# COMPENSATING DAMAGES SUFFERED BY THIRD PARTY INVESTORS DUE TO RELYING TO CREDIT RATING AGENCIES

*Üçüncü Kişi Yatırımcıların Kredi Derecelendirme Kuruluşlarına Güvenilmesinden Doğan Zararların Tazmini*

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**ABSTRACT**

We are used to hearing country credit ratings that demonstrate the economic force and performance of the country however ratings are also carried out for companies individually. In such a case rating information allow investors to assess the risks related with the corporations listed in Capital Market. Therefore, ratings announced by Credit Rating Agencies (CRAs) are one of the main data used by investors especially before buying or selling company stocks. The reliability of the ratings is important for the trust in the market and the sustainability of the activities of the CRAs. However, putting liability to CRAs for any third party who uses the data announced would it be fair or possible?

The Capital Market Law no. 6263 adopted in 2012 clearly accepted liability to CRAs to any third party who suffered damages due to the misleading information announced. This newly accepted liability against third parties investors is a result of an endeavour to harmonise our Capital Market Law with the European Union (EU Regulation No. 1060/2009). This paper is examining this newly adopted liability of CRAs to third party investors.

**Key Words:** Credit Rating Agencies, liability to third party investors, tort liability

**ÖZET**

Haberlerde sık sık ülkenin ekonomik gücü ve gelişimini temsil eder şekilde kredi derecelendirme notlarının ilan edildiğini duymaya alışık olsak da esasen kredi derecelendirme münferit olarak şirketler için de yapılmaktadır. Şirket derecelendirme raporları özellikle sermaye piyasasında yatırım yapanların şirket hisselerini alıp satmadan önce dikkate aldıkları önemli verilerdendir. Yatırımcıların doğru karar verebilmesi dolayısıyla zarara uğramaması için bu derecelendirmelerin

There is no requirement of Ethics Committee Approval for this study.

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de titizlikle yapılmış olması önemlidir. Fakat açıklanan verileri kullanan herhangi bir üçüncü taraf için Kredi Derecelendirme Kuruluşlarına sorumluluk yüklemek adil mi veya mümkün müdür?

2012 yılında yürürlüğe giren 6362 sy Sermaye Piyasası Kanunu ile kredi derecelendirme kuruluşlarının faaliyetleri dolayısıyla zarara uğrayan üçüncü kişi yatırımcılara karşı sorumlu olacakları açıkça düzenlenmiştir. Üçüncü kişi yatırımcılar lehine kabul edilmiş olan bu yeni sorumluluk düzenlemesi esasında, Sermaye Piyasası Kanununun Avrupa Birliği (1060/2009 sayılı AB Direktifi) kurallarıyla uyumlaştırılma çabasının bir sonucudur. Bu makale ile Kanunda getirilen bu yeni sorumluluğun koşulları incelenecektir.

**Anahtar Kelimeler:** Kredi Derecelendirme Kuruluşları, haksız fiil sorumluluğu, üçüncü kişi yatırımcıya karşı sorumluluk

## INTRODUCTION: CREDIT RATING AGENCIES (CRAS) AND HOW THEY AFFECT INVESTMENT DECISIONS

Credit rating agencies (CRAs) play an important role in global securities and banking markets, as their credit ratings are used by investors, borrowers, issuers, and governments as part of making informed investment and financing decisions.[1] A credit rating (or note) is an independent opinion of a rating agency on the ability of a public or private issuer to reimburse its debt. The rating allows investors to assess the issuer's risk of default, that is, the risk of non-reimbursement.

Credit institutions, investment firms, etc. may use those credit ratings as the reference for the calculation of their capital requirements for solvency purposes or for calculating risks in their investment activity. Consequently, credit ratings have a significant impact on the operation of the markets and the trust and confidence of investors and consumers. It is essential, therefore, that credit rating activities are conducted in accordance with the principles of integrity, transparency, responsibility, and good governance to ensure that resulting credit ratings are independent, objective, and of adequate quality.

The agencies use three letters to present their ratings, sometimes accompanied by a plus or minus sign. The rating allows investors to immediately identify the degree of risk, with the letters representing a scale of potential default, from AAA (the famous triple-A or highest rating) to D (no reimbursement possible, the issuer is bankrupt). While all rating agencies use the same letters, they differentiate themselves by using different combinations of upper- and

[1] For more information see Frank Partnoy, 'The Siskel, and Ebert of Financial markets? : Two Thumps Down for The Credit Rating Agencies' (1999) 77/3 WULQ 633, 634, 640; Colin Bradshaw, 'Credit Rating Agencies: Regulation and Liability', (2020) 24/4 Lewis & Clark LR 1502; Mete Feridun 'Küresel Bankacılık Düzenlemelerinin Dünü, Bugünü ve Yarını' (2020) 335 TBB 46, 127

lower-case letters, different scales, and above all different methodologies to determine their ratings. Moreover, the agencies have adopted different rating methods depending on the debt security they are rating (bonds, sovereign debt, etc.).

A credit rating can be assigned to securities, especially bonds (issue rating), but also the issuers of debt or securities, including sovereigns (issuer rating, sovereign rating). Credit ratings are used by professional investors such as companies listed on the stock exchange to incite investors to invest either in their issued stocks or bonds.

CRAs act as neutral third parties providing information concerning for the creditworthiness of investments. With the expertise CRAs have they evaluate the credit risk level of various firms and businesses. However, over time it is commonly understood that over-reliance to CRAs could be hazardous. As experienced in 2008, over-reliance on credit ratings contributed to the global financial crisis that escalated in 2008. The 2008 crises are mostly believed to be triggered by the unrealistic rating of the CRAs.[2] The exaggerated ratings caused an artificially rapid growth of the market which then led to the collapse of the banking sector.

The global crises of 2008 mobilized the European Commission to pursue reforms. Thus, the European Parliament and the Council issued the Regulation on Credit Rating Agencies No. 1060/2009[3] to strengthen the internal risk assessments of institutional investors and banks.[4] Thence as of the 2010s, credit ratings became a regulated activity in many parts of the world, and/or existing duties have been tightened.

Additionally, the International Organization of Securities Commissions (IOSCO)[5] which was initially formed in 1983 and which now regulates the world's securities and future markets, published widely accepted Code of Conduct Fundamentals for Credit Rating Agencies.[6] The Code was first published in 2003[7] than following the global crises revised in 2014, reflects internationally accepted rating practices.

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2 Ali Küçükçolak, Kredi Derecelendirme Sektörü (Hiperlink 2020) 48.

3 EC Regulation 1060/2009 concerning Credit Rating Agencies [2009] OJ L302/1 (Regulation 1060/2009).
Regulation (EU) No 462/2013 of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies [2013] OJ L 146/1, Consolidated version: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02009R1060-20190101&from=EN

4 For further information see Güray Özsu 'Regulation of Credit Rating Agencies in Terms of Conflict of Interest and Civil Liability in European Union'(2022) 12/24 Law & Justice R 55-71.

5 See https://www.iosco.org

6 See https://www.iosco.org/library/pubdocs/pdf/IOSCOPD437.pdf

7 See IOSCO Technical Committee, Statement of Principles Regarding the Activities of Credit Rating Agencies (2003), http://www.iosco.org/library/pubdocs/pdf/IOSCOPD151.pdf.

As a developing country that needs funds for its professional investors/ corporations and financial institutions such as banks, Turkey is also closely following the regulations entered into force in the EC and OECD countries. Turkish Capital Market Law No. 6263 (CML no 6263)[8] has been amended in 2020 to comply with Regulation no. 1060/2009 related to the CRAs.

## I. THE LEGAL FRAME WORK OF CREDIT RATING ACTIVITIES IN CML

Activities related to corporate rating in Turkey are quite new. The new system, aligned with EU Regulations and Basel Accords, expands the scope of information to be disclosed under the offerings. With the recent legislative changes, regulations related to credit rating operations in Turkey took a similar form to European and US equivalents. As said above Turkey is closely following the regulations entered into force in the EC and OECD countries. CML 6263 (CML no. 6263) has been amended in 2020 to comply with EC Regulation no. 1060/2009 related to the CRAs.

Turkey has adopted a dual rating system where credit ratings of capital market instruments and financial market instruments are being regulated by different legal regulations and supervised by different authoritative bodies. Thus, credit ratings of corporations that are listed in the Turkish stock market, their securities, and bonds (issuer/ issue rating) are regulated as per the CML No. 6263 under the supervision of the Capital Market Board (CMB). On the other hand, credit ratings of financial institutions such as banks, and the creditors of the banks are regulated as per the Turkish Banking Law (BL) No. 5411[9] under the supervision of the Banking Regulation and Supervision Agency (BRSA).

With this paper we are only examining the credit rating of capital market instruments which are subject to CML no. 6263. As said above Capital Market Board (CMB) is authorized to regulate and supervise the CRAs that rate corporations listed in the Stock Market. The ability of CRAs to carry out rating activities in Turkey is also conditional on obtaining authorization from the Capital Market Board (Article 62/2 of the CML no. 6362).

In order to regulate the principles regarding the authorization and activities of the Rating Agencies, CMB issued Communiqués Serial VIII, no. 51 which had to be altered many times in line with the changes in the relevant laws, the EU Regulation No. 1060/2009, and the needs of the market. "Communiqué on Principles of Rating Activities and Rating Agencies in Capital Market", Serial: VIII, No: 51 (Communiqué)[10] of the CMB was first published in 2007,

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8 Turkish Capital Market Law No. 6263, 2012 OJ 28513. For official English translation see https://www.cmb.gov.tr/Sayfa/Dosya/116

9 Turkish Banking Law No. 5411, 2005 OJ 25983 (duplicative). For official English translation see https://www.bddk.org.tr/Mevzuat/DokumanGetir/961

10 See official English translation in https://www.cmb.gov.tr/Sayfa/Dosya/145

and after being amended many times, it was lastly updated on 11/10/2019 with Serial: VIII, no. 79.

Turkish CRAs that want to rate the corporations listed in the Turkish Stock Market need to provide all the conditions listed in Art. 9, 10, 11 of the Communiqué and obtain a license from the CMB. Accordingly, CRAs can only be established in the form of joint-stock company with all its shares registered. Art. 8 of the Communiqué regulates the international CRAs and requires them to apply and be approved by the CMB and open representative offices in Turkey. With the Communiqué, the international CRAs following their authorization by the CMB, need to open their representative offices in Turkey within 1 year (Communiqué, Art. 8/3, Provisional Article 3).

Although the CMB has communicated in August 2008 its decision regarding the obligation for foreign rating agencies to open an office in Turkey; we see that international CRAs have not acted accordingly till now. In other words, although Moody's and S&P have not opened offices in Turkey, they continue to rate Turkish sovereigns and corporations. Thus, by not obeying the decision of the Board dated 07/07/2008 obliging Moody's and S&P to open offices in Turkey; they violate the Communiqué.

Following the authorization given by the CMB, the information is announced on the official web page of the CMB (www.spk.gov.tr). As of today, CMB has authorized 9 CRAs in total, three of which are the big three (Fitch, Moody's, S&P).[11]

## II. NEW LIABILITY REJIM

Prior to the adoption of CML no. 6263, the legal regime of the liabilities that will arise as a result of the activities of the CRAs were not specifically regulated, thus those activities were evaluated as per the general liability regime in the Turkish Code of Obligations (TCO) no. 6098.

With the CML no. 6362 which entered into force in 2012 special provisions have been introduced regarding the liability for the damages caused by the activities of the CRA. A general responsibility provision has been included with Article 63 in the CML not only for CRAs but also for the audit and appraisal firms. The second sentence of the provision clearly stipulates that the CRAs are liable for damages arising from their activities. The provision is as follows:

CML no 6362

*"Independent audit firms shall be responsible, with the auditors that 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,*

[11] https://www.spk.gov.tr/SiteApps/EVeri/Detay/derkur

*credit rating agencies, and appraisal firms shall be 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."*

Above quoted Art. 63 is not the only liability provision in CML. Special liability for "public disclosure documents" is stipulated in Art. 32; for "the rating reports included in the prospectus" is stipulated in Art. 10/2, for "the certificate of the issue without a public offer" is stipulated in Art. 11/3 of CML.

Additionally, the Communiqué (Serial VIII, No. 51) also includes detailed liability provisions specific to CRAs. Article 27 of the Communiqué gives us the main liability rule. The provision is as follows:

Art. 27, Communiqué

*"(1) Without prejudice to the general law provisions pertaining thereto, the rating agency and the relevant rating surveyors and rating committee members shall be severally liable for all kinds of damages and losses that may be incurred by customers and third parties due to failure in performance of rating activities in compliance with principles, rules, and procedures set forth in this Communiqué.*

*(2) Rating agencies authorized by the Board must take out a professional liability insurance cover against probable damages and losses that may arise out of their rating activities.*

*(3) Criminal liabilities of shareholders, directors, managers, rating committee members, controllers, rating surveyors and other employees of rating agency are, however, reserved."*

As also seen from the above-quoted Article 27 of the Communiqué, the CRAs, and the rating surveyors and rating committee members shall be severally liable for all kinds of damages and losses that may be incurred by customers and third parties due to failure to perform rating activities in compliance with principles, rules and procedures set forth in this Communiqué.

In consideration with other legislation, the Communiqué has regulated in a more detailed way the responsibility of the CRAs. The Communiqué sheds light on whom the CRAs are liable and the reason for their responsibility. The primary reason for the legal liability of CRAs against customers and third parties is the rating's not being carried out in accordance with the principles and rules set forth in the Communiqué.

It should also be kept in mind that the fact that the liability provisions incorporated in the CML no. 6362 and the Communiqué does not remove CRAs' liability arising from the general provisions in accordance with the Turkish Code of Obligations (TCO).

## III. CONDITIONS OF THE LIABILITY STIPULATED IN CML no. 6362 AND COMMUNIQUÉ

As explained where the legal bases of the liability of CRAs lies in CML (art. 63, art. 32) the details are stipulated in the Communiqué. The primary reason for the legal liability of CRAs against third party is the rating's not being carried out in accordance with the principles and rules outlined in the Communiqué. We will look into those principles in detail below.

Before starting, it should be noted that Art 27/I of Communiqué states that the CRAs would be liable to the customers and third parties. The concept of customer is any person who solicited rating, in other words who has a contractual relation with CRA. On the other hand, the concept of a third party is not as clear as the concept of a customer and it is not defined in the Communiqué. We assume that third party refers to the information users other than the customers of the CRAs. Information users may be anyone who invests by relying on financial statements and reports. An unsolicited investor may claim compensation for damages incurred due to relying on the credit rating reports of the CRA. The Communiqué does not limit the number of third parties (plaintiffs) as long as a failure to comply with the principles and procedures of the rating activity is established. With this paper we examine the compensation possibility provided for third party investors who suffered losses due an activity failure of a CRA.

### A. LEGAL BASIS FOR TORT LIABILTY IN GENERAL

The investor who has suffered a loss due to relying to the rating (or the information) announced by a CRA could claim to be compensated based on alternative reasons each of which requires the fulfilment of different conditions.

An investor that has solicited a credit rating directly from CRA may make a **contractual damage claim** against the CRA. Under Turkish contract law, the plaintiff must prove that contract is breached and that he has suffered a loss due to the breach, while the burden of proof for negligence is shifted to the defendant (Art. 112, TCO). If the defendant cannot prove that he was not faulty, he is assumed faulty due to the "presumption of fault principle" recognized in contractual law provisions of TCO.

An investor that has not solicited the credit rating from CRA, cannot base his claim on contractual liability but he can base his compensation claim on general **tort law** provided the conditions are met. To hold someone liable for tort, four conditions need to be realized in Turkish Law: (1) unlawful act, (2) fault, (3) causation (4) damages. [12] The first condition being an "unlawful act"[13]

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12 See Fikret Eren, Borçlar Hukuku Genel Hükümler (Yetkin 2020), N. 1611, 584; Kemal Oğuzman and Turgut Öz, Borçlar Hukuku Genel Hükümler Cilt 2 (Vedat Kitapçılık 2021), N. 37, 14.

13 See for details Tuba Akçura Karaman "Comparative study on the Liability of Classification Societies To Third Party Purchasers with reference to Turkish, Swiss; German and US Law" (2011) 42/1 JMLC 130, 134.

appears less clear when we are claiming for pure-economic damages. As per the vastly accepted doctrine in Turkey, likewise in Germany and Switzerland, **general tort law** limits liability for pure economic loss, with few exceptions to cases of intentional damage (TCO, art. 49/2).[14] Thus, if the plaintiff proves that CRA has issued misleading data with the intention of causing harm to the plaintiff then CRA could be held liable for tort for damages caused.

Another exception to **tort liability** limitation **on pure economic loss** is accepted when there is a legal norm protecting such economic interest. This limitation for claims on pure economic loss roots in the unlawfulness requirement of the tort liability. The notion of unlawfulness is controversially discussed among academics. The majority accepts that an act harming an absolute right such as "right in rem" or personal right is unlawful in nature; whereas, an act harming all other interests, especially harming pure economic rights, is unlawful if such an economic interest is being protected by a legal norm.[15] In capital markets, the economic interests of issuers and investors are both protected by the liability provisions of CRAs in CML no. 6362. [16] As explained above as of 2012 following the adoption of CML no. 6362, pure economic rights of the issuers and investors are protected with art. 10, 32, 63 of the CML no. 6362 and with art. 27 of the Communiqué. Those regulations ended the legal debate on the pure economic losses, securing tort claims via law. Thus, an investor may initiate a tort claim against the CRA in order to compensate his pure economic loss incurred due to reliance on CRA's misleading rating report.

In light of the above explanations, the provisions stipulated in CML and the Communiqué are protecting the **pure economic loss** of the investors aroused due to activities of CRAs. Thus, when an investors is suffering an economic loss due to an activity carried out by CRA then CRAs are accepted to have acted unlawfully. Given that the other three conditions (fault, damage, causation) are also fulfilled then the CRA would be held liable.

The Capital Market Law emphasizes on CRAs' carrying out their activities in compliance with principles, rules, and procedures outlined in the Communiqué. The Communiqué (art. 27) states that CRAs will be liable for all kinds of third-party damage due to failure to operate rating activities in compliance with the principles, rules, and procedures.

Therefore, if a plaintiff proves that CRA has not complied with the principles or that the information included in CRA's report is false, misleading, and incomplete then CRA then this is enough to fulfil the requirement for

14 ibid 130-132.

15 ibid 132.

16 For a similar assessment on tort liability of independent audit firms see Aytekin Çelik, Bağımsız Denetim Kuruluşlarının Sorumluluğu (Yetkin 2005) 152.

unlawfulness. As explained below art 32 of the CML no. 6362 has also incorporated a presumption of fault for a CRA which fails to comply with the rules and the principles. Further, the plaintiff still needs to prove the causality between the damage incurred and such faulty behaviour of CRA.

Below we will examine each of the conditions (unlawfulness, fault, damage, causation) in details one by one.

### B. UNLAWFUL ACT: BREACH OF A DUTY IMPOSED BY LAW

CML no. 6362 imposes liability for CRAs for damages they have caused due to false, misleading, and incomplete information they have used or announced (art. 63, 32/2). Thus, the main duty that CML no. 6362 imposes to CRAs is, to use or announce proper, correct and complete data for CRAs. Additionally, the "Communiqué on Principles of Rating Activities and Rating Agencies in Capital Markets, Serial VIII, No. 51" (the Communiqué) imposes liability to CRAs due to failure in performance of rating activities in compliance with principles, rules and procedures outlined in this Communiqué (art. 27). [17]

Communique is listing the principles that CRAs are required to follow and any failure to fulfil any of the principles is accepted to be unlawful. As per the principles set down in the Communiqué, CRAs should be impartial (Art. 18), independent (art.19), prudent, should use reliable financial data for their evaluations, avoid information that might be misleading or false, appoints experienced experts in their activities, etc. to provide high-quality reports (art. 15).

Related regulations emphasize liability for false, misleading, or incomplete data. The scope of such liability is interpreted broadly to prove full protection to investors. For example, late announced/reported data is considered misleading/incomplete information. The Communiqué requires the data used in the rating to be reliable and correct. For this reason, financial data should be duly approved by independent auditors, and the rating activity and rating methodologies should be carried out duly accordingly to the principles shown in the CMB Communiqué**.** CRA is obliged to verify information provided by the issuer, statutory auditor, or publicly available information.

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[17] Communiqué, Liability Arising out of Rating Activities, art. 27:
(1) Without prejudice to the general law provisions pertaining thereto, the rating agency and the relevant rating surveyors and rating committee members shall be severally liable for all kinds of damages and losses that may be incurred by customers and third parties due to failure in performance of rating activities in compliance with principles, rules and procedures set forth in this Communiqué.
(2) Rating agencies authorized by the Board must to take out a professional liability insurance cover against probable damages and losses that may arise out of their rating activities.
(3) Criminal liabilities of shareholders, directors, managers, rating committee members, controllers, rating surveyors and other employees of rating agency are, however, reserved.

As per art. 17 of the Communiqué, CRAs should continuously follow the changes in the data or circumstances between the ones used in their report and should do the revisions accordingly. The provision is as follows:

*Communiqué, art. 17:*

*(1) After making a rating public as above, the rating agency is under obligation to continuously keep that rating updated by:*

*a) Regularly reviewing information regarding the relevant client and/or capital market instruments representing indebtedness;*

*b) Being aware of all kinds of information which may affect the rating operations and decisions, also including those which require termination of the rating contract;*

*c) Reassessing the rating works in a timely manner depending on review outcomes.*

*(2) A rating work may not be terminated with the intention of refraining from making the ratings public. With the exception of this case, a decision regarding termination of a rating work shall be made public by the relevant rating agency. The public disclosure relating thereto shall also declare the last date of revision of ratings, and the reasons underlying termination of the rating work.*

*(3) The maximum time of revision of solicited or unsolicited country credit ratings shall be implemented as 6 months.*

As it can be seen from the above provision, CRAs are under the obligation to review and update the rating information that they have declared to the public.

Article 19 of the Communiqué, emphasizes the obligation of being independent and being refrained from conflict of interest.[18] Further art. 20 of the Communiqué exemplifies situations where independence is deemed to be lost. If one of the situations is proven then CRA shall be deemed to violate the principle of independence. For example, if it is detected that a benefit is obtained directly or indirectly from or is promised to be provided by the client or any other persons, entities, or corporations related to the client, other than those specified in the rating contract is deemed to have compromised the independence (art. 20/a1). Another example where it is deemed that independence is broken is; if it is demonstrated that a shareholding relationship is entered into with the client, or the shareholders holding 10% or more of the capital of the client, or natural persons or legal entities which are directly or indirectly affiliated with the client in terms of management, audit and/or capital or are or controlled by the client (art. 20/a2).

The burden of proof that a CRA does not comply with any of the principles set forth in the legislation is on the plaintiff. For a third-party investor it is not

[18] See also Özsu (n. 4) 55-71.

easy to follow up and show such a behaviour. For that reason, a presumption is accepted in CML no. 6362 to help the investors in their claims. art. 32/4 of the CML no. 6362 establishes liability to CRAs as long as the investor can prove that he has suffered losses due to an investment decision that is taken right after the rating data is announced.

However, CML no. 6362 also incorporated opportunities for CRAs to be freed from liability. Article 32/5 of CML no. 6362 has listed four situations where the compensation claim will be rejected. The provision is as follows:

*CML no. 6362, art. 32/5:*

*"Compensation requests arising from inaccurate, misleading or incomplete public disclosure documents may be rejected in the event that;*

*a) The purchase or sale of capital market instruments is not based on the public disclosure document,*

*b) The purchase or sale of capital market instruments has been realised although it was known that the information contained in the public disclosure document was inaccurate, misleading or incomplete,*

*c) The correction regarding the inaccurate, misleading, or incomplete information contained in public disclosure documents has been disclosed before the investment decision has been taken or before the transaction based on this document has been made,*

*ç) The investors would have incurred a loss even though the information contained in the public disclosure documents was not inaccurate, misleading or incomplete."*

In case a CRA could prove any of the facts listed above in art. 42/5 a-ç in CML no. 6362 then it would not be liable for the losses incurred.

**C. FAULT**

In general, even slight negligent is enough for both in tort and contractual liability in Turkish Law. Only in art 49/II of TCO requires intention for the wrongdoer to be liable due to his immoral acts.

*TCO, art. 49:*

*"Any person who unlawfully causes damage to another, whether wilfully or negligently, is obliged to provide compensation.*

*A person who wilfully causes damage to another in an immoral manner is likewise obliged to provide compensation."*

Contrary to the general principle of tort liability (TCO, art 49), art. 32/3 of the CML no. 6362 required gross negligent or intention for CRA for liability. This requirement of intention approximating the liability of CRA to the liability

for immoral behaviour stipulated in art. 49/2 of TCO. Art. 32/3 of the CML no. 6362 is as follows:

*"Persons who prove that they were not informed about the inaccurate, misleading or incomplete information included in public disclosure documents and that this information deficiency does not arise from their intention or gross negligence shall not be responsible."*

As seen in the above quoted art. 32 of the CML no. 6362, liability is based on intentional or gross negligent act of the CRAs. While requiring a more severe fault for liability, the wording of the article clearly demonstrates a fault assumption in favour of the claimant. The above quoted provision states that if the CRA can prove that it was not grossly negligent then it may be freed from liability. Conversely thinking, the provision accepts a presumption as to CRA's being grossly negligent[19], providing an opportunity to CRA to prove the opposite to free itself. Here it should also be remembered that any careless behaviour within the expertise of an expert is deemed as being grossly negligent.[20] In general liability principles the duty of care is aggravated and referred to as professional care (pater familias). CRAs, being experts, any minor omission or careless behaviour within their expertise area would be deemed as gross negligence before the Turkish courts.

Therefore, it is not easy for a CRA to prove that their experts are not acted grossly negligent in not being informed or aware of a piece of information. Since any slight negligence is assumed as being gross negligent if it is related to his/her area of expertise. An expert needs to be aware of all the data within the scope of its expertise. Not knowing data cannot be an excuse. Therefore, it is commonly accepted that the expert may only claim that he was slightly negligent for not being aware of an information if the information is not within the scope of his expertise.[21]

As explained above art. 63 of the CML no. 6362 states that CRAs are responsible for the damages they cause due to incorrect, misleading, and incomplete information included in their rating reports. Thus, it shall be enough for the investor to show that he suffered damage due to the rating report; he does not have to show the CRA was at fault. Then the burden is on CRA to prove that it's not in fault (acted neither intentionally nor gross negligently) as per art. 32/3 of the CML no. 6362.

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19 See also, Nevin Meral, Sermaye Piyasasında Kamuyu Aydınlatma Belgelerinden Doğan Sorumluluk (Onikilevha 2021) 346. The reference EC Regulation no. 1060/2009 art. 35a also requires gross negligence or intention for liable however it does not include any wording on the burden of proof. Regarding this issue see also Özsu (n. 4) 67 etc.

20 Oğuzman and Öz (n. 12), N. 159, 160, 162, 163, at 62, 63, 64.

21 See Meral (n. 19) 349. Also see the other authors Meral referred in the same page.

**D. CAUSATION**

To hold the CRA liable for any loss incurred, the claimant has to establish the causal link between the unlawful act of CRA and the damage suffered. In other words, it should be proven that the CRA failed to perform in accordance with the principles outlined in the Communiqué and the damage incurred by the investors is due to said failure.

In general, the burden to prove the causation between the act and the damage is on the claimant (investor). However, CML no. 6362 has enacted provisions that would ease the way for the investors to prove the causalities.[22] If the damage caused is due to an investment decision that is taken right after the rating data is announced then the causation between damage and the rating is deemed established (art. 32/4, CML no. 6363).[23] Such an assumption of causation in favour of investors does not prevent a CRA to prove that there is no causation between their rating and the fluctuation in the market which caused the investor to lose money. Therefore, we may assume that the burden of proof is transferred to the CRA with the presumption provision enacted in art. 32/4 of the CML no. 6362.

The Communiqué regulates the principles of the CRAs and their rating activities. Article 27 of the Communiqué bases the liability of CRA on the failure to comply with the principles and procedures of the rating activity specified in the Communiqué. It also adopts several presumptions where the failure is deemed to exist. For example, Article 20 of the Communiqué listed the below examples among several others where the essential independent character of the CRA is deemed vanished:

- Customers' not paying or paying less or more than the contractually determined rating fee for previous years without a valid reason.
- The rating fee's being conditional or tied to a pre-agreed rating estimate or be determined after completion of the rating process or being different significantly from the market value

In case of any hesitation by the customers or other relevant parties regarding the independence of the CRA, the independence is deemed removed. In cases where independence is lost, the Board (CMB) should be immediately informed.

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22 For a parallel opinion see Meral (n.19) 370.

23 Art 32/4, CML:
"During the validity period of the prospectus containing inaccurate, misleading or incomplete information and immediately after the disclosure of the other public disclosure documents to public, in the event that a loss arises in the assets of investors upon the sale or purchase on the exchange of capital market instruments, purchased at the initial public offer or purchased or sold on exchange immediately after the date when the information consistent with the reality has arisen, a casual link shall be deemed as established between the public disclosure documents and the loss, in regards of the compensation requests to be asserted according to this Article."

The CRA together with its rating experts and rating committee members are deemed jointly and severally liable for the damages suffered by the customers and third parties due to their failure to comply with the principles and procedures of the rating activity specified in the Communiqué, without prejudice to the general provisions (Communiqué, art. 27).

**E. DAMAGES**

According to the Turkish Code of Obligations, the maximum amount of compensation is the damage suffered.[24] The amount of compensation cannot exceed the damage. As per Art. 50 of the TCO, a person claiming damages must prove that damage has occurred. Where the exact value of the damage cannot be quantified, the court shall estimate the value at its discretion in the light of the normal course of events and the steps taken by the person suffering damage.

The plaintiff needs to materially prove the loss incurred due to relying on the information disclosed as a result of a rating activity of CRA and investing accordingly. In speculative markets such as stock markets, it is very difficult to materially prove the real loss.

In cases of taking investment decisions relying on rating reports publicly disclosed the calculation is even confusing. For example, relying on the accuracy of the information disclosed by CRA the investor might have bought at a high price or sold the papers in his hand at a very low price. However, only a possibility of loss is not enough for investors should prove material loss. Therefore, an expectation of market effect is not enough, the investor cannot base his legal claim on an assumption; the market price should be affected by the announced rating note.

As explained above, CML no. 6362 has adopted provisions that would ease the way for the investors in proving their loss. If the damage caused is due to an investment decision that is taken right after the rating data is announced then the causation between damage and the rating is deemed established (CML, art. 32). It is the same if the loss suffered occurs right after the announcement of the correction data by CRA then the causation is deemed established.

CML no. 6362 has accepted another presumption of causation when the investor himself reverses the initial transaction -and does the opposite of the one based on the incorrect rating- immediately after the announcement of the correction of the rating. Article 32/4 of the CML states that in case of damage to the assets of the investors due to the sale or purchase of the capital market instruments purchased or sold on the stock exchange immediately after the disclosure of the rating and purchase or sale of the same instruments

[24] For detailed explanation see Oğuzman and Öz (n. 12) pp. 48-56; Eren (n. 12), 871; Meral (n. 19) 419.

immediately after the correction announcement; a causal link is deemed to have been established between the rating and the damage.

Loss of the investor mainly consists of the difference between the undistorted price and the distorted price (too high purchase price) which is due to the incorrect credit rating. Or the loss might occur due to the sale of the investor at a low price relying on the incorrect rating and then having to buy at a high price after the correction. To calculate the amount of the compensation to be paid by CRA, the court needs to have proof of such differences and transactions.

Loss of an investor may also occur when he stops buying an instrument following a rating disclosed by a CRA. Had he not seen the unrealistic rating he would have bought the financial papers and would have earned money. This kind of loss is referred to as loss of profit. It is mostly accepted that such a loss of profit is almost impossible to prove and it does not fall into the scope of the losses stipulated in art. 32/4 of the CML.[25]

In general, if the plaintiff can prove only the existence of the loss but not the amount, then it is the judge's duty to calculate the exact amount of the compensation to be paid (TCO, art. 51). However, it's the plaintiff's duty to prove that the damage has occurred and that there is causation between the damage and the incorrect rating. To be able to show the causation, it should first be proved that the incorrect rating has affected the prices in the market. Since the market does not always react very quickly it shall not be easy to establish such a causation. Thus, the first and the correcting transactions should have to be carried out physically to be able to calculate the price differences. It should also be kept in mind that not every loss following a declaration could be linked to the rating of a CRA.[26] Even following correct rating data, it is possible to see an unexpected downwards fluctuation of the market. Due to the assumption of causation deemed in art. 32/4, it would be CRA's duty to prove that there is no causal link between its rating activity and the loss incurred.

## IV. STATUE OF LIMITATION

Under Turkish law, liability in tort is subject to a limitation period of two years starting from the date on which the victim learns about the damage and the identity of the wrongdoer. For an incurred loss, the maximum period is 10 years from the date of the tortious act (TCO, art. 72). Under Turkish law, contractual liability is generally subject to a limitation period of 10 years from the date on which a damage claim is due (TCO, art. 146).

CML no. 6362 incorporated a shorter limitation period for the damage claims caused due to relying on the inaccurate, misleading, or incomplete

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25 For a similiar opinion see also Meral (n. 19) 365; Mehmet Murat İnceoğlu, Sermaye Piyasasında Aracı Kurumların Hukuki Sorumluluğu, (Seçkin 2004) 134.

26 See also, Meral (n. 19) 365.

information included in all kinds of public disclosure documents. As per article 32/6 of the CML no. 6362, the compensation requests arising from public disclosure documents shall lapse within ***six months starting from the date when the loss has occurred.*** The loss is deem occurred when the investor/ issuer becomes aware of the correct data which is when the correction rating is declared. The investors will not be damaged until the real rating is declared and the loss becomes apparent.

The rather short period (6 months) stipulated in art. 32/6 of the CML no. 6362 is criticized in doctrine. It should also be remembered that any unlawful act of CRA that does not fall in the scope of the art. 32 would be subject to the general limitation periods in the TCO.[27] However, in such a case the investor could not profit from the presumptions in the Art. 32 which are favouring the plaintiff.[28]

## CONCLUSION

Investors have obtained a solid legal reason to base their damage claims against CRAs thanks to the Art. 63 and Art. 32 of the CML. Prior to those regulations an investor who has invested as per the data announced by an CRA was having hard time to compensate his damages. Such regulations supervising rating activities in favour of individual investors, establish trust and high-quality activities within in the stock market transactions.

It should be noted that the legal regulations and the domestic CRAs are rather new in Turkey and the investors have not yet been aware of their legal rights. Therefore, it is not surprising not to have any jurisdiction issued pursuant to newly enacted laws. Hopefully the effects of the new liability regime accepted in favour of third-party investors will be seen gradually by time.

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[27] See Meral (n 19) 421.

[28] ibid 421, 422.

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