated, those who act as public offeror, the leader intermediary institution which acts as intermediary during the issue, the guarantor, if any, and the members of the board of directors of the issuer are responsible to the extent of their fault and to the extent the losses can be attributed to them according to the necessities of the situation[279].

A sequential liability status has been determined for liability in preparing the prospectus[280]. The primary responsible person is the issuer[281]. This liability to which the issuer is subject is a strict liability; the issuer cannot escape liability by claiming that it has no fault in providing false, misleading, or incomplete information in the prospectus[282]. If the issuer cannot compensate the damage or it is understood that it cannot be compensated, compensation claims are directed to the second-degree liable parties. Those who are second-degree liable are the public offerors, the leading intermediary institution that mediates the issuance, the guarantor, if any, and the members of the board of directors of the issuer. Although joint liability is essential among them, a differentiated solidarity liability system has been envisaged in proportion to their faults[283].

It should be accepted that the creditor's situation becomes more difficult in differentiated solidarity. Although the joint liability regulated in Article 10 of the Law allows the creditor to collect the damages in whole from any responsible person in theory, it can put the creditor in a problematic situation in practice. In particular, the absence of a precise regulation in this article on how the liability for compensation will be determined among the responsible parties or the plaintiff can file a single lawsuit against all responsible parties and request the court to determine the liability of each party, makes the creditor's process of seeking rights unclear and disorganized. However, another differentiated joint liability example in Article 557/2 of the Turkish Commercial Code, which regulates

[279] Adıgüzel, *Sermaye Piyasası*, 138.
[280] Güzin Üçışık and Aydın Çelik, *Anonim Ortaklıklar Hukuku*, Cilt 1 (Ankara: Adalet Yayınevi, 2013), 204.
[281] Çatakoğlu, *Borçlanma Araçları*, 119.
[282] Tolga Ayoğlu, "İzahnameden Doğan Sorumluluk," in *İsviçre Borçlar Kanunu'nun İktisabının 80. Yılında İsviçre Borçlar Hukuku'nun Türk Ticaret Hukuku'na Etkileri* (Istanbul: Vedat Kitapçılık, 2009), 642.
[283] Memiş and Turan, *Sermaye Piyasası*, 81.

liability in closed companies, enables a joint lawsuit to be filed against multiple responsible parties for the entire damages and enables the judge to determine the liability for compensation of each defendant in the same lawsuit, thus providing more effective protection for the creditor. In this context, the regulation in Article 10 of the CML is insufficient regarding litigation strategy and ease of collection[284].

In the event of the above-mentioned liability situations regarding the prospectus, investors in capital market instruments will not be able to resort to those other than the issuer, as a natural consequence of the issuer being secondarily liable, as long as the issuer has the ability to pay its debts, as per the provision of Article 10 (1). It is unclear how to determine whether the investors' losses can be compensated by the issuer or whether it is obvious that they cannot be compensated. According to some views in the doctrine, it should be accepted that such a situation occurs when insolvency or one of the documents replacing the insolvency certificate is obtained[285]. It should also be noted that the guarantor's liability mentioned in this provision differs from that of other liable parties. Given the nature of guarantee agreements, the guarantor's liability is not contingent upon fault[286]. Individuals not listed above may also be held liable. This includes those who prepared the documents that were used to create the prospectus. The second paragraph of Article 10 states that persons and institutions such as independent audit, rating, and appraisal firms preparing reports that are included in the prospectus shall also be responsible in the framework of the provisions of the Law due to inaccurate, misleading, and incomplete information included in the reports they have prepared[287]. It is important to discuss whether the issuer may be liable for incomplete or inaccurate information contained in the relevant reports. These institutions undertake the task of preparing the reports to be included in the prospectus due to their expertise in specific fields. As also stated in the second paragraph of Article 10 of the Capital Markets Law, these institutions are liable under the provisions of the Law for any inaccurate, misleading, or incomplete information included in the reports they have prepared. In this context, if the investor suffers a loss

[284] Akdağ Güney, 2016, 395-403; Reha Poroy, Tekinalp and Çamoğlu, *Ortaklıklar Hukuku I*, 433-434.
[285] Buket Çatakoğlu, *"The Legal Nature of the Prospectus in Public Offerings and the Legal Liability Arising from It." Journal of the Faculty of Economics and Administrative Sciences, Kastamonu University* 11 (January 2016):123; Üçışık and Çelik, 2013, 205.
[286] Memiş and Turan, *Sermaye Piyasası*, 81.
[287] Adıgüzel, *Sermaye Piyasası*, 138

and the issuer is held liable for that loss, fairness requires that the issuer should have the right to seek recourse against the responsible institution. Otherwise, the liability regime established to protect investors relying on the prospectus could lead to disproportionate outcomes against the issuer.

Paragraph 6 of Article 32 states that compensation claims arising from public disclosure documents become time-barred within six months from the date of the damage[288]. Similarly, Under Article 32 (7) of the Law, agreements or records related to them that reduce or eliminate liability arising from public disclosure documents are invalid. In this context, it is not possible to limit, narrow down, or eliminate the liability of the prospectus regulated in Article 10 through the provisions of the contract to be concluded between the parties[289].

There is a difference between the provision of Article 10 of the Law and the provision of Article 32, which regulates liability for public disclosure documents -including the prospectus- in terms of joint liability -differentiated joint liability. The question arises as to whether this difference should be evaluated as a contradiction or whether it should be interpreted differently[290]. First, the difference between joint and differentiated joint liability should be explained. Joint liability is a liability in which each of the debtors is liable for the entire debt to the creditor; in other words, the creditor can apply to each of the debtors to collect the entire debt, and in the event that the entire or partial receivable is fulfilled by one of the debtors, the others are also relieved of their debts to the extent of the amount fulfilled, and this can only be the case if it is agreed upon in the contract or provided for by law [Turkish Code of Obligations (COO) Article 162/2, 163][291]. The characteristic of joint liability is that the faults of the debtors who caused the damage together in the occurrence of the damage are not taken into account in the external relationship (against the creditor)[292] but can be claimed in the internal relationship (against each other in sharing the damage). This issue is understood from the provision

[288] Adıgüzel, *Sermaye Piyasası*, 142.
[289] Turan, "İzahname Sorumluluğu," 220; Adıgüzel, *Sermaye Piyasası*, 137.
[290] Memiş and Turan, *Sermaye Piyasası*, 82; Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk,* 301.
[291] Günergök and Kayıhan, *Borçlar Hukuku Genel Hükümler*, 683.
[292] Oğuzman and Öz, *Borçlar Hukuku Genel Hükümler*, 478.

of Article 61 of the COO regarding torts[293]. The meaning of differentiated solidarity is that in a liability lawsuit filed against persons who jointly caused the damage, each of the persons causing the damage is not responsible for the entire damage in terms of external relations but has the right to demand that the damage be shared accordingly by putting forward the degree of personal status and faults in the concrete case[294].

As explained above, when the prospectus's function in the public offering and its content, preparation, and announcement are subject to special procedures, it should be accepted as a special public disclosure document. Therefore, Article 10 of the CML is a special provision compared to Article 32. It should be concluded that the legislator made a conscious choice here and that he/she knowingly adopted the differentiated solidarity in Article 10. Accordingly, the persons charged with liability together with the issuer in Article 10 will be liable for the false, misleading, or incomplete information provided in the prospectus - in external relations - to the extent of their fault. In other words, they will be able to claim this in a liability lawsuit to be filed against them. On the other hand, those who sign public disclosure documents other than the prospectus - or the persons on whose behalf these documents are signed - will be jointly and severally liable to the plaintiff for all damages arising from the false, misleading, or incomplete information in these documents, by Article 32[295].

On the other hand, the possibility of relief from liability is granted to jointly and severally liable persons in Article 32/b-3 of the Law. Accordingly, persons who prove that they were unaware of the false, misleading, or incomplete information in public disclosure documents and that this lack of information was not due to intent or gross negligence will not be held liable. Since the defendants must prove that they were not at fault in order to avoid liability, we can state that the existence of liability is accepted as a presumption[296].

[293] Sami Narter, *Kusursuz Sorumluluk, Haksız Fiil Sorumluluğu ve Tazminat Hukuku* (Ankara: Adalet Yayınevi, 2024), 21.
[294] Narter, *Kusursuz Sorumluluk, Haksız Fiil Sorumluluğu ve Tazminat Hukuku*, 23.
[295] Memiş and Turan, *Sermaye Piyasası*, 83; Adıgüzel, *Sermaye Piyasası*, 139.
[296] Turan, "İzahname Sorumluluğu," 191; Adıgüzel, *Sermaye Piyasası*, 140.

1.2. Article 11 of the Regulation (EU) 2017/1129

According to Article 11 of the Prospectus Regulation[297], the responsibility for ensuring the accuracy and completeness of the information presented in a prospectus, along with any supplements, lies with specific parties. These parties include the issuer, members of its administrative, management, or supervisory bodies, the offeror, the person seeking admission to trading, or the guarantor, depending on the situation[298]. These responsible individuals or entities must be clearly identified in the prospectus, along with declarations confirming that, to the best of their knowledge, the information is truthful and contains no material omissions. The Regulation also mandates that Member States ensure the application of their civil liability rules to these persons. However, civil liability does not arise solely from the summary section unless the summary is misleading, inaccurate, inconsistent with the rest of the prospectus, or fails to provide key information necessary for investors[299].

1.3. Section 90 (1) of the Financial Services and Markets Act 2000 of the UK

The UK legislation includes a specific provision for prospectus liability. According to Section 90(1) of the Financial Services and Markets Act 2000 (FSMA), "any person responsible for listing particulars is liable to pay compensation" to individuals who acquired securities and suffered losses due to misleading or incomplete information contained in the prospectus, unless they can provide a sufficient defense. The persons responsible are defined in the Prospectus Rules issued by the Financial Conduct Authority (FCA)[300] and typically include the issuer, its directors, anyone named as responsible in the prospectus, the offeror of the securities (provided that they are not also the issuer), and their directors. Additionally, it includes the person requesting admission to trading

[297] European Parliament and Council, Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, *Official Journal of the European Union* L 168 (30 June 2017): 12–82, https://eur-lex.europa.eu/eli/reg/2017/1129/oj/eng?utm_, accessed June 14, 2025.
[298] Meral, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk,* 259.
[299] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 311.
[300] Financial Conduct Authority, *Prospectus Regulation Rules (Prospectus Rules Handbook)* (London: Financial Conduct Authority), https://www.handbook.fca.org.uk/handbook/PRR.pdf, accessed: June 14, 2025.

and their directors, as well as any individual who has authorized the contents of the prospectus and does not fall into any of the previous categories[301].

UK legislation broadly outlines potential liable parties for a defective prospectus, including categories specifically excluded by the European and Turkish legislators. It allows for various shareholders, accountants, and advisors of the issuer to be regarded as responsible persons if they have "authorized parts of the prospectus," without requiring a formal declaration. Experts who contribute to technical sections, knowing their text will be included unchanged, may also be viewed as "authorizers." This involvement significantly impacts the UK prospectus liability regime, as it assigns responsibility for the content of the prospectus.

1.4. Sections 11 and 12 of the 1933 Securities Act and Rule 10b- 5 of the U.S. Securities and Exchange Commission (SEC)

US federal securities laws allow private actions by investors under Sections 11 and 12 (a) (2) of the 1933 Securities Act. Section 12 (a) (2) limits liability to the person who sold the securities to the investor for any misrepresentations[302]. However, this narrow definition of "seller" may hinder adequate investor protection. As a result, US courts have expanded Section 12 (a) (2) liability to include not just the immediate seller but also individuals with a financial interest in the sale and who actively solicited it, such as directors, officers, principal shareholders, and "controlling persons." This case law has clarified the personal scope of Section 12 (a) (2) liability[303].

Section 11 of the Securities Act defines a broad group of individuals responsible for the prospectus. Section 11 (a) identifies four categories of responsible parties. Section 11 (a) (1) includes those who signed the registration document, such as the issuer, principal executive officers, the principal financial officer, and the comptroller. Section 11 (a) (2) mentions directors, relevant position holders, and shareholders. Additionally, Sections 11 (a) (3), (4), and (5) list auditors, underwriters, and other experts named in the registration

[301] Alastair Hudson, *Securities Law* (London: Sweet & Maxwell, 2013), 544.
[302] Ayoğlu, *Halka Arz*, 134; Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 307.
[303] Pinter v. Dahl, 486 U.S. 622 (1988); Phillips v. Kidder, Peabody & Co., 686 F. Supp. 413 (S.D.N.Y. 1988).

documents[304]. A person can be held liable under Section 11 only if they have signed the prospectus or hold a position explicitly mentioned in this provision. Their actual involvement in the preparation or publication of the prospectus is not relevant. Additionally, Section 11(a) stipulates that the contributions of experts, underwriters, and others must have an external effect on investors, meaning their names must be included in the prospectus[305].

Rule 10b- 5 of the U.S. Securities and Exchange Commission (SEC) is a key anti-fraud provision for prospectus claims. It prohibits fraud and false statements in securities transactions, stating that it is unlawful for any person to: employ any device or scheme to defraud, make untrue statements of material fact, or engage in acts that operate as fraud or deceit in connection with securities[306]. Subsection (b) is significant because it raises the question of whether certain parties, such as issuers and underwriters, are "makers" of misleading statements under this rule and thus "primary actors." Only primary actors can be liable under Rule 10 b-5. The issuer is always considered a primary actor, meaning the rule covers any misleading statements made by it[307].

American case law recognizes two main approaches regarding the prospectus liability of secondary actors, such as aiders and abettors: the "bright line test" and the "substantial participation test." The bright line test determines liability under Rule 10 b- 5 based on whether the false or misleading statement was made by the individual and publicly attributed to them. This approach generally excludes secondary actors like lawyers and accountants from liability. In contrast, the substantial participation test assesses whether an individual played a significant role in preparing the prospectus. If they did, they could be held liable as a primary actor under Rule 10 b-5, even if investors are unaware of their

[304] Marc I. Steinberg, "U.S. Prospectus Liability — An Overview and Critique", *Journal of European Tort Law* 14, no. 2 (2023): 129, *https://doi.org/10.1515/jetl-2023-0010,* accessed: May 15, 2025.
[305] Meral, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 226.
[306] Richard A. Booth, *A Brief (and Partial) History of Securities Litigation*, European Corporate Governance Institute - Law Working Paper No. 845/2025, May 1, 2025, SSRN, http://dx.doi.org/10.2139/ssrn.5237984, accessed: June 16, 2025.
[307] Rodney D. Chrisman, "Bright Line," "Substantial Participation," or Something Else: Who is a Primary Violator Under Rule 10b-5? *Kentucky Law Journal* 89 (2001): 201, https://uknowledge.uky.edu/klj/vol89/iss1/6/, accessed: May 16, 2025.

contribution. Thus, substantial involvement in the preparation can lead to liability, regardless of public attribution[308].

Some district court decisions initially suggested a broad interpretation of Rule 10 b—5, allowing liability against secondary actors. However, most courts rejected the substantial participation standard due to difficulties distinguishing between primary liability and aiding-and-abetting liability. In 2011, the US Supreme Court narrowed the scope of subsection 10 b-5 (b) in Janus Capital Group, Inc. v. First Derivative Traders. The Court ruled that an investment adviser could not be held primarily liable for misleading statements in a mutual fund's prospectus, despite the adviser's significant role in its preparation. The Court defined the "maker" of a statement as the person or entity with ultimate authority over it, concluding that the adviser's contributions were ultimately under the mutual fund's authority[309].

Recently, the US Supreme Court diverged from its earlier rulings in Lorenzo v. SEC. It ruled that the director of investment banking at a brokerage firm, who shared false or misleading statements to defraud potential investors, can be held liable under Rule 10 b-5 (a) and (c) for "scheme liability," even if they did not "make" the statements, as defined in the Janus case. This decision broadens the scope of liability by allowing investors to bring claims under Rule 10 b- 5 against those involved in disseminating a false prospectus created by someone else. However, the Janus standard still protects defendants who neither make nor disseminate false information, such as those who only help draft misstatements issued by another entity[310].

1.5. Art. 752 of the Swiss Code of Obligations

In Swiss law, the scope of prospectus liability is quite broad. Article 752 of the Swiss Code of Obligations holds any individual accountable who has participated in the creation

[308] Chrisman, “Primary Violator Under Rule 10b-5”, 212.
[309] Edward F. Greene, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, and Nicolas Grabar. *U.S. Regulation of the International Securities and Derivatives Markets* (New York: Wolters Kluwer Law & Business, 2017), 11.
[310] Edward F. Greene, Leslie N. Silverman, Daniel A. Braverman, Sebastian R. Sperber, and Nicolas Grabar. *International Securities and Derivatives Markets*, 66.

or distribution of incorrect or misleading information in a prospectus[311]. However, it is important to note that not every minor contribution qualifies for liability; only substantial involvement can justify it. There must be a certain level of influence over the content or format of the prospectus. The professional and economic status of the individual is not considered a deciding factor in determining liability[312].

The signatories of the prospectus and the issuer itself, which plays a central role in the issuing process, are frequently identified as liable parties. Additionally, the members of the board of directors of the issuer may also be held liable if they are involved in creating an incorrect prospectus or participated in its publication. Employees of the issuer can also be included among the defendants if they were involved in the production or dissemination of the faulty prospectus and bear a certain level of responsibility[313].

Prospectus liability primarily falls on the underwriters, especially the lead manager, who is crucial in organizing and executing the IPO and preparing the prospectus. Despite usually not signing the prospectus, lead managers have a vested interest in the IPO's success, and investors trust their expertise. In Swiss law, lead managers are clearly liable for their roles in the prospectus's production and distribution. This liability also extends to supporting individuals and consultants, such as lawyers and auditors, and in rare cases, rating agencies may also be included[314].

2. NATURE OF PROSPECTUS LIABILITY

The legal nature of the liability arising from the prospectus is debatable. The legal basis of this liability may vary from country to country and from author to author and may be accepted as contractual or non-contractual liability[315].

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[311] Ayoğlu, *Halka Arz*, 143; Ida Hardegger, *Les Notions de Droit en Usage dans la Banque* (Basel: Schweizerische Bankiervereinigung, 1991), 113.
[312] Andreas Rohr, *Grundzüge des Emissionsrechts* (Zurich: Schulthess Polygraphischer Verlag, 1990), 229.
[313] Rohr, *Grundzüge des Emissionsrechts*, 229.
[314] Rohr, *Grundzüge des Emissionsrechts*, 229.
[315] Ayoğlu, *Halka Arz*, 149; Guido Alpa, "The Harmonisation of the EC Law of Financial Markets in the Perspective of Consumer Protection," *European Business Law Review* 13, no. 6 (2002): 535, https://www.francoangeli.it/Area_RivistePDF/getArticolo.ashx?idArticolo=18417, accessed: May 16, 2025.

2.1. Contractual Liability

Legal obligations that individuals must comply with are divided into general and specific (relative) obligations. While general obligations apply universally through mandatory legal rules, specific obligations arise from legal relationships, primarily contracts. Contractual obligations are categorized as primary and ancillary duties, and a breach of either constitutes contractual liability. This form of liability presupposes a pre-existing legal relationship between the parties. The breach must occur by the debtor, and the creditor may claim compensation for damages arising from that breach. Since contractual liability is based on a specific legal relationship, aspects such as the statute of limitations, burden of proof, and third-party liability are subject to distinct rules[316].

A contract can be defined as an agreement that is established and binds the parties in line with the mutual and compatible declarations of the will of the parties to produce a suitable legal result[317]. If a securities sales contract has been signed between the investor and the person responsible for the damage, the investor may bring a contractual claim before the courts for prospectus liability. However, since there are cases where no contract is established between the investor and the persons liable for the prospectus, contractual liability does not provide protection to the investor in all cases[318].

First, to discuss prospectus liability and contract law, whether a contractual link develops between the parties should be examined. Due to the structure of capital markets, the answer to that question is not straightforward. For instance, if the issuing company offers the securities, the issuer becomes the counterparty and may be liable for contractual liability. In practice, the issuance process often involves multiple other institutions, such as investment firms and rating agencies[319].

[316] Narter, *Kusursuz Sorumluluk, Haksız Fiil Sorumluluğu ve Tazminat Hukuku*, 17.
[317] Özcan Günergök and Şaban Kayıhan, Borçlar Hukuku Dersleri Genel Hükümler (Istanbul: On İki Levha Yayıncılık, 2024), 79; O. Gökhan Antalya, *Borçlar Hukuku Genel Hükümler Cilt V/1,1* (Ankara: Seçkin Yayıncılık, 2019), 271.
[318] Paraskevi Nikou, Prospectus Liability As A Means Of Investor Protection In The EU Comparative Remarks ((PhD diss., Aristotle University of Thessaloniki, 2023), 71, https://www.didaktorika.gr/eadd/handle/10442/53305, accessed: May 12, 2025.
[319] Hopt and Voigt, *Prospekt- und Kapitalmarktinformationshaftung*, 345.

Generally, investors who want to acquire securities often sign a contract directly with an intermediary, usually a bank providing underwriting services. In this case, the counterparty to the investor depends on the form of underwriting. If the underwriter acts on behalf of the issuer, it does not enter into a contract with the investor. The bank's involvement establishes a legal contract solely between the investor and the issuer[320].

Another note worth mentioning is that the issuer's board of directors actually drafts the prospectus. The directors who knew the prospectus's misleading content but did nothing to prevent its adoption will be held liable. Since the issuer's directors do not have a contractual relationship with investors, the principles of contract law do not adequately address their situation[321].

According to a view in Turkish doctrine, the mandate or service agreement between the board and the company, based on the articles of association, indirectly establishes a contractual link with the shareholders. Accordingly, it is accepted in the doctrine that the liability of board members under the Turkish Commercial Code is contractual in nature, allowing both shareholders and company creditors to bring claims for breach of contract[322]. The same reasoning should apply to the liability of board members towards investors arising from misstatements in the prospectus[323].

2.2. Culpa In Contrahendo

The doctrine of liability arising from *culpa in contrahendo* is primarily based on the work of German jurist Rudolf von Jhering, particularly his article published in 1861. In this seminal work, Jhering developed the theory that a party whose culpable conduct during pre-contractual negotiations leads to the invalidity or failure of the contract should be held liable for the resulting damages. Following Jhering's introduction of this concept as a legal figure, its influence has expanded across various legal systems. Both legal

[320] Nikou, Prospectus Liability, 71; L.C.B. Gower, *Gower's Principles of Modern Company Law*, 4th ed. (London: Stevens & Sons, 1979), 341.
[321] Ann Ridley, *Company Law* (London: Routledge, 2011), 24.
[322] Poroy, Tekinalp and Çamoğlu, *Ortaklıklar Hukuku I*, 433; Akdağ Güney, *Yönetim Kurulu*, 278; Hasan Pulaşlı, "Türk Ticaret Kanunu Tasarısına Göre Anonim Şirket Yönetim Kurulu Üyelerinin Özen Yükümlülüğü ve Müteselsil Sorumluluğu," *Banka ve Ticaret Hukuku Dergisi* (BATİDER) 25, no. 1 (Mart 2009): 36.
[323] Turan, "İzahname Sorumluluğu," 211.

scholarship and court decisions in many jurisdictions have since begun to address the complex issues related to liability arising from wrongful conduct during the pre-contractual phase[324].

Building on this foundation, several European legal systems have adopted rules that recognize pre-contractual liability. Such liability is not grounded in contract but rather in the protection of justified trust. The German concept of *Vertrauenshaftung* (liability based on trust) applies where a relationship equivalent to a contract exists and one party's legitimate expectations have been disappointed. The principle behind this notion is to safeguard the interests of a party that, despite lacking a contract, deserves protection[325].

The doctrine of *culpa in contrahendo* has exerted an influence on Swiss law and, through it, on Turkish law[326]. According to a view in Turkish doctrine, a contractual relationship exists between the investor who purchases the capital market instrument subject to the issue and the issuer. In this context, the loss suffered by the investor who purchases by relying on the information in the prospectus can be evaluated as the loss arising from the inaccuracy of the information given by one of the contracting parties to the other about the subject of the contract prior to the contract. Accordingly, the issuer's liability can be characterized as a liability arising from a typical pre-contractual negotiation (culpa in contrahendo)[327].

In the doctrine, it is argued that the issuer, its board members (through the issuer), and the intermediary institution are, directly or indirectly, in a contractual relationship with the investor. On this basis, it can be accepted that the liability arising from false or misleading statements in the prospectus is contractual in nature. This argument is further supported by the allocation of the burden of proof to the defendants, a characteristic typically associated with contractual liability. However, given that the information in the prospectus is provided prior to the conclusion of any contract, some authors suggest that

[324] Ümit Gezder, *Türk/ İsviçre Hukukunda Culpa in Contrahendo Sorumluluğu* (Istanbul: Beta Basım, 2009), 1.
[325] David Vasella, Die Haftung von Ratingagenturen (Zurich: Schulthess Verlag, 2011): 306.
[326] Gezder, *Culpa In Contrahendo Sorumluluğu*, 19.
[327] Mehmet Murat İnceoğlu, *Sermaye Piyasasında Aracı Kurumların Hukuki Sorumluluğu* (Ankara: Seçkin Yayıncılık, 2004), 132; Ezgi Koca, *İzahnameden Doğan Sorumluluk*, SPK Yeterlik Etüdü (2010), 26; Yusuf Ziyaeddin Sönmez, *Aracı Kurumların Hukuki Sorumluluğu* (Unpublished Master's Thesis, Ankara University, 1997), 120.

the more accurate qualification would be *culpa in contrahendo*, arising from a breach of trust created during pre-contractual negotiations[328].

Typically, when two parties enter into a contract, they negotiate with each other beforehand. The concept of a pre-contractual stage is based on the assumption that the parties involved know each other's identities, can exchange information, and communicate effectively. However, this assumption raises the question of how compatible it is with the dynamics of capital markets, where the parties to a transaction often do not know each other's identities. Participation in capital markets usually occurs anonymously. This creates a noticeable conflict between the acceptance of a pre-contractual stage and the anonymity inherent in capital markets[329].

2.3. The Contract With Protective Effects Towards Third Parties

To overcome the obstacles that occur under the contractual legal basis, it has been argued that prospectus liability could be based on the doctrine of "contract with protective effects towards third parties' (Vertrag mit Schutzwirkung für Dritter). Under this doctrine, a protective effect of an underwriting contract made between the issuer and the underwriter is accepted regarding the price of the securities and the accuracy of the content of the prospectus, because of the underwriter's participation in the preparation of the initial public offering. Therefore, underwriter's liability for the value or price of the securities is established[330].

2.4. Tort Law

When contract law fails to provide satisfactory solutions, tort liability may extend its scope of protection to include investors. Causing damages by acting contrary to the duties

[328] Turan, "İzahname Sorumluluğu," 212.
[329] Nikou, Prospectus Liability, 78.
[330] This approach was established by German Courts from the combination of § 328 (1) and (2), § 311 (3) and § 241 (2) BGB and the principle of good faith, to offer third parties legal protection stemming from a contract. Under this institution, investors can claim for damages for economic losses caused by breaches of fiduciary obligations; otherwise, they would be unable to enforce contractual obligations. For further information see Hobt and Voigt, *Prospekt- und Kapitalmarktinformationshaftung,* 177.

imposed by the law and not based on any legal relationship is referred to as a tort[331]. This form of liability is primarily based on the principle of fault. A person may either fail to fulfill a duty required by law or engage in behavior that the law explicitly prohibits. A tort can be doing something prohibited by the law with an executive action or not doing something ordered by the law with an act of negligence[332].

By engaging in sales transactions, the intermediary institution enters into a legal relationship with the investor. If it acts in the name and on behalf of the issuer, it functions like an agent; if it acts in its own name but on behalf of the issuer, it resembles a commission agent. In any case, the underwriting agreement is concluded between the issuer and the intermediary, and the intermediary's contractual obligations are owed solely to the issuer — not to the investor. When acting in the name and on behalf of the issuer, no contractual negotiations occur between the intermediary and the investor. Thus, the intermediary is regarded as an auxiliary person and may be held liable under tort law for its own fault[333].

According to certain scholars in Turkish legal doctrine, liability arising from the prospectus cannot be classified as tortious liability. This is because the requirement to pursue the issuer first does not align with the structure of tort law. Moreover, if the liability were to be characterized as tortious, the burden of proof regarding elements such as fault and damage would rest entirely on the claimant. This would be inconsistent with the principle of investor protection. Therefore, these scholars argue that prospectus liability should be regarded as a statutory liability to which the provisions of tort law are applied only by analogy[334]. Given the structural characteristics of the capital market, which make it difficult to apply other forms of liability, and the fact that prospectus liability is explicitly regulated by law, this approach represents a pragmatic solution that reflects the realities of the market.

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[331] Sefa Reisoğlu, Borçlar Hukuku Genel Hükümler (Istanbul: Beta Yayınları, 2012), 162; Günergök and Kayıhan, *Borçlar Hukuku Genel Hükümler*, 455.
[332] Narter, *Kusursuz Sorumluluk, Haksız Fiil Sorumluluğu ve Tazminat Hukuku*, 461.
[333] İnceoğlu, *Aracı Kurumların Hukuki Sorumluluğu*, 132; Manavgat, *Halka Arz,* 259; Kütükçü, *Sermaye Piyasası C.1*, 81.
[334] Ayoğlu, *Halka Arz*, 648; Çatakoğlu, *Borçlanma Araçları*, 124.

In line with this view, establishing tort liability in capital markets can be challenging. In most cases, the damages suffered by investors either do not result from deceit by those responsible or proving such deceit is difficult. Furthermore, the traditional approach to establishing causation may not be practical in the context of capital markets[335]. This is because investment decisions are influenced not only by the information that is published but also by other factors. Consequently, investors face significant challenges in proving their claims against the issuer and other market participants. Such claims require establishing a causal link between the misleading information and investors' investment decisions.

2.5. Consumer Protection Law

Some Member States of the European Union utilize consumer protection laws as a basis for claims related to misleading or inaccurate prospectuses[336]. The rationale behind this protection is that retail investors often find themselves at an economic and negotiating disadvantage compared to issuers, intermediaries, and others. As a result, they are considered to be in a similar position to consumers receiving services, making consumer protection provisions applicable in these circumstances[337]. To effectively provide consumer protection, it is essential not only to have a formal legal definition but also to fulfill certain conditions. These conditions include a lack of specific knowledge, experience, and proactive investment initiatives, as well as the need for appropriate information, financial strength, and technological infrastructure. These factors underscore the necessity of protecting individuals who are weaker participants in economic transactions[338].

According to the European Court of Justice, a private individual is considered a consumer if they invest capital without any connection to their commercial or professional activities. This classification also applies to investors, as long as they are not acting within

[335] D. Liappis, *Compensation of Investors and Law of the Capital Market* (Athens: Nomiki Vivliothiki, 2012), 119.
[336] Loannis Linaritis, *The Access to Financial Services through the Internet: in light of Directives 2002/65/EC, 2000/31/EC, 1999/93/EC* (Athens: Sakkoulas Publications, 2005), 65.
[337] Dimitris Avgitidis, *The Underwriter's Responsibility in Consumer Protection Law* (2005), 319.
[338] Sezer Çabri, Tüketicinin Korunması Hakkında Kanun Şerhi (Ankara: Adalet Yayınevi, 2021), 59.

the context of a professional role. The determination of whether someone is a consumer is based solely on an objective perspective. The key factor is whether the capital investment is linked to the investor's professional activities. Personal attributes, such as experience and knowledge, should be ignored in this assessment[339]. It should be noted that in capital market law, information asymmetry is unavoidable. It can be argued that there is a significant difference between an investor and a consumer: capital investment is aimed at generating wealth rather than meeting consumption needs. The crucial point is that investment activities are intended for profit, whereas consumer protection typically aims to shield consumers from profit-driven practices of corporations. In other words, financial instruments are not goods meant for consumption; instead, they are assets through which individuals seek to profit or invest.

According to some authors in Turkish law, the protections offered by the capital market may, in certain cases, prove ineffective[340]. From this perspective, despite all the safeguards provided by the capital market legislation, it is possible that these protections may fail to remedy certain investor grievances[341]. Investors in modern financial markets resemble consumers in goods and product markets. Due to developments such as the emergence of a wide range of complex financial instruments, misleading advertisements, aggressive sales techniques, and the imbalance of power between investors and organized, sophisticated financial intermediaries, investors—much like consumers—require a certain level of protection[342]. In light of this, the applicability of consumer law in resolving investor disputes became a topic of discussion.

In this context, the first issue to be examined is which investors benefiting from investment services and activities may fall within the scope of consumer law. Article 3/1-l of the Law on the Protection of Consumers (TLPC) defines a consumer transaction as

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[339] Court of Justice of the European Union, *Judgment of 3 October 2019, Petr Bastecký v Bundesanstalt für Finanzdienstleistungsaufsicht, C-208/18, ECLI:EU:C:2019:825,* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62018CJ0208, accessed: May 15, 2025.

[340] H. Ebru Töremiş, "Yatırım Hizmet ve Faaliyetlerinden Yararlanan Yatırımcıların Tüketici Sıfatının Belirlenmesi," *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi* 24, no. 4 (Ekim 2020): 229, https://doi.org/10.34246/ahbvuhfd.813041. accessed: May 15, 2025.

[341] H. Ebru Töremiş, *"Yatırım Hizmet ve Faaliyetleri Bağlamında Yatırımcının Tüketici Olarak Korunması"* (PhD diss., İhsan Doğramacı Bilkent Üniversitesi, 2021), 147.

[342] Nusret Çetin, "Sermaye Piyasası Hukukunda Yatırımcının Korunması İlkesinin Teorik Analizi," *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi* 15, no. 1 (January 2011): 8, https://dergipark.org.tr/tr/pub/ahbvuhfd/issue/48119/608519, accessed: May 16, 2025.

"any kind of contract or legal transaction, including agency, banking, and similar contracts, established between consumers and natural or legal persons, including public legal entities, acting for commercial or professional purposes, or acting on behalf or account of those who do." Accordingly, in a transaction considered a consumer transaction, the party who is not the seller or provider will always be regarded as the consumer. Furthermore, Article 3/1-k of the same Law provides the definition of a consumer as "a natural or legal person acting for purposes that are not commercial or professional."

In the doctrinal literature, it is generally accepted that to be regarded as a consumer, the acquisition of a good or service must serve personal needs and not be motivated by commercial or professional purposes[343]. It is emphasized that if the good or service is used in a way that allows for the recovery of its cost or reintegration into commercial circulation, the transaction may be deemed commercial in nature[344]. Accordingly, consumer status is often denied where the transaction serves income-generating purposes, such as resale or use in production[345]. In contrast, if the individual is the ultimate end-user and does not intend to transfer the good or service for profit, this typically supports the qualification as a consumer[346].

Consumer protection is based on the idea of preventing deception caused by a lack of knowledge. It is generally assumed that individuals have sufficient expertise in their professional or commercial activities, whereas deception is more likely in private transactions. However, narrowing the concept of private use by interpreting commercial purpose too broadly may lead to unjust outcomes. For example, a car purchased for

[343] Hasan Seçkin Ozanoğlu, "Tüketici Sözleşmeleri Kavramı (Tüketicinin Korunması Hakkında Kanun'un Maddî Anlamda Uygulama Alanı)," *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 50, no. 1 (Şubat 2001): 55–90, https://doi.org/10.1501/Hukfak_0000000610, accessed: May 16, 2025.
[344] Nihat Yavuz, *Tüketicinin Korunması Hakkında Kanun Şerhi* (Ankara: Seçkin Yayıncılık, 2007), 52; İ. Yılmaz Aslan, *6502 Sayılı Tüketici Kanununa Göre Tüketici Hukuku*, 5th ed. (İstanbul: Beta Yayınları, 2015), 4.
[345] Işık Özer, "Sermaye Piyasasında İşlem Yapan Yatırımcıların Tüketicinin Korunması Hakkında Kanun Kapsamında Korunup Korunamayacakları Sorunu Üzerine Bir İnceleme," *Banka ve Ticaret Hukuku Dergisi (BATİDER)* 34, no. 1 (2018): 65.
[346] İpek Yücer Aktürk, "Tüzelkişi Tacirin Tüketici Sıfatı," *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi* 20, no. 2 (April 2016): 114, https://dergipark.org.tr/tr/pub/ahbvuhfd/issue/48094/608113, accessed: May 16, 2025.

personal use might later be sold at a profit, but this alone should not disqualify the buyer from being considered a consumer[347].

In this context, the evaluation of whether legal entities may qualify as consumers should also be addressed. Article 3(k) of Law No. 6502 on the Protection of Consumers defines the term 'consumer'. According to this provision, both natural and legal persons may qualify as consumers, provided that the conditions specified in the law are met. In the doctrine, this article is heavily criticized[348]. It is generally accepted that, based on the presumption of commerciality set forth in Article 19 of the TCC, it is argued that commercial companies—who, by definition, cannot act with non-commercial or non-professional purposes—can never acquire consumer status[349].

According to some scholars, it is appropriate that the definition of consumer in the Law includes not only natural persons but also legal persons. However, there is an ongoing debate in the doctrine regarding which types of legal persons may qualify as consumers. While there is general agreement that legal entities such as associations and foundations without a commercial purpose can be considered consumers, the classification of commercial legal persons—particularly traders—as consumers remains a subject of contention[350].

As the consumer concept has expanded, small business owners—though legally classified as traders—are often seen as the weaker party in contracts. Some argue that they require more protection than individual consumers, particularly when caught between consumer rights and the power of large enterprises[351]. It is suggested that the key factor should be whether the relationship relates to the person's trade or profession. For example, painting the interior of a home is a consumer transaction, but painting the inside of a commercial building should also be included in that classification.[352].

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[347] Töremiş, "Yatırımcıların Tüketici Sıfatı," 237.
[348] Emel Tekten, "Tüzel Kişi Tacirlerin Tüketici Sıfatı Sorunu ve Bu Kapsamda Taraf Oldukları Hukuki Uyuşmazlıkların Ticari/Tüketici Dava Şartı Arabuluculuğa Etkileri," *Selçuk Üniversitesi Hukuk Fakültesi Dergisi* 31, no. 1 (March 2023): 12, https://doi.org/10.15337/suhfd.1055626, accessed: May 16, 2025.
[349] Aktürk, "Tüzelkişi Tacirin Tüketici Sıfatı," 118.
[350] Tekten, "Tüzel Kişi Tacirlerin Tüketici Sıfatı Sorunu," 13.
[351] Töremiş, "Yatırımcıların Tüketici Sıfatı," 240.
[352] Aviva Freilich, "A Radical Solution to Problems with the Statutory Definition of Consumer: All Transactions Are Consumer Transactions," *University of Western Australia Law Review* 33

According to some authors in the doctrine, when investors engage in capital market instruments for investment, hedging, or profit-making through trading margins, they may acquire consumer status regarding any service received from a capital market institution, provided they obtain investment services and activities to fulfill these purposes[353].

In Article 29, titled 'Definition of Customer and Know-Your-Customer Rule,' of the Capital Markets Board's Communiqué No. III-39.1, the term 'Customer' is defined. According to the article, a customer refers to all natural and legal persons to whom investment services and activities, as well as ancillary services, are provided by investment firms. The article also states that investment firms shall verify the identity information of their customers before opening an account for them.

Article 30 of the Communiqué stipulates that investment firms shall classify all their customers as either professional or general customers in accordance with the principles outlined in the Communiqué, offer services and conduct activities in line with this classification, and fulfill their obligations in accordance with the customer classes. In the Communiqué, customers are classified into two categories: professional customers and general customers. Article 31 defines the professional customer[354]. It is clear that the legal

(2006): 114, https://classic.austlii.edu.au/au/journals/UWALawRw/2006/5.pdf, accessed: May 17, 2025.

[353] Töremiş, "Yatırımcıların Tüketici Sıfatı," 243; Özer, "Sermaye Piyasasında İşlem Yapan Yatırımcıların Korunması," 83; Nusret Çetin, "6362 Sayılı Sermaye Piyasası Kanunu'nda Yatırımcıların Korunması," in *6362 Sayılı Yeni Sermaye Piyasası Kanunu Işığında Sermaye Piyasası Hukuku Sempozyumu, June 6–7, 2013, Istanbul*, ed. Korkut Özkorkut (Ankara, 2017), 458.

[354] ARTICLE 31 – (1) "Professional customer" refers to a customer who has experience, knowledge and expertise required for giving his own investment decisions and evaluating and assessing associated risks. In order to be categorized as a professional customer, a customer shall be from one of the following institutions or must fulfill the listed qualifications: a) Intermediary institutions, banks, portfolio management companies, collective investment schemes, pension funds, insurance companies, mortgage finance corporations, asset management companies and their equivalent institutions residing abroad; b) Pension and charity funds, and funds established pursuant to temporary article 20 of the Social Security Law no. 506 dated 17/7/1964; c) Public entities and institutions, and Turkish Central Bank, and such international organizations as World Bank and International Monetary Fund; ç) Other institutions which may be accepted by the Board to be similar to the aforementioned institutions due to their characteristics; d) Institutions meeting at least two of the criteria of having a total assets of more than 50,000,000 Turkish Lira, a yearly net sales of more than 90,000,000 Turkish Lira, and a shareholders' equity of more than 5,000,000 Turkish Lira; e) Customers accepted as a professional customer upon the demand mentioned in Article 32.

entities mentioned in this article—such as intermediary institutions, banks, portfolio management companies, collective investment schemes, pension funds, insurance companies —do not qualify as customers under the Consumer Protection Law. This is because these entities do not have a weaker position in their relationship with capital markets institutions, nor can it be argued that they are acting for purposes other than professional or commercial interests.

Entities meeting at least two of the financial thresholds listed in Article 31, paragraph (d) of the Communiqué—total assets over 50 million TL, annual net revenue above 90 million TL, or equity exceeding 5 million TL—are classified as professional customers. However, some scholars argue that this classification should not automatically exclude them from consumer protection. Being a commercial entity under the Turkish Commercial Code does not, by itself, rule out consumer status if the transaction lacks a commercial or professional purpose. In particular, if the service is not acquired for resale or integration into business operations, the entity may still qualify as a consumer. Given that large firms may engage in capital markets for purposes such as hedging[355], these customers may still be exposed to information asymmetry or conflicts of interest, justifying the need for protection in certain instances[356].

Article 32 provides that general customers may be classified as professional customers upon their written request, provided they meet at least two of the following criteria: (1) executing at least 10 transactions with a minimum trading volume of 500,000 TL per quarter over the past year; (2) holding financial assets exceeding 1,000,000 TL; or (3) having worked at any one of top managerial positions in the field of finance for at least 2 years or as a specialized personnel in capital markets for at least 5 years, or holding Capital Market Activities Advanced Level License or Derivative Instruments License. Customers who become professional customers will not be able to benefit from many regulations that provide protection to customers under capital markets legislation.

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(4) Customers who are not included within the scope of the professional customer definition shall be accepted and treated as "general customers".

[355] Hedging policies are measures and strategies that companies adopt to protect themselves against potential future financial risks, such as fluctuations in exchange rates, interest rates, or commodity prices. The purpose of these policies is to mitigate the negative effects of uncertainty and maintain financial stability.

[356] Töremiş, "Yatırımcıların Tüketici Sıfatı," 248.

According to a theory in the doctrine, professional customers mentioned in the third paragraph of Article 32 who, while subject to the capital markets legislation as general customers, have declared in writing that they do not require the protections provided to general customers and who meet at least two of the conditions set forth in Article 32 of the Communiqué, are excluded from capital markets protections upon their own request. Therefore, it is not reasonable to expect that consumer protection legislation will fully apply to such customers. However, the customers described in the first and second paragraphs, despite meeting certain thresholds of financial assets or trading volume, often lack the knowledge, experience, or professional background to assess risky capital market investments. Thus, their classification as professional customers should not lead to the assumption that they are on equal footing with investment firms or that their transactions serve commercial or professional purposes solely because of their wealth[357].

According to Communiqué No. III-39.1, all real and legal persons not included in the professional customer category are classified as general customers. It is stated that general customers should be considered consumers under the Consumer Protection Law when they act for non-commercial or non-professional purposes. Legal entity general customers should also be considered consumers unless, considering the specifics of each case, there is clear evidence that they are acting for commercial or professional purposes[358].

Some scholars argue that although investors may appear to use financial services for investment rather than consumption, ultimately, since they consume the services provided by financial intermediaries to make investments, there is no real difference between them and consumers of any other service. Investors may be exposed to various market failures and deficiencies such as fraudulent conduct, misappropriation of their assets and funds, conflicts of interest, and inadequate service provision by intermediary firms. It is therefore argued that such deficiencies must be addressed through capital market regulations within the framework of the principle of investor protection[359].

[357] Töremiş, "Yatırımcının Tüketici Olarak Korunması," 219.
[358] Töremiş, "Yatırımcıların Tüketici Sıfatı," 253-254.
[359] Çetin, "Yatırımcının Korunması İlkesinin Teorik Analizi," 7.

In the decision of the General Assembly of Civil Chambers of the Court of Cassation dated February 7, 2019, with docket number 2017/2348 and decision number 2019/82, the court upheld the local court's resistance decision. Although Article 49(1) of the *Consumer Protection Law*, under the section titled "Other Consumer Contracts," defines financial services as including all banking services, credit, insurance, private pensions, investment and payment-related services, and defines distance contracts for financial services as contracts concluded between the provider and the consumer using remote communication tools within a system established for the remote marketing of financial services, it was ruled that the consumer courts do not have jurisdiction to resolve the dispute, since the contract signed between the parties explicitly stated that the investment transactions to be carried out under the agreement were "for commercial purposes."

In the dissenting opinion of the same decision, it was emphasized that according to the Regulation on Distance Contracts for Financial Services, published in the Official Gazette dated 31.01.2015 and issued pursuant to Article 49, financial services include all banking services, credit, insurance, private pensions, investment and payment-related services (Art. 4/1-a), and distance contracts for financial services are defined as contracts concluded between the provider and the consumer using remote communication tools within a system established for the remote marketing of financial services (Art. 4/1-a). The Regulation further contains provisions on pre-contractual information requirements, the method of such information, contract formation, the right of withdrawal, and the rights and obligations of the parties. As can be seen from these provisions, the Consumer Protection Law No. 6502 and the related Regulation acknowledge that financial services can qualify as consumer transactions, and by explicitly including the term "investment services," it is accepted that even investment-oriented financial transactions may be deemed consumer transactions. Therefore, if the plaintiff is not acting for commercial or professional purposes, the financial service utilized—even if for investment purposes—should be regarded as a consumer transaction. In this specific case, there is no evidence suggesting that the plaintiff was a trader or acted with a commercial or professional purpose. Even though the contract stated that the leveraged transactions would be carried out for commercial purposes, such a qualification cannot be applied to a person who is not a trader. Including a statement in the contract indicating that the transaction was made for commercial purposes, when in fact it was not, should be considered an unfair term, as

it would prevent the application of protective provisions granted to consumers under the law[360].

Institutions and organizations established by public legal entities are also entities founded under their respective establishment laws. They are managed according to private law provisions or are established to operate commercially. These entities acquire the status of traders by being established by the State, provincial special administrations, municipalities, villages, and other public legal entities[361]. According to the prevailing view, since consumer law consists of protective norms designed to safeguard the weaker party, it is inherently inappropriate for the State and other public legal entities to possess consumer status[362].

3. CONDITIONS OF LIABILITY

The proper functioning of the public disclosure system depends on the investor being fully and accurately informed. In other words, the investment risk is left to the investors, but it is based on the assumption that they will be fully and accurately informed about the relevant investment. In cases where this assumption is not realized, compensation of the investors who suffer losses due to an investment based on false or misleading information becomes necessary. With the adoption of the public disclosure system, it has also been regulated who will be responsible and in what way for the incomplete and/or incorrect information provided to the investor who is left with the risk of the investment. In this type of liability, the persons who play a role in providing false information are charged with the liability to compensate for the damage[363].

The principle of fault is addressed in the regulations in both Articles 10 and 32 of the Law, and within this framework, Articles 49 and subsequent articles of the Turkish Code of Obligations, which determine the basic principles of tort liability, are taken into

[360] Turkish Court of Cassation (General Assembly of Civil Chambers), Case No. 2017/2348, Decision No. 2019/82, decision dated February 7, 2019, accessed via Legalbank.
[361] Aktürk, "Tüzelkişi Tacirin Tüketici Sıfatı," 124.
[362] Töremiş, "Yatırımcıların Tüketici Sıfatı," 243.
[363] Turan, "İzahname Sorumluluğu," 198; Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk,* 343.

consideration as general provisions[364]. First, an unlawful act must occur. The person's obligation to compensate for the damage is based on this act[365]. This act is the information in the documents being wrong, misleading, or incomplete. There must be damage because these documents do not reflect the truth. The importance of whether those responsible for these documents are at fault or not varies according to the law.

3.1. Wrongfulness (Unlawful Act)

The first essential element of liability is the act[366]. A wrongful act can occur either through action or inaction. In legal terms, a tort can be committed not only by performing an action but also by failing to take necessary actions. However, for an omission (failing to act) to be deemed tortious, there must be a specific obligation to act[367]. Various rules define a person's obligations, including duties to inform, report, keep accurate accounts, or assist others[368].

In the context of prospectus liability, the tortious act involves providing false, misleading, or incomplete information in the prospectus. Providing false and misleading information in the prospectus may be an example of a tort by action, whereas providing incomplete information may be an example of a tort by omission[369]. Deficiency in information can refer to either the partial absence of necessary details or the complete lack of required information. Article 6.1 of the CML stipulates that the information must be consistent and understandable. If inconsistency in information and difficulty in understanding the presentation reaches the level of misleading, it results in the obligation to compensate for the damage that may occur[370].

If the information shared with the public is untrue, it is considered incorrect. However, a view in the doctrine states that if the correct information can be obtained from the entirety

[364] Turan, "İzahname Sorumluluğu," 207.
[365] Ahmet M. Kılıçoğlu, *Borçlar Hukuku Genel Hükümler* (Ankara: Turhan Kitabevi, 2021), 363; M. Kemal Oğuzman and M. Turgut Öz, *Borçlar Hukuku Genel Hükümler 2* (Istanbul: Vedat Kitapçılık, 2022), 14; Günergök and Kayıhan, *Borçlar Hukuku Genel Hükümler*, 457.
[366] Fikret Eren, *Borçlar Hukuku Genel Hükümler* (Ankara: Yetkin Yayınları, 2022), 594; Narter, *Kusursuz Sorumluluk, Haksız Fiil Sorumluluğu ve Tazminat Hukuku*, 464.
[367] Günergök and Kayıhan, *Borçlar Hukuku Genel Hükümler*, 459.
[368] Kılıçoğlu, *Borçlar Hukuku Genel Hükümler*, 364.
[369] Meral, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk,* 336.
[370] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk,*, 344.

of the disclosed information, there is no element of false information in the context of the responsibility arising from public disclosure[371]. Some authors hold a different perspective on this matter. They argue that requiring the recipients of public disclosure statements to conduct a thorough review of the prospectus goes against the principle of investor protection. Additionally, it is the responsibility of those who prepare the prospectus to address any inconsistencies between individual instances of misinformation and the overall interpretation of the prospectus[372].

False information must be misleading and of a nature that may affect the investment decision for it to lead to liability. In this respect, it must be accepted that minor errors that do not reach the misleading level and will not affect the investment decision are not material[373]. If the prospectus contains an expression meant to mislead the public, it should be considered misleading. The experience and insight of an objective investor must be taken as a criterion in determining whether the information in the prospectus can lead to a wrong general opinion[374].

The partial or complete absence of information that should be included in the prospectus constitutes one of the unlawful violations foreseen in Article 10 of the Capital Markets Law. The information that should be included in the prospectus is determined by the Law, secondary regulations, and the standards prepared and published by the Board. However, it should be stated that not all deficiencies in the information included in the prospectus according to these regulations will result in liability; this deficiency must be fundamental. Deficiencies that are not fundamental and do not affect the investment decision are not within the scope of unlawful information[375].

[371] Manavgat, *Halka Arz*, 230.
[372] Gözüyeşil, *İzahnameden Doğan Sorumluluk*, 263.
[373] Manavgat, *Halka Arz*, 230.
[374] Gözüyeşil, *İzahnameden Doğan Sorumluluk*, 263.
[375] Gözüyeşil, *İzahnameden Doğan Sorumluluk*, 263.

3.2. Damage

Damage means a decrease in value. A tort gives rise to liability because it creates an obligation to repair the harm caused[376]. The person who committed the tort is responsible for undoing the loss they caused and restoring the injured party to their position before the wrongful act. In other words, the tortfeasor is liable because they are required to compensate for the damage resulting from their actions[377]. In doctrine and practice, damage is divided into damage in the broad sense and damage in the narrow sense. Damage in the narrow sense refers to material damage in the technical sense[378].

The concept of damage in the broad sense includes both harm to a person's property (economic damages) and harm to their emotional or mental well-being (non-economic damages), such as pain and suffering or emotional distress. Thus, it is possible to define damage broadly as "the decrease in a person's property or harm to their emotional well-being that occurs against their will."[379] Regarding its nature, damage arising from prospectus liability is material (economic) damage. Another distinction made in the doctrine for damage is direct and indirect damage. Direct damages refer to the losses that a person suffers immediately as a result of the act. In contrast, indirect damages arise from the act but are not directly caused by it. Whether or not liability arises for indirect damage other than the direct damage due to the act is related to the concept of causal link[380].

Based on the wording of Article 32 of the Capital Markets Law, a loss occurs when investors experience a decrease in the value of their assets during the validity period of a prospectus that contains false, misleading, or incomplete information. This loss may arise immediately after the public disclosure of such a prospectus or following the sale or purchase of capital market instruments on the stock exchange, particularly after the initial public offering or once the true information becomes publicly known.[381]

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[376] Günergök and Kayıhan, *Borçlar Hukuku Genel Hükümler*, 478.
[377] Kılıçoğlu, *Borçlar Hukuku Genel Hükümler*, 389.
[378] Günergök and Kayıhan, *Borçlar Hukuku Genel Hükümler*, 479.
[379] Eren, *Borçlar Hukuku Genel Hükümler*, 599; Oğuzman and Öz, *Borçlar Hukuku Genel Hükümler*, 44.
[380] Narter, *Kusursuz Sorumluluk, Haksız Fiil Sorumluluğu ve Tazminat Hukuku*, 501; Oğuzman and Öz, *Borçlar Hukuku Genel Hükümler*, 46.
[381] Manavgat, *Halka Arz*, 257; Adıgüzel, *Sermaye Piyasası*, 140; Doğan Kütükçü, *Sermaye Piyasası Hukuku Cilt: 1* (Istanbul: Beta Basım Yayım, 2004), 240.

The damage regulated in the Article 32 is the damage that occurs directly in the investor's assets. Therefore, compensation can be claimed based on the CML due to the damage that occurs directly in the investor's assets. However, individuals also have the right to claim other damages based on other laws. Article 32 is not the only situation where damages may occur. It is also possible to determine damages by general provisions within various possibilities. One of the possibilities where general provisions will find application is when the effect of illegal information is eliminated, and the price of the capital market instrument decreases significantly while the capital market instrument is still in the hands of the investor. In this case, the investors can claim compensation for their damages by proving the decrease in their assets and the causal link within the framework of general provisions[382].

3.3. Causation

In terms of compensation claims, causal linkage is required as well. Causal link is the connection between cause and effect. Accordingly, the result we call damage must be caused by the act that caused it[383]. The person can only be held responsible for damages that are the result of his own act. If the damage is not caused by this act but by other causes, there will be no liability[384]. There are many different reasons that can lead to the occurrence of a damage. In doctrine, two main theories are used to establish causation: the condition theory (*conditio sine qua non*), which considers all conditions that are necessary for the damage to occur, and the theory of adequate causation, which limits liability to consequences that are foreseeable and objectively appropriate[385].

According to the condition theory, every damage is in a cause-and-effect relationship with all the acts that are necessary for its occurrence. According to this theory, all the conditions that produce the result are equal to each other[386]. The condition theory is criticized because it can lead to uncertainties in establishing a causal link with damage. Because there may be a danger of being held responsible even for very remote reasons

[382] Gözüyeşil, *İzahname Sorumluluğu*, 272.
[383] Günergök and Kayıhan, *Borçlar Hukuku Genel Hükümler*, 483.
[384] Kılıçoğlu, *Borçlar Hukuku Genel Hükümler*, 400.
[385] Günergök and Kayıhan, *Borçlar Hukuku Genel Hükümler*, 485.
[386] Eren, *Borçlar Hukuku Genel Hükümler*, 619.

that may lead to the occurrence of damage. Although it is argued that the perpetrator cannot be considered faulty and responsible for remote reasons that cause the damage in order to eliminate this danger, uncertainties that may arise in establishing a causal link will still not be prevented[387]. According to the theory of adequate causal link, in determining the act that can be held responsible for the damage, the most appropriate one should be investigated according to life experiences and the flow of events[388]. If more than one act causes damage, the causal link should be established with the most appropriate one among them, and the responsibility should be determined[389].

Adequate causal link theory is criticized in the doctrine as well. According to these criticisms, adequate causality is not definite and specific. The concept of adequate causality leads to arbitrariness. According to some authors, the adequateness of the causal link in the same case can be accepted or rejected depending on the accepted point of view. The theory is also based on a definite principle, such as accepting or rejecting compensation. In this case, the judge is forced to choose one of two alternatives. However, the adequateness concept is relative and can be graded as much as desired[390].

The theory of adequate causality, which is the dominant theory in Turkish law, has two functions: The first is the establishment of liability; the second is the limitation of liability[391]. The constitutive and limiting functions of the theory of adequate causality are considered transaction causality and loss causality in the context of liability arising from the prospectus. The appropriate causality also points to a causality chain. Regarding liability arising from the prospectus, the first link in the chain is the provision of false

[387] Kılıçoğlu, *Borçlar Hukuku Genel Hükümler*, 400; Oğuzman and Öz, *Borçlar Hukuku Genel Hükümler*, 49.
[388] Narter, *Kusursuz Sorumluluk, Haksız Fiil Sorumluluğu ve Tazminat Hukuku*, 476.
[389] For instance, a consumer may become seriously ill after consuming a packaged food product. Multiple factors could be identified as potential causes of the harm: the manufacturer who produced the item, the supermarket that stored it, the logistics company that transported it, or even the food inspector who approved it during a routine check. However, under the theory of adequate causal link, liability is not attributed to every condition that may have contributed to the outcome. Instead, responsibility is assigned to the cause that appears most appropriate and foreseeable in light of ordinary life experience and the natural flow of events. In this case, the manufacturer's failure to ensure food safety during the production process constitutes the most adequate cause of the damage.
[390] Eren, *Borçlar Hukuku Genel Hükümler*, 626.
[391] Selahattin Sulhi Tekinay, Sermet Akman, Haluk Burcuoğlu and Atilla Altop, *Borçlar Hukuku: Genel Hükümler* (Istanbul: Filiz Kitabevi, 1985), 773.

information based on the investment decision; the last link is the cause leading to the damage[392].

If the inaccurate or misleading information contained in the prospectus has influenced the investment decision, the causal link should be deemed to exist[393]. However, proving that the incorrect information actually affected the investor's decision can be particularly challenging. A presumption regarding causal linkage has been regulated in the Law for prospectus liability. Accordingly, during the validity period of the prospectus containing false, misleading, or incomplete information, immediately after the date of public disclosure of other public disclosure documents, immediately after the date of public disclosure, in case of loss in the assets of investors upon the sale or purchase of capital market instruments purchased or sold on the stock exchange immediately after the date of the emergence of accurate information, a causal link between the public disclosure document and the damage shall be deemed to have been established in terms of compensation claims to be put forward according to this article. However, it should be noted that the person to whom the compensation claim is put forward may be exempted from compensation by proving that the causal linkage did not occur. In other words, the presumption stipulated in the Law may be proven otherwise[394].

3.4. Fault

Fault is a behavior that is not approved and found appropriate by the legal system. Therefore, fault is the subjective element of the wrongful act. The behavior that the person has exhibited, which is called the act, is considered faulty because the legal system does not approve it. Fault is a concept related to the nature of the act[395]. Fault can be classified by its degree. In the context of liability law, it is divided into intent (dolus) and negligence (culpa). Intent refers to a situation in which the perpetrator knowingly and willingly

[392] Merritt B. Fox, "Demystifying Causation in Fraud-on-the-Market Actions," *The Business Lawyer* 60 (2005): 514.
[393] Üçışık and Çelik, Anonim Ortaklıklar Hukuku, Cilt 1, 205.
[394] Memiş and Turan, *Sermaye Piyasası*, 82; Kara, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk,* 152.
[395] Kılıçoğlu, *Borçlar Hukuku Genel Hükümler*, 407.

causes a harmful result. In such cases, the legally protected interest is violated deliberately, which makes the fault more serious in nature[396].

Negligence is the failure to exercise the necessary care to prevent an unlawful outcome, even if there is no intention for such a result. Negligence refers to failing to fulfill a legal duty to prevent harm by not taking necessary precautions. Here, the person causing the harm does not want the unlawful result but can foresee it. In this case, the basis of negligence is based on behavior contrary to the duty of care imposed by the legal order. The measure of negligence is objective. It is evaluated according to the precautions an average person should take, the care they will show, and the effort they will spend according to the characteristics and requirements of the situation in the concrete case[397].

While there is only one type and degree of intent, different degrees of negligence can exist. Because the attention, precautions, and professional care that should be shown in torts may differ. The recklessness of a person who harms another person while driving a motor vehicle with a faulty brake system while under the influence of alcohol is not the same level and intensity as the recklessness of a person who drives a well-maintained motor vehicle following all traffic rules by not applying the brakes in time for a person who jumps out in front of him at a red light. Therefore, negligence is divided into gross negligence and slight/ ordinary negligence[398].

Gross negligence is failing to show the simplest care and attention a person should show in the same incident[399]. The act of a driver who consumed alcohol and entered traffic with an impaired vehicle is a serious degree of negligence. Gross negligence constitutes a serious degree of fault. When assessing whether a person's behavior constitutes negligence and its seriousness, ideal behavior will be based on careful individuals in similar situations. The actions of the tortfeasor or overly cautious individuals will not be used as benchmarks. Instead, an *objective* approach will evaluate behavioral patterns[400].

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[396] Oğuzman and Öz, *Borçlar Hukuku Genel Hükümler*, 59; Eren, *Borçlar Hukuku Genel Hükümler*, 659.
[397] Narter, *Kusursuz Sorumluluk, Haksız Fiil Sorumluluğu ve Tazminat Hukuku*, 481; Günergök and Kayıhan, *Borçlar Hukuku Genel Hükümler*, 496; Eren, *Borçlar Hukuku Genel Hükümler*, 602.
[398] Kılıçoğlu, *Borçlar Hukuku Genel Hükümler*, 409.
[399] Eren, *Borçlar Hukuku Genel Hükümler*, 665.
[400] Narter, *Kusursuz Sorumluluk, Haksız Fiil Sorumluluğu ve Tazminat Hukuku*, 481.

Negligence that does not reach the level of gross negligence is slight negligence[401]. Slight negligence is the failure to show the care that only careful people can show[402].

The principle of tort liability is based on fault. However, due to some social perspectives and equity considerations, certain individuals who are not at fault may still be held responsible for damages incurred. For this reason, the legislator has accepted that some people who are not at fault in the occurrence of the damage should also be held responsible for it. Being held responsible for the damage caused despite not being at fault is called strict liability. In cases where there is a risk of causing damage to others, the legislator has adopted strict liability, which is a serious type of liability, in order to prevent the occurrence of this damage or to compensate the injured party for this damage without any discussion of fault when the damage occurs[403].

The persons responsible for the prospectus are determined gradually in Article 10 of the Law. According to this gradual order, the persons responsible for the prospectus can be addressed under two main headings: "issuer" and "persons responsible other than the issuer." On the other hand, there are institutions that contribute to the preparation of the prospectus with the reports they prepare, and these also have separate responsibilities limited to their activities[404].

According to Article 10/1 of the Law, issuers are responsible for damages arising from incorrect, misleading, and incomplete information in the prospectus. As stated above, the legislator has determined the responsibility for the prospectus in stages. Accordingly, while the issuer is primarily responsible for the accuracy and completeness of the information in the prospectus in all cases and circumstances, other persons are held responsible only in cases where the damage cannot be compensated by the issuer[405].

Investors who suffer losses due to incorrect, misleading, and incomplete information in the prospectus are granted the right to apply to certain individuals and institutions that

[401] Eren, *Borçlar Hukuku Genel Hükümler*, 665.
[402] Günergök and Kayıhan, *Borçlar Hukuku Genel Hükümler,* 497.
[403] Narter, *Kusursuz Sorumluluk, Haksız Fiil Sorumluluğu ve Tazminat Hukuku*, 95; Oğuzman and Öz, *Borçlar Hukuku Genel Hükümler*, 143.
[404] Turan, "İzahname Sorumluluğu," 203.
[405] Ibid.

contributed to the loss, apart from the issuer. The persons held responsible after the issuer are listed in a limited manner in the Law, and the responsibilities of these persons are subject to the condition that the loss cannot be compensated by the issuer[406]. The persons listed in Article 10 of the Law are the public offerors, the leading intermediary institution that mediates the issue, the persons and institutions that provide guarantees related to the issue, and the members of the issuer's board of directors[407].

The second paragraph of the article states that the persons and institutions that prepare the reports included in the prospectus, such as independent audit, rating, and appraisal firms, are also responsible for the incorrect, misleading, and incomplete information in the reports they prepare[408]. As understood from the article's provision, this responsibility of the auxiliary institutions is "limited" to the information included in the content of the reports they prepare and is different from the responsibility of the persons mentioned above[409].

The issuer cannot escape liability by claiming it is not at fault for any incorrect, misleading, or incomplete information in the prospectus. In this regard, the issuer's liability is considered strict liability. This strict liability can be supported by principles of equity and a duty of care. Additionally, the fundamental purpose of capital market regulations—to protect investors, maintain confidence in the market, and ensure adequate oversight—further justifies the issuer's strict liability[410].

The liability imposed on persons other than the issuer and the guarantor is fault-based liability. In this context, one can seek compensation from those responsible only to the extent that the damage can be attributed to them, in accordance with their level of fault and the specifics of the situation[411]. However, there are alternative views in the doctrine advocating for strict liability due to the importance of investor protection[412].

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[406] Manavgat, *Halka Arz*, 232.
[407] Memiş and Turan, *Sermaye Piyasası*, 80; Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 409.
[408] Meral, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 345.
[409] Korkut Özkorkut, *6102 Sayılı Türk Ticaret Kanunu Açısından Anonim Şirketlerde Bağımsız Denetim* (Ankara: Banka Ve Ticaret Hukuku Araştırma Enstitüsü, 2013), 95.
[410] Turan, "İzahname Sorumluluğu," 210.
[411] Manavgat, *Halka Arz*, 232.
[412] Dilara Uçar, *Payların Halka Arzında İzahnameden Doğan Kamuyu Aydınlatma Sorumluluğu* (Istanbul: On İki Levha Yayıncılık, 2020), 121.

4. COMPENSATION LAWSUIT

4.1. Plaintiff

Investors who suffer losses due to the prospectus being false, misleading or incomplete may claim their losses through a lawsuit[413]. There is no distinction between investor types in terms of plaintiff status. It does not make a difference whether the investors are individual or institutional investors[414]. In the public disclosure system, the risk is left to the investor. After doing the necessary research, the investor must decide whether to invest. Thanks to this investment, the investor can lose money or earn income. Losses encountered by the investor, other than ordinary business risk, may arise from the issuer, intermediary institutions, and persons responsible for auditing[415].

Investors who suffer losses due to misleading information in a prospectus must first seek compensation under Article 10 of the Capital Markets Law, which specifically addresses these situations. Meanwhile, Article 32 of the Capital Markets Law applies to losses that arise from public disclosure documents other than the prospectus. Although the CML does not explicitly regulate who the plaintiffs will be, some inferences can be made regarding the persons who can file a lawsuit in Article 32. In this article, the legislator has regulated that a loss may arise with both a purchase and a sale transaction. In addition, the timing of these purchase and sale transactions is also important[416]. Accordingly, in order to acquire the capacity to bring a claim, a loss must have occurred in the investor's assets. This condition is fulfilled when the capital market instruments acquired in the initial public offering are sold on the stock exchange shortly after the date on which the accurate and complete information is disclosed to the public, and a financial loss arises as a result of this transaction.

If the injured parties cannot be protected by the special provisions in the Capital Markets Law, they may request compensation for their losses based on Article 549 of the Turkish

[413] Çatakoğlu, *Borçlanma Araçları*, 123.
[414] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 479.
[415] Turan, "İzahname Sorumluluğu," 192.
[416] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 481.

Commercial Code[417]. In the preamble of Article 549 of the TCC, It is stated that if damage occurs due to the information in the prospectus being incorrect, misleading, or incomplete, the right to file a lawsuit against the persons responsible for the prospectus belongs to the injured party. Here, the injured parties may be shareholders, holders of securities, or even their subsequent owners, depending on the characteristics of the concrete event[418]. Another possible legal basis is to bring an action against the responsible parties under Article 49 of the Code of Obligations, which sets out the general provisions on tort liability.

4.2. Defendants

The issuer, the public offerer, the guarantor (if any), the intermediary institution, the board members, and the independent audit and rating institutions are liable to the investor for any inaccurate, misleading, or incomplete information in the prospectus.

4.2.1. The Issuer

According to Article 3/1-h of the CML, an issuer is a legal entity that issues capital market instruments, applies to the Board for the issue of such instruments, or whose capital market instruments are offered to the public, and investment funds subject to the Law, except parties collecting funds through crowdfunding platforms[419]. The concepts of issuer and public joint stock company are different concepts, and the difference between them needs to be explained. A public joint stock company is defined as a joint stock company whose shares have been offered to the public or are deemed to have been offered to the public. Therefore, in order to gain the status of a public joint stock company, its shares must have been offered to the public. The sale of capital market instruments other than shares to the public does not grant the issuing company the status of a public joint stock company[420]. The liability of issuers arising from the prospectus is a result of their role as a seller[421].

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[417] Kervankıran, "Türk Ticaret Kanunu'nda Düzenlenen Suçlar - II," 333.
[418] İslamoğlu, *İzahname Sorumluluğu*, 105.
[419] Memiş and Turan, *Sermaye Piyasası*, 51; Adıgüzel, *Sermaye Piyasası*, 38.
[420] Ayoğlu, *Halka Arz*, 26.
[421] Kara, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 143; Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 503.

In order to gain the status of an issuer, the shares do not need to have been offered to the public. The issuance of shares or any capital market instrument other than shares and their sale without being offered to the public or through a public offering is sufficient to gain the status of an issuer. In this respect, not every issuer is a public joint stock company; however, every public joint stock company is also an issuer. Because issuing shares and selling them to the public grants the company the status of an issuer in addition to the status of a public joint stock company. Joint stock companies that do not offer their shares to the public but issue one of the capital market instruments other than shares and sell it to the public do not acquire the status of a "public joint stock company" but only the status of an "issuer"[422].

According to Article 10/1 of the Law, issuers are liable for damages arising from incorrect, misleading, or incomplete information in the prospectus. As mentioned above, the legislator has established responsibility for the prospectus in stages. Thus, while the issuer is primarily accountable for the accuracy and completeness of the information in the prospectus, other parties are deemed responsible only when the issuer cannot compensate for the damage[423].

The issuer's liability is strict liability; however, as discussed at the beginning of this chapter, it is important to address whether the issuer should be liable for incomplete or inaccurate information contained in the audit and valuation reports. Companies that become publicly traded by offering their shares to the public have their financial statements and reports independently audited periodically. Companies enter into a contract with these institutions to prepare reports to be included in the prospectus due to their expertise in specific fields. Article 10 of the Capital Markets Law states that these institutions are liable under the provisions of the Law for any inaccurate, misleading, or incomplete information included in the reports they have prepared. In this context, if the investor suffers a loss and the issuer is held liable for that loss, fairness requires that the issuer should have the right to seek recourse against the responsible institution.

[422] Ayoğlu, 2008, 27; Ünal Tekinalp, "Sermaye Piyasası Kanununa Göre 'Menkul Kıymetleri Halka Arz Eden Anonim Ortaklık' ile 'Hisse Senetleri Halka Arz Olunan Anonim Ortaklık' Farklılığı ve Sonuçları," *İktisat ve Maliye Dergisi* 28, No. 7 (1981), 301.
[423] Turan, "İzahname Sorumluluğu," 203.

Otherwise, the liability regime designed to protect investors relying on the prospectus could lead to disproportionate outcomes against the issuer.

4.2.2. The Public Offerors

According to the legal definition introduced under the Capital Markets Law No. 6362, the term "offeror" refers to natural or legal persons who apply to the Capital Markets Board to publicly offer the capital market instruments they hold (CML Art. 3/1.g). It is important to note that the concepts of "offeror" and "issuer" do not bear the same legal meaning, even though they may refer to the same entity in practice. The distinction arises from the different roles assigned to each party[424].

According to Article 10, if the loss cannot be compensated by the issuer, the public offerer will also be liable for the investor's loss. If the issuer and the public offerer are different persons, the public offeror's liability will come after the issuer's. The public offerors liability in this regard is based on fault liability[425]. The rationale behind holding the offeror liable for the prospectus lies in the fact that they are responsible for preparing the prospectus in the public offering process. While it has been argued that the issuer should primarily bear liability[426], given that the offeror relies on information provided by the issuer, others contend that offerors should not be held legally liable for the prospectus, as they are not in a position to verify the accuracy of the information provided by the issuer[427].

4.2.3. The Guarantor

While the Turkish Code of Obligations does not define the guarantee contract, the legal doctrine and court decisions provide a definition for this contract. With a guarantee contract, the guarantor undertakes to ensure a specific action or result of an undertaking by a third party and to pay compensation to the other party if the third party fails to

[424] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 511.
[425] Çatakoğlu, *Borçlanma Araçları*, 123.
[426] Turan, "İzahname Sorumluluğu," 204.
[427] Kara, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 144.

perform the guaranteed action or the result does not occur[428]. In the doctrine, the guarantee contract is divided into two: a dependent and an independent guarantee contract. In an independent guarantee contract, the result is guaranteed without being tied to a debt. In a dependent guarantee contract, there is a primary debt involved, and the guarantor guarantees the performance undertaken by one of the parties in this primary debt relationship[429]. Guarantees given regarding capital market instruments are based on dependent guarantee agreements[430]. Article 7 (2) of the Communiqué states that if a third party guarantees the fulfillment of obligations relating to capital market instruments to be offered to the public, the prospectus shall also contain information about the guarantor and the kind and description of guarantee.

As stated in Article 10 of the CML, in the event of loss arising from the prospectus, if there is a guarantor in the purchase of the securities, the guarantor may be held liable in cases where the loss cannot be recovered from the issuer. According to the contract between the guarantor and the investor, if the guarantor acts contrary to the contractual relationship, the guarantor may be liable for non-compliance with the contract's provisions. If an investor suffers a loss due to a tort, the guarantor may be liable under tort law if there is a specific protective provision[431]. It is important to note that, although the article states that the responsible parties other than the issuer will be responsible to the extent that the damages can be attributed to them according to their faults and the requirements of the situation, the liability of the guarantor differs from the liability of other responsible parties. Due to the nature of the guarantee agreement, the guarantor's liability is not based on fault[432].

4.2.4. The Lead Intermediary Responsible For Underwriting The Issuance

If companies offer their capital market instruments to the public on their own, they may have difficulty reaching a wide range of investors, and the sale period may be extended,

[428] For further information on the guarantee contract, see *Borçlar Hukuku Dersleri – Özel Hükümler* by Cevdet Yavuz, Faruk Acar, and Burak Özen (Istanbul: Beta Yayınları, 2018), 825-832.
[429] Fikret Eren, *Borçlar Hukuku Özel Hükümler* (Ankara: Yetkin Yayınları 2014), 778 et seq.
[430] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 519.
[431] İslamoğlu, *İzahname Sorumluluğu*, 108.
[432] Memiş and Turan, *Sermaye Piyasası*, 81.

which may result in the failure to sell capital market instruments and insufficient funding. Therefore, to eliminate such risks and benefit from a specialized institution's technical and marketing capabilities, issuers benefit from the services of intermediary firms[433].

The intermediary ensures that all necessary steps are completed before applying to the Board, including preparing application documents, particularly the prospectus. Additionally, they handle critical tasks such as collecting demand, determining the price, and facilitating the delivery of the capital market instruments to buyers. This underwriting service provided by the intermediary institution helps ensure the process is conducted accurately and efficiently[434].

Intermediary institutions have many responsibilities during the public offering process. They are obliged to collect the necessary information and documents and apply to the Board and to carry out sales in accordance with the sales conditions specified in the prospectus and the laws in the relevant legislation. They are also obligated to fulfill these duties diligently[435]. For this reason, the legislator has counted them among the persons liable to investors[436]. The liability of the intermediary institutions comes after the issuer, and their responsibility in this regard is based on fault liability. Within the scope of Article 10, the practice of holding all intermediary institutions liable for issuance was abandoned, and only the lead intermediary institution was regulated as liable[437].

4.2.5. The Board Members

A joint-stock company is typically formed by the general assembly of the shareholders and the board of directors. Some jurisdictions also include the executive management organ which may include a CEO and other officers. Additionally, depending on the legal

[433] Namık Kemal Gökalp, *Sermaye Piyasalarında Halka Arz* (Istanbul: Beta Basım, 2022), 77.
[434] Memiş and Turan, *Sermaye Piyasası*, 46.
[435] Gökalp, *Sermaye Piyasalarında Halka Arz*, 60.
[436] Nikou, Prospectus Liability, 73.
[437] Çatakoğlu, 2016, 122; Nusret Çetin, Hatice Ebru Töremiş, and Zeynep Cantimur, 6362 Sayılı *Sermaye Piyasası Kanunu'nun Sistematik Analizi* (Ankara: Yetkin Yayınları, 2014), 77.

requirements and company bylaws, there may be other organs such as audit committees or supervisory boards[438].

There are two mandatory organs in a joint-stock company under the Turkish commercial law. First is the general assembly, which is formed by the shareholders of the company, and it is the decision-making organ. The second is the board of directors, which is the organ that implements the decisions taken at the general assembly[439]. The board of directors is the management and representation organ of the company[440]. It is usually formed by experienced and expert managers, especially in the public companies. The board of directors decides how the company will be strategically managed, the selection and limitation of areas in which commercial activities will be carried out, the priorities of the business and what will be and not be done accordingly[441].

The board of directors is given the freedom to organize itself to create a board structure that aligns with the company's needs[442]. The board members have two primary duties which are duty of loyalty and duty of care[443]. While the origin of the duty of loyalty is based on the principles of trust developed by the courts of common law jurisdictions, the basis of the duty of care is

[438] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk*, 505; Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku* 5th ed. (Istanbul: Vedat Kitapçılık, 2020), 431.
[439] Hasan Pulaşlı, *Şirketler Hukuku Genel Esaslar* (Ankara: Adalet Yayınevi, 2020), 319; Poroy, Tekinalp and Çamoğlu, Ortaklıklar Hukuku I, 358.
[440] İpekel Kayalı, *Turkish Company Law*, 248.
[441] Necla Akdağ Güney, *Anonim Şirket Yönetim Kurulu* (Istanbul: Vedat Kitapçılık, 2016), 148.
[442] Ece Deniz Günay and Gözde Engin Günay, "Anonim Ortaklık Yönetim Kurulu Başkanının Fonksiyonunun Türk-İsviçre Hukuku Yönünden Karşılaştırmalı İncelenmesi ve Değerlendirmeler," *Legal Hukuk Dergisi* 19, no. 226 (2021): 4489.
[443] Julian Velasco, "The Diminishing Duty of Loyalty", 75 Wash. & Lee L. Rev. 1035 (2018): 1037, https://scholarlycommons.law.wlu.edu/wlulr/vol75/iss2/8, accessed: April 19, 2025.

negligence[444]. In common law jurisdictions, judges first detailed directors' fiduciary duties, which continue to evolve to this day[445]. The duty of loyalty dictates that directors always act in the best interest of the company, not their own. The most important fragment of this duty is avoiding conflicts of interest with the company[446]. Duty of care is the directors' duty to exercise their job diligently and prudently[447]. The Turkish Commercial Code regulates the duty of care and the duty of loyalty under the same article. The article states that members of the board of directors and third parties charged with management are obligated to fulfill their duties with the care of a prudent manager and to protect the company's interests by complying with the rules of honesty[448].

Board of directors members are subject to various duties while performing their roles. These include the duty of care, the duty of loyalty, the obligation to avoid conflicts of interest, the prohibition on conducting transactions with the company and borrowing from it, the non-competition obligation, the duty to fulfill management and representation tasks personally, the

[444] Klaus J. Hopt, "Conflict of Interest, Secrecy and Insider Information of Directors, A Comparative Analysis," *European Company and Financial Law Review*, (2013): 168.
[445] Bernard S. Black, "The Principal Fiduciary Duties of Boards of Directors," Presentation at Third Asian Roundtable on Corporate Governance Singapore, April 4, 2001, 1, https://www.oecd.org/daf/ca/corporategovernanceprinciples/1872746.pdf, accessed: April 19, 2025.
[446] Black, "The Principal Fiduciary Duties of Boards of Directors," 2.
[447] Mina W.M. Yip, "Challenging the role and duty of directors in high profile corporate failures in the USA and Europe in the wake of financial crisis - possible allegations against board of directors for breach of duty of care, skill and diligence?" *EuroMed J. Management, Vol. 1, No. 1* (October 2015), 73, 2024, https://doi.org/10.1504/EMJM.2015.072563, accessed: May 16, 2025.
[448] Akdağ Güney, *Yönetim Kurulu*, 187.

obligation to establish adequate supervision and reporting systems, the obligation of equal treatment of shareholders, the corporate opportunity doctrine, and the prohibition on profiting from their position. Although these duties are regulated differently across legal systems, most of them appear as extensions of the duties of care and loyalty[449]. According to Article 10 of the CML, if the damage cannot be covered by the issuer, the members of the board of directors of the issuer are also liable to the extent that the damages can be attributed to them, depending on their faults and the requirements of the circumstances[450].

Although the parties listed in Article 10 of the Capital Markets Law are jointly and severally liable, a system of liability based on the degree of fault, known as differentiated joint and several liability, is regulated. This situation puts the plaintiff in a difficult position, as it is very difficult for the plaintiff to determine which party is more at fault and which party is less at fault in the occurrence of the damage. Article 557 of the Turkish Commercial Code provides convenience to the plaintiff in lawsuits filed due to the liability of the board of directors in companies that are not publicly traded. According to the article, the plaintiff can sue more than one responsible person together for the entirety of the damage and request the judge to determine the

[449] Poroy, Tekinalp and Çamoğlu, *Ortaklıklar Hukuku I,* 410-425; Pulaşlı, Şirketler Hukuku Genel Esaslar, 430,441; İpekel Kayalı, *Turkish Company Law*, 249; Akdağ Güney, *Yönetim Kurulu*, 181-244.
[450] Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Hukuki Sorumluluk*, 504.

compensation obligation of each defendant in the same lawsuit[451]. Including a similar provision for plaintiffs in Article 10 of the CML would have been appropriate[452].

4.2.6. The Independent Audit And Rating Institutions

Companies that become publicly traded by offering their shares to the public are subject to certain obligations. The most important of these is to have their financial statements and reports independently audited and to disclose their independently audited financial statements to the public periodically. This framework establishes a relationship between the licensed independent auditing institution and the issuer[453]. Independent auditing institutions obtain licenses from the Public Oversight Accounting and Auditing Standards Authority. Similarly, in cases where the legislation requires that the real value of the assets in question be determined by an expert institution about a particular transaction, a contractual relationship is established between the issuer and the valuation institution. Valuation institutions, like investment institutions, have professional organizations. The rating agencies are another institution with which the issuer and publicly held companies interact. Rating agencies rate the issuer and the issued capital market instruments according to specific previously announced criteria, and provide indicative grades that will be useful in market analysis for individual and institutional investors[454].

Article 10/2 of the Law states that individuals and institutions that prepare reports to be included in the prospectus, such as independent audit, rating, and appraisal firms, are also responsible for incorrect, misleading, and incomplete information in the reports they prepare within the framework of the Law's provisions.[455]

[451] Çatakoğlu, *Borçlanma Araçları*, 125.
[452] Memiş and Turan, *Sermaye Piyasası*, 81.
[453] Poroy, Tekinalp and Çamoğlu, *Ortaklıklar Hukuku I*, 504.
[454] Memiş and Turan, *Sermaye Piyasası*, 47.
[455] Özkorkut, *Anonim Şirketlerde Bağımsız Denetim*, 95.

Article 63 of CML states that independent audit firms, credit rating agencies, and appraisal firms are responsible, with the auditors who have signed the report, within the limited scope of their duties, for damages that may result from the fact that financial statements and reports they have audited have not been audited in accordance with legislation. Independent audit firms, credit rating agencies, and appraisal firms are liable for damages they have caused due to false, misleading, and incomplete information included in reports they have prepared as a result of their activities[456]. As can be understood from the article's provision, the subsidiary institutions' responsibility is "limited" to the information included in the reports they prepare. It differs from the other persons' liability in Article 10 of the Law[457].

4.3. Burden of Proof for Fault and the Possibility of Exculpation

The Law introduces a presumption of fault for those held liable concerning public disclosure documents. According to Article 32(3), individuals are not held liable if they can prove that they were unaware of the false, misleading, or incomplete nature of the information contained in the disclosure documents and that such lack of knowledge did not result from their intent or gross negligence[458]. This provision indicates that the legislator presumes the existence of fault on the part of the responsible persons. However, this is a rebuttable presumption. Accordingly, defendants may be released from liability if they can prove their lack of knowledge regarding the information's inaccuracy, misleading nature, or incompleteness and that such unawareness did not stem from their own fault. Thus, the burden of proof in a liability lawsuit rests with the defendants[459].
Some views in the doctrine argue that the board members are required to prove that they have fulfilled their duty of care. According to this view, what is expected from the subject of liability in the prospectus liability is to prove that they have exercised the necessary care to verify the accuracy of the disclosed information[460]. Placing the burden of proof on the defendants is a reasonable approach to protect investors. Capital markets include

[456] Balcı and Turan, *Sermaye Piyasası Kanunu Şerhi C.1,* 1442.
[457] Özkorkut, *Anonim Şirketlerde Bağımsız Denetim*, 95.
[458] Balcı and Turan, *Sermaye Piyasası Kanunu Şerhi C.1*, 651.
[459] Turan, "İzahname Sorumluluğu," 217; Çatakoğlu, *Borçlanma Araçları*, 127.
[460] Ersin Çamoğlu, "Sorumluluk Hukukunun Evrensel İlkeleri Işığında Yeni Türk Ticaret Kanunu'nda Anonim Ortaklık Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu," in *Prof. Dr. Şener Akyol'a Armağan* (Istanbul: Filiz Kitabevi, 2011), 412.

many people with different levels of financial knowledge. Some investors may not understand the information in the prospectus or may not even know how the market works. In this context, requiring investors to prove that the mistakes or omissions in the prospectus were caused by the fault of the executives or signatories would place an unfair burden on them.

It is essential to recognize that exculpation does not apply to the issuer. This is because the issuer's liability arising from one of the public disclosure documents—the prospectus—is regulated explicitly under Article 10 of the Capital Markets Law, which establishes strict liability. In other words, the issuer cannot avoid liability by claiming an absence of fault.

4.4. Statute of limitations

According to Article 32/ 6 of the Law, compensation claims arising from public disclosure documents become time-barred within six months from the date of the damage[461]. The legislator has kept the time-barred period relatively short compared to general provisions. The reason for this is explained in the justification as the need to establish a balance between the protection of investors and the liability arising from information in connection with the rapidity of reactions in financial markets and the necessity of transactions to be carried out within a short period within the framework of available information[462]. The date when the damage occurred is considered the starting point of the limitation period[463].

[461] Çatakoğlu, *Borçlanma Araçları*, 128.
[462] Turan, "İzahname Sorumluluğu," 220.
[463] Adıgüzel, *Sermaye Piyasası*, 142; Aydoğan, *Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk,* 546.

CONCLUSION

A public offering is the sale of capital market instruments to a large number of previously unknown investors through an invitation and advertisement. Thanks to the public offering, companies meet their financial needs while investors have the opportunity to evaluate their savings. This process needs to be supported and encouraged due to its contribution to the economy. At the same time, the system must be regulated and supervised to protect investors—particularly individual investors—and, by extension, the economy. Nevertheless, companies should not be placed at a competitive disadvantage by being compelled to disclose trade secrets under the pretext of public disclosure. It is up to capital market law to provide this balance.

The principle of public disclosure is of great importance for the protection of investors and the control of the system. The Capital Markets Law No. 6362 has adopted the public disclosure system, which is also adopted by modern legal systems. According to this system, a prospectus must be prepared in order for capital market instruments to be offered to the public.

There are differing opinions among legal scholars regarding the legal nature of the prospectus. While some authors argue that the prospectus constitutes an offer, others maintain that it should be classified as an invitation to treat. According to the view that sports the first theory, prospectus constitutes all the essential elements necessary for the formation of a contract. However, second view argues that this reason is not enough to accept prospectus as a binding offer.

If the prospectus is deemed to be an offer, the issuers would be obligated to accept every subscription submitted by investors. However, this is not always possible in capital markets. It is also necessary to mention that Article 14/II (c) of the Capital Markets Board's Communiqué on the Sale of Capital Market Instruments no. II-5.2 explicitly states that the collection of investor demands does not automatically create a binding obligation to fulfill those demands. Therefore, it should be accepted that characterizing the prospectus as an invitation to treat provides a more balanced and equitable legal framework.

With the recent developments in the European Union, steps have been taken to facilitate public offerings to encourage small and medium-sized enterprises and to ensure uniformity in the legislation of member states. There has been little discussion in Turkey yet on the EU Listing Act. Given the recent surge in interest in public offerings, it is worth considering whether the process should be made more accessible to support the growth of small and medium-sized enterprises. However, while promoting business activity to stimulate economic recovery may seem advantageous, it is crucial to maintain a balance by adhering to one of the core principles of capital markets: the protection of investors.

Liability for incorrect, misleading or incomplete information in the prospectus is specifically regulated in many legal systems, including Turkey. Article 10 of the Capital Markets Law in Turkey states that the issuer is primarily responsible for losses arising from incorrect, misleading or incomplete information in the prospectus. In cases where it is not possible for the issuer to cover the loss, the public offerors, the lead intermediary institution, the guarantor, if any, and the issuer's board of directors are held liable in proportion to their faults.

The second paragraph of Article 10 states that individuals and institutions that prepare reports to be included in the prospectus, such as independent auditing, rating, and valuation institutions, are also responsible for any inaccurate, misleading, and incomplete information contained in the reports they prepare. The issuer's liability is strict liability; nonetheless, it is vital to consider if the issuer should be held accountable for incomplete or inaccurate information in audit, rating, and valuation reports. Publicly traded companies enter into a contract with these institutions to prepare reports to be included in the prospectus due to their expertise in these fields. If an investor suffers a loss and the issuer is held liable for that loss, fairness requires that the issuer should have the right to seek recourse against the responsible institution. Otherwise, the liability regime unfairly burdens the issuer.

Many views have been put forward regarding the nature of liability arising from the prospectus in Turkish law and international legal systems such as contract law, tort law, and consumer protection law. In some cases, if there is a direct contract between the investor and the issuer or intermediary, contractual liability may be applied. However, because capital market transactions are often anonymous and involve multiple parties, a

direct contract may not always exist. This limits the use of contract law in protecting investors.

Another possible legal ground is culpa in contrahendo, which refers to liability during the pre-contractual phase. If the investor relies on false or misleading information in the prospectus before entering into a contract, the responsible parties may still be held liable for breaching trust. This idea is supported by Turkish law and allows for the protection of investors even when a formal contract has not yet been formed.

When neither contract law nor pre-contractual liability applies, tort law may offer protection. However, proving fault and causation in tort can be difficult in capital markets due to their complexity. Some scholars in comparative law and Turkish law also argue that investor protection could be supported by consumer protection laws, especially for retail investors who lack knowledge and bargaining power. It is generally accepted, investing is fundamentally different from consuming; therefore, applying consumer law requires careful analysis.

In capital markets law, customers are divided into classes. Some customers are considered professional customers due to their professions or areas of activity. Examples of such customers include intermediary institutions, banks, and portfolio management companies. These institutions do not qualify as customers under the Consumer Protection Law. This is because these entities do not have a weaker position in their relationship with capital markets institutions, nor can it be argued that they are acting for purposes other than professional or commercial interests. However, individual investors and legal entity investors whose areas of activity are outside the capital markets are included in the general customer category, and due to their lack of knowledge in the capital markets, they may need to be protected as consumers.

There are authors who argue that liability arising from prospectus in Turkish law is a special type of liability arising from the law. Considering that it is difficult to apply other types of liability due to the structure of the capital market, and that such liabilities do not always provide complete protection in all circumstances, and that prospectus liability is specifically regulated in the law, it can be argued that this approach is both balanced and appropriate.

The effectiveness of the public disclosure system relies on investors being fully informed. When this assumption fails, compensation for losses from false or misleading information becomes necessary. The system outlines who is responsible for providing accurate information and holds those who supply false information liable for damages. The principle of fault is addressed in the regulations in both Articles 10 and 32 of the Law, and within this framework, Articles 49 and subsequent articles of the Turkish Code of Obligations, which determine the basic principles of tort liability, are taken into consideration as general provisions. It is important to note here that the liability of the issuer and the guarantor, unlike other liable parties, is strict liability.

First, an unlawful act must occur. The person's obligation to compensate for the damage is based on this act. In the context of prospectus liability, the tortious act involves providing false, misleading, or incomplete information in the prospectus. There must be damage because these documents do not reflect the truth. Based on the wording of Article 32 of the Capital Markets Law, a loss occurs when investors experience a decrease in the value of their assets during the validity period of a prospectus that contains false, misleading, or incomplete information.

A presumption regarding causal linkage has been regulated in the Law for prospectus liability. Accordingly, during the validity period of the prospectus containing false, misleading, or incomplete information, immediately after the date of public disclosure of other public disclosure documents, immediately after the date of public disclosure, in case of loss in the assets of investors upon the sale or purchase of capital market instruments purchased or sold on the stock exchange immediately after the date of the emergence of accurate information, a causal link between the public disclosure document and the damage shall be deemed to have been established in terms of compensation claims to be put forward according to this article. However, it should be noted that the person to whom the compensation claim is put forward may be exempted from compensation by proving that the causal linkage did not occur.

Investors who suffer losses due to the prospectus being false, misleading, or incomplete may claim their losses through a lawsuit. There is no distinction between investor types in terms of plaintiff status. It does not matter whether the investors are individual or

institutional. In the public disclosure system, the risk is left to the investor. After conducting the necessary research, the investor must decide whether to proceed with the investment. With this investment, the investor can lose money or earn income. Losses encountered by the investor, other than ordinary business risk, may arise from the issuer, intermediary institutions, and persons responsible for auditing.

The Law establishes a presumption of fault for individuals liable for public disclosure documents. According to Article 32(3), parties are not liable if they can prove they were unaware of the inaccurate or misleading information and that this lack of knowledge was not due to intent or gross negligence. This presumption is rebuttable, allowing defendants to avoid liability if they can demonstrate that they were unaware of the information's issues without their own fault. Therefore, the burden of proof in such lawsuits lies with the defendant. Under Article 32/6 of the Law, compensation claims from public disclosure documents are time-barred after six months from the date of damage. This shorter period balances investor protection with liability given the fast-paced nature of financial markets, where timely transactions are crucial.

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