



THE INFLUENCE OF EUROPEAN AND U.S. LEGISLATION ON TURKISH CAPITAL MARKETS REGULATION

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ABSTRACT

Regulation of capital markets is vital when irregularities and abusive actions in the market are concerned. In order to protect investors and provide integrity for a fully functioning economic system, regulatory authorities should act with increased care and take recent developments into consideration. The aim of this paper is to depict the changes brought about with the new capital markets regulation and the effects of European and U.S. legislation as well as the International Istanbul Financial Center Project of the government. This is achieved by using a conceptual approach to analyze Turkish regulation. Accordingly, it is clear that the new Capital Markets Law (CML) of Turkey has its roots connected to the EU regulation, MiFID, especially where market abuse is concerned. Again, this relationship is signified in the following regulations such as communiqués on market abuse and foundations of brokerage firms.

1. INTRODUCTION

Financial markets are considered as the heart of the economy in developed and developing countries of today's complex and technology based world. Investment decisions are one of the major factors that define the outlook of the markets. Since financial sector is built on mutual trust, prevention of any disruptions in financial markets is paramount. Technologic developments can be considered as the starting point for an advanced economic structure. In addition to this, advanced means of communication simply shrank the perimeter of the earth in a figurative sense by enabling cheaper and quicker access to information available. This has become even more pronounced by advances on the information technology front such as internet and 3G in 1990s and 2000s respectively. Thus, the complexity of investment instruments has kept on increasing; especially in derivatives transactions it has become nearly impossible to guess the cost of default due to the domino effect.

That is why the recent sovereign debt crisis had a huge impact on the overall state of the economies globally. Because of the increased complexity of such transactions, global markets have become more integrated than ever. Even though financial instruments and related information technology have shown immense advancement, authorities have failed to keep up the pace for regulating these means of investments. Lack of regulation concerning complex capital market transactions have also fueled the malfunctioning performed by investment firms. This study aims to attract the attention towards the recent changes made in Turkish Capital Markets regulation and to point toward the increased integration of capital markets in today's competitive market environment and the cause effect relationship between global developments in regulations. The first section is literature review, where U.S. and European regulations are investigated to point out the foundations of Turkish regulation. The second and third sections look into the changes made in Turkish regulation that are based on foreign regulation and the final section sums up the effects and consequences of foreign regulation on local legislation.

2. LITERATURE REVIEW

From a general perspective, it is possible to say that there is a main agenda of securities regulations, regardless of who the regulator is. "Securities regulation may be divided into three broad categories: (i) disclosure duties, (ii) restrictions on fraud and manipulation; and (iii) restrictions on insider trading – each of which contributes to the creation of a vibrant market for information traders" (Goshen and Parchomovsky, 2006). Goshen and Parchomovsky simply point out three important reasons behind any securities regulation and accordingly, it is the same concept that is behind Securities and Exchange Act, MiFID (Markets in Financial Instruments Directive), and Capital Markets Law of Turkey. Securities fraud or corporate fraud has been an ongoing issue of capital markets. According to Gerding, insider trading and financial statements fraud result in securities bubbles. "A brief historical survey demonstrates that stock market bubbles almost invariably coincide with epidemics of securities fraud, and provides a compelling argument that the outbreak of fraud in the Enron era did not stem merely from factors unique to the 1990s, but from the dynamics of an asset price bubble as well." (Gerding, 2006). Since it is not possible to keep a bubble from bursting forever, such problems come to daylight, inevitably. "The manipulation equilibrium generates bubbles in Treasury security prices and specials repo rates", thus causes inflation and promotes channeling of funds into money markets instead of capital markets (Chatterjea and Jarrow, 1998). Manipulation is extremely hazardous to the price determination function of the markets. This is mainly achieved through information asymmetry. "Allowing for asymmetries introduces the possibility of profitable manipulation. This means that it is necessary to change the notion of equilibrium used so that the specialist takes account of the possibility that he is trading with a manipulator and in equilibrium manipulators just break even." (Allen and Gorton, 1991). Thus, securing publicly available information via public announcements is vital for obstructing information asymmetry. This is considered as one of the main indicators of corporate governance. There are a number of regulations in developed countries against market abuse. Securities and Exchange Act made the first move in regulation of securities in 1930s in the U.S. "Section 10(b), and specifically Rule 10b-5, of the sometimes trading.

Act made insider trading and other schemes in against their information.” (John and Narayanan, 1997) Insider trading has some of the most devastating consequences in financial markets, perhaps after the financial statements fraud. Sarbanes – Oxley (SOX) is perceived as a touchstone in regulating capital markets, however Coates states that the SOX regulation is not a recent development. “The core ideas behind Sarbanes-Oxley had developed for years. Federal bills to create an auditing oversight body date to 1978, after hearings and reports prompted by auditing failures in the market downturn of the early 1970s. Similar legislation was debated again in 1995.” (Coates, 2007). SOX emphasizes on internal control attestation rules and corporate responsibility, respectively in Sections 404 and 302. The Enron scandal and involvement of Arthur Andersen has been a turning point in the creation of SOX regulation, but once again internal audit is referred to as the responsible party. This sentence creates a responsibility on management to implement financial controls and test their effectiveness. Concerning investment fraud, an emphasis is also present in analyst conflicts of interest in Title V of SOX. This section is meant for regulating the analysts employed in intermediary institutions against abuses. “Regarding securities where their employer had an interest, there were supposed to be strong separations of responsibility between the people recommending a stock for investment and those selling it to investors.” (Moeller, 2009). Thus, implementation of Chinese Walls in Brokerage Houses is very important for investor protection against investment fraud. The control of which again falls under the responsibility of internal audit. It is clear that this point is also reflected in MiFID. According to Moloney (2006) the law making process was approached with “increased levels of consultation, transparency, and assessment” in order to guarantee investor protection and well functioning capital markets. Recent scandals such as Enron, Parmalat, Worldcom, etc. are marked as the incidents where auditors have failed to detect fraud. The stricter regulations made after these scandals have increased the responsibility of internal auditors in detecting fraud. For instance SOX Titles VIII and IX are related to Fraud Accountability and White-Collar Crime. Especially Section 307 of Title VIII refers to investment fraud. According to this rule “whoever executes or attempts to execute a scheme to defraud any persons in connection with a corporation’s securities or fraudulently receives money or property from that sale ‘shall be fined or imprisoned not more than 25 years or both’ (Moeller, 2009, p.74)”.

The major regulation concerning financial markets in EU, MiFID, aims to bring together European Markets under a single platform in order to increase competition while enabling a broader market and lower transaction costs. It is effective since November 2007. This has enabled cooperation between Europe and U.S. argues Posner. “Euro-American regulatory condominium (is) characterized by close interactions among decision makers and mutual accommodation” (Posner, 2009) “Institutionally, a relatively sophisticated law-making apparatus, in the form of the Lamfalussy structures, a plethora of advisory bodies and stakeholder bodies, ... had been established.” (Moloney, 2011). Meanwhile, Ortino (2007) and Schammo (2008) argue that transatlantic stock exchange consolidation has some problems, such as which laws to be practiced and to what consequences.

These regulations aim to increase surveillance of financial markets, increase transparency of transactions and tracking the beneficial owners. This is a key point because anonymity is the first step in market abuse.

J. C. Sharman states that “The issue of anonymous corporations has been widely identified in a parade of reports and studies as crucial in combating a range of high-priority international problems: the drug trade, organized crime, terrorism, money laundering, tax evasion, corruption, corporate crime, and systemic financial instability”(Sharman, 2010). In order to eliminate problems and suspiciousness in MASAK (Financial Crimes Investigation Board) undertakes the responsibility to “establish policies, develop Implementation strategies, prepare drafts of laws, bylaws and regulations in accordance with the determined policies, make other necessary arrangements regarding implementation, ensure coordination among relevant institutions and organizations exchange views and information” regarding money laundering and terrorism financing as stated by the Board. As a result, it is possible to see that there has been a great deal of toil for trying to prevent market abuse and fraud in capital markets in the U.S. and EU. Since all capital markets are integrated one to another, similarities between different regulations are easy to spot. Furthermore, the effects of U.S. and especially EU regulations are much more significant in Turkish regulation, which is covered in broad perspective in the section below.

3. CHANGES MADE IN TURKISH REGULATION CONCERNING MARKET ABUSE

Currently, there is an increased trend in integration of capital markets, especially in Europe. “The integration of European equity markets is in large part explained by the drive towards EMU, and in particular the elimination of exchange rate volatility and uncertainty in the process of monetary unification.” (Fratzscher, 2002). Meanwhile, Dunis et al (2013) state that new comers in EU have nothing in common with the other EU members except for the fact that they are small markets and all are in EMU. On the other hand, Guiso et al. (2004) argue that financial integration is promoting growth in EU and copying this movement in search of further growth in its stock market is Borsa Istanbul that has integrated Istanbul Gold Exchange and Turkish Derivatives Exchange in its newly updated organization. The new structure of Borsa Istanbul includes stock market and derivatives transactions under one roof, such as pair trade, stock futures and FX trading. Borsa Istanbul has reached a corporation status according to the new CML. This movement is not only signified in financial instruments and flow of capital, but the effects can be seen in the regulations, as well. Accordingly, the new Capital Markets Law No. 6362 was published in Official Gazette on December 30, 2012. This is also related to demands for regulating the economic developments and new instruments entering Turkish finance arena due to increased competitiveness. In addition to this, it is possible to see the effects of International Finance Center (IFC) project, which aims to present Istanbul as a new hub for international investors. Another important indicator is the rebranding of Istanbul Stock Exchange as Borsa Istanbul, which became official in April 2013.

Although the above are new developments on the scene, intermediation in Turkey dates back to establishment of the Capital Markets Board of Turkey (CMB) and the Capital Markets Law (CML) No 2499 in 1981. CML makes up the most important part of legislation that concerns intermediation and its preamble can be summarized as regulating capital markets, protecting investors’ interests and securing trust and stability to ensure the efficiency of capital markets, help distributor savings to increase economic development and secure an even distribution of wealth.

Even though insider trading is considered as a fraudulent act in capital markets and corporations are required to follow certain rules, there weren't any other detailed regulations on insider trading in the previous Capital Markets Regulation in Turkey. In EU regulation a detailed application for insider trading measures is described in the directive specific to insider trading and market manipulation. This is taken as a basis for the new CML and related regulation. Recently, CMB, the main regulatory authority has published the new Capital Markets Law, and 67 communiqués in relation to this new Law, 3 of which concern market abuse and indicate the influence of MiFID in new Turkish regulation. These communiqués offer definitions on market abuse and activities that cause market abuse in capital markets and sanctions that will be awarded to those who succeed and gain an income from market abusing activities, thus leaving a loophole for market abuse attempts without any financial gain.

It is possible to see a similar structure to MiFID in the new CMB legislation. In the previous CML, insider trading, manipulation and speculation were featured in Article 47's first three clauses. Also internal auditors were cited as responsible for ensuring that all operations and transactions of intermediary institutions are compliant with CMB legislation and related regulations according to Communiqué Serial 5 No 68. Thus, there is coverage of investment fraud in Turkish legislation and internal auditors' main role is to detect and assess the fraud risk and suspicious transactions in Intermediary Institutions, similar to SOX. On the banking side increased regulation and supervising have resulted in a decreasing of significance of fraud although the frequency stays the same. Green and Reinstein state that this is reflected in fraud strategies (Green and Reinstein, 2004). Also post SOX perception of internal audit's role in fraud risk assessment and detection of fraud has changed dramatically towards a better understanding of such regulations (Foster et al. 2010). However there isn't any significant research on Intermediary Institutions in audit or finance literature concerning the effects of regulation or changes in regulation.

MiFID holds the basis for the new Capital Markets Law in Turkey. In MiFID, the definition of inside information is very detailed and covers every possible perspective. In other words, insider information is not only defined according to the source but it is defined to feature all possible parties to be involved in case. Also a very interesting move is made by defining passive orders as inside information, as well.

The previous CML lacked description of inside information; however insider trading was defined even though the definition of inside information in Article 47 was missing. Also in CML derivative instruments and commodities were completely ignored in the definition. The description of manipulation in CML was very plain. When the effects of manipulation are considered, the previous CML seemed out of date, because it was written in and in effect since 1981.

In the old CML the following article was featured to define actions that are abusive in nature.

“Article 47 – ...

1. To benefit to his/her self-owned property or to eliminate a loss so as to damage equal opportunity among the participants operating in capital markets with the aim of gaining benefit for himself/herself or for third parties by making use of non-public information which will be able to affect the values of capital market instruments is insider trading. The chairman and members of the Board of Directors, directors, internal auditors and other staff of the issuers within the scope of Article 11, capital market institutions or of the subsidiary or dominant establishment, and apart from these the persons who are in a position to be have information while carrying out their professions or duties, and the persons who are in a position to have information because of their direct or indirect relations with these.
2. Real entities, the authorized persons of legal entities and those acting together with them all which trade capital market instruments in order to artificially affect their demand and supply, to give the impression of existence of active market, to hold the prices at the same level, to increase or decrease the prices.
3. Real entities, authorized persons of the legal entities and those acting together with them all which give and those acting together with them all which give and disseminate misleading, false, deceiving, information and news, make comments or do not disclose the information which he/she should disclose.”

If we look into the events that have been going on in Turkish Capital Markets and capital markets around the world, one of the most important and striking events is market abuse. While there is a global trend to increase the awareness of public at large towards market abuse and in Turkey it is possible to see the effects of this development in the New Capital Market Law. The term “market abuse” is given a considerable place in the new CML. The new CML No. 6362 defines market abuse as follows:

“ARTICLE 104 – (1) Actions and transactions which cannot be explained with a reasonable economic or financial justification, which are of a nature deteriorating the functioning of exchanges and other organized markets in security, openness and stability, shall be regarded as market abuse actions, provided that they do not constitute a crime. An administrative fine from twenty thousand Turkish Liras up to five hundred thousand Turkish Liras shall be given to those who perform the market abuse actions determined by the Board. However, in case when a benefit has been procured by this means, the amount of the administrative fine to be given cannot be less than twice of this interest.”

The new CML also defines insider trading and manipulation as given below:

“ARTICLE 107 – (1) Those who make purchases and sales, give orders, cancel orders, change orders or realize account activities with the purpose of creating a wrong or deceptive impression on the prices of capital market instruments, their price changes, their supplies and demands, shall be sentenced to imprisonment from two years up to five years and be punished with a judicial fine from five thousand days up to ten thousand days. However, the amount of the judicial fine to be imposed due to this crime cannot be less than the benefit obtained by committing the crime.

(2) Those who give false, wrong or deceptive information, tell rumors, give notices, make comments or prepare reports or distribute them in order to affect the prices of capital market instruments, their values or the decisions of investors, shall be sentenced to imprisonment from two years up to five years and be punished with given a judicial fine up to five thousand days.”

Under all circumstances it is very important to provide investors with necessary, valid and timely data in order to overcome principal – agent problems in capital market activities, thus helping investors avoid institutions that aid market abusers or that aspire to abuse and manipulate market for financial gain should be the main purpose of auditors both employed in public and private institutions.

There are also regulations on improper public offer and unauthorized capital market activities, abuse of confidence and forgery that aims to prevent any institution being formed without the validation of CMB. Furthermore, irregularities in legal books, accounting records and financial statements and reports are regulated in Article 112 of CML, undeniably influenced by SOX.

“ARTICLE 112 – (1) Those who intentionally;

- a) Do not duly keep the books and records they are legally obliged to keep,
- b) Do not preserve the books and documents they are legally obliged to preserve throughout the legal period, shall be sentenced to prison from six months up to two years and punished with judicial fine up to five thousand days.

(2) Those who intentionally;

- a) Draw up the financial statements and reports so as not to reflect the truth,
- b) Open accounts contrary to facts,
- c) Commit all kinds of accounting frauds on records,
- d) Draw up wrong or misleading independent audit and assessment reports as well as the responsible managers or members of the board of directors of issuers, who provide their drawing up, shall be penalized according to the related provisions of the Law numbered

5237. However, in order to impose a penalty due to the crime of forgery on private documents, the usage of the forged document shall not be stipulated.” Borsa Istanbul Regulation has listed a number of certain conditions that define manipulation and is forbidden for intermediary institutions to perform in Article 24. According to this article, creating an impression of trading volume where in truth there is none by performing several buy and sell transactions that are not bound to client orders.

In case of proprietary trading this is very hard to detect due to the nature of these transactions. Proprietary trading is performing buy and sell transactions in Company portfolio by the intermediary institution. In this case, buy and sell orders should be controlled regarding time stamp mechanism. In other words, cross transactions which are “buy” and “sell” orders concerning a certain stock at precisely the same time and same price should be investigated.

Borsa Istanbul announced Circular Letter No 395 on June 27, 2012 and with the Letter Borsa Istanbul has restricted the amount of cross transactions performed for proprietary trading with respect to contract numbers, trading volume in TRY and arithmetic mean of both. Gross settlement is required for and a boycott for 180 days may be applied to the institutions that do not abide this rule. With the new legislation in effect as of July, 2014, this rule and related sanctions are included in the newly published Communiqué called “Communiqué on Sanctions to be awarded to Information Fraud and Market Abuse Investigations”. In addition to this, CMB requires reporting of suspicious transactions similar to that in Anti-Money Laundering applications.

4. CHANGES MADE IN OTHER ARTICLES

There are several changes for capital market actors brought into discussion with the new Law and perhaps the most important of these changes is the introduction of new financial instruments and CMB’s increased regulatory authority on over –the –counter markets. In addition to this Initial Public Offering process is changed to resemble European practices by introduction of a new system related to public awareness, instead of granting of permission by CMB. There are remarkable changes on enforcement of Corporate Governance principles and aligning CMB Legislation with the European Regulation MiFID, as well. There are significant changes concerning investment firms, especially on fund management, which will be allowed for Asset Management companies. Before this change took place, banks and brokerage houses were allowed to establish funds and manage these funds. Moreover, the uptick rule was removed from legislation recently, which can be interpreted as a step to synchronize Turkish Capital Market with European Capital Markets as a part of IFC Project. By July 2014, intermediary institutions will be called investment firms and they will be grouped into different categories according to their capital adequacy ratios. These categories will define the ability to perform settlement and custody services. Another new article that grabs attention is the obligation for reporting of suspicious transactions to CMB by investment firms, which once again emphasizes the importance of preventing of market abuse. In order to comply with this rule investment firms will have to perform specific controls for the purposes of detecting manipulation.

The newly introduced regulations also impose articles in relation to custody services, which were again ignored in the previous regulation. New rules on IT infrastructure are introduced, penetration tests are now required from Investment Firms. Clients should answer to some tests to be used for client classification. Client classification is almost directly copied from MiFID, with two different strata of clients; professional and general are imposed. Conflicts of interest are given more importance and a written policy is required.

Finally, outsourcing requirements are newly introduced to Turkish capital markets regulation. A minor comparison that sums up the points discussed above is given in the following table.

Table 1: Comparison of Old and New CML

Old CML	New CML
There isn't any definition of market abuse.	Market abuse is defined thoroughly.
There isn't any definition of inside information.	Inside information is defined and categorized according to content.
Limited sanctions on manipulation and insider trading.	Sanctions for market abuse, manipulation and insider trading are defined in detail.
No need for reporting market abuse to CMB.	Reporting of market abuse to CMB is mandatory.
Brokerage firms are defined as intermediary institutions.	Brokerage firms are defined as investment institutions.
Brokerage firms are not categorized.	Brokerage firms are categorized according to capital adequacy.
There aren't any rules on precautions on protecting IT infrastructure.	Precautions are imposed on protecting IT infrastructure.
Fund management can be performed by brokerage firms.	Fund management can only be performed by asset management companies.
There aren't any rules on custody services.	Custody services are introduced as a new facility and periodic reconciliation for custody accounts are mandatory.
There aren't any rules on wealth management.	Wealth management is presented as a new facility for brokerage firms.

5. CONCLUSION

In Turkish capital markets, CMB is the main regulatory institution that is responsible for regulating market abuse. Also CML's most important baseline is to create a safe and trustworthy environment and markets for investors to participate in. This is only possible by imposing strict measures for preventing market abuse. Intermediary institutions take up an important space in this subject because investors can only enter capital markets by becoming clients of intermediary institutions. Thus, every possible crime involves intermediary institutions, whether they take part in these crimes on purpose or not. There is an air of confusion in Turkish capital markets as a new communiqué is published by the main regulatory authority CMB almost daily. There are major changes imposed by this act of publishing the new CML and related regulations. Some of these changes are establishment of Istanbul Stock Exchange under the name of Borsa Istanbul and integration of several exchanges under one roof, in line with European capital market integration. Secondly, there is a major development concerning market abuse. In the old CML the concept of market abuse was totally ignored and only insider trading and manipulation were just mentioned.

In the new CML, a similar perspective that is influenced by MiFID is adopted. Market abuse, manipulation and insider trading are thoroughly defined and there are additional communiqués published for each issue that clearly states the sanctions imposed for noncompliance with these rules.

There are changes made in other issues to signify the similarities between MiFID and CML as well. In a nutshell, it is possible to say that Turkish capital markets regulation is clearly influenced by its European and U.S. peers. This development may be considered in line with the IFC project and takes a big step in filling the missing fragments in becoming a part of Europe.

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