ISTANBUL MEDENIYET UNIVERSITY
INSTITUTE OF GRADUATE STUDIES
DEPARTMENT OF PRIVATE LAW

Directors' Duty of Care in Corporate Governance: Legal, Technological, and Sustainability Perspectives

Master's Thesis

Baran Can Kaya

March 2024

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THESIS JURY APPROVAL

This Master thesis titled "**Directors' Duty of Care in Corporate Governance: Legal, Technological, and Sustainability Perspectives**." written by Baran Can Kaya at the Department of Private Law was accepted by our jury.

<u>**JURY MEMBERS**</u>	<u>**SIGNATURE**</u>
Supervisor: Asst. Prof. Meltem Karatepe Kaya Istanbul Medeniyet University	
Other Jury Members:	
Prof. Ferna İpekel Kayalı Istanbul Medeniyet University	
Asst. Prof. Muhammed Fatih Cengil Istanbul Commerce University	

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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 the Chicago and used its footnote reference format consistently throughout the entire text.

Signature

Asst. Prof. Meltem Karatepe Kaya

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

Baran Can Kaya

GENİŞ ÖZET

Kurumsal Yönetimde Yöneticilerin Özen Yükümlülüğünün Hukuk, Teknoloji ve Sürdürülebilirlik Perspektifinden Değerlendirilmesi

Kaya, Baran Can

Yüksek Lisans Tezi, Özel Hukuk Anabilim Dalı

Danışman: Dr. Öğr. Üyesi Meltem Karatepe Kaya, PHD

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Anonim şirketler TTK m. 365'e göre yönetim kurulu ve diğer yöneticiler tarafından yönetilir ve temsil edilirler. Dolayısıyla bu kapsamda gerek yönetim kuruluna gerek diğer yöneticilere çok ciddi işler düşmektedir. Bu kişiler yaptıkları her işte ciddi bir dikkat ve özen göstermek zorundadırlar. Dolayısıyla, yönetim kurulu üyeleri ve diğer yöneticilerin özen yükümlülüğünün şirketler hukuku bakımından büyük önem arz ettiği ifade edilebilir. Ayrıca, gerek teknolojinin hızlı bir şekilde gelişimi ve bunun şirketlere yansımaları gerekse dünyada yer alan iklim değişikliğinden kaynaklı sürdürülebilirliğin sağlanması gibi sorunlar şirketlerin bu güncel konularda belirli bir şekilde pozisyon almasını gerektirmektedir. Dolayısıyla, şirketler hukukunu da bu kapsamda revize etme ihtiyacının ortaya çıktığı görünmektedir. Bahse konu revizeden anonim şirket yöneticilerinin TTK m. 369 kapsamında düzenlenmiş olan özen yükümlülüğü de etkilenecektir. Bu kapsamda bu çalışmada güncel gelişmeler ışığında yönetim kurulu üyelerinin özen yükümlülüğü ele alınmaktadır.

Tezin ilk bölümünde Türk hukuku kapsamında yönetim kurulu üyelerinin özen yükümlülüğü anlatılmıştır. İkinci bölümde ise dijitalleşmenin özellikle yapay zeka, blokzincir gibi gelişen teknolojilerin yönetim kurulu üyelerinin sorumluluğu ve özen yükümlülüğünü nasıl etkilediği anlatılmıştır. Üçüncü bölümde ise sürdürülebilirliğin sağlanması adına atılacak adımlar doğrultusunda yönetim kurulu üyelerinin özen yükümlülüğünün ne şekilde

etkineceği değerlendirilmiştir.

Öncelikle yukarıda da ifade etmiş olduğumuz üzere tezin ilk bölümünde yönetim kurulu üyeleri ve diğer yöneticilerin özen yükümlülüğünün Türk hukukundaki boyutu detaylı bir şekilde incelenmiştir. Bu kapsamda ilk olarak özen yükümlülüğünün TTK'nin 369'uncu maddesi inceleme altına alınmıştır. Bu amaca istinaden ikinci olarak, özen yükümlülüğünün hukuki niteliği değerlendirilmiştir. Özen yükümlülüğünün ne şekilde kategorize edileceği öğretide tartışmalıdır. Zira bazı görüşler özen yükümlülüğünü bağımsız bir asli edim yükümlülüğü olarak tanımlarken bizim de katıldığımız diğer görüş asıl edimin yanında bulunan bir yan yükümlülük olarak tanımlamaktadır.

Ayrıca anonim şirketlerde yer alan özen yükümlülüğünün, şirketin iktisadi ve sosyal işlevlerini yerine getirmesi konusunda en önemli unsurlardan birisi olduğu da tezde ifade edilmektedir. Zira, anonim şirketlerin işlevlerini gerçekleştirebilmesi için hem ciddi bir özenle hem de kurumsal yönetim ilkelerine dayalı olarak yönetilmesi gerekmektedir. Anonim şirketlerde yöneticilerin ortaklığın menfaati için objektif özen yükümlülüğü kapsamında tedbirli yönetici gibi davranmaları şirkete karşı yükümlülükleridir ve neticede şirkete ciddi bir fayda sağlayacaktır.

Özen yükümlülüğü, münferiden sahip olunup yerine getirilebilecek bir yükümlülük olup her bir yönetim kurulu üyesi için ayrı ayrı varlığı söz konusudur. Ayrıca tüm yönetim kurulu üyeleri bu yükümlülüğe sahip olmakla birlikte somut olayda gösterilmesi gereken özen sıfat ve konuma bağlı olarak değişebilecektir. Bu hususa da tezde değinilmiştir.

Yönetim kurulu üyelerinin yanında yönetimde görevli olan üçüncü kişilerin de özen yükümlülüğüne tabi olduğu tezde değinilmiş olup yönetimde görevli üçüncü kişilerin belirlenmesinde TTK'nin 553'üncü maddesinin esas alındığı açık ve net bir şekilde ortaya konmuştur. Yine fiili organ konumundaki kişilerin de gerektiği takdirde özen yükümlülüğüne tabi olması gerektiği kabul edilmiş ve TTK 367 uyarınca yönetimin devredildiği kişiler ile TTK 370/2 uyarınca temsil yetkisinin devredildiği kişiler de yönetici kavramı dahilinde değerlendirilmiş ve özen yükümlülüğüne tabi tutulmuştur. Bu kapsamda öğretide de baskın gelen görüşe göre kayyım ve tasfiye memuru da yönetici olarak değerlendirilebilecek ve özen yükümlülüğüne tabi olacaktır.

Yine bu çalışmada yönetim kurulu üyelerinin sahip oldukları bu sıfatı kazanmaları ile birlikte özen yükümlülüğünü üstlenmiş olacakları ifade edilmiştir. Yönetim kurulu üyelerinin görevinin sona ermesi ile birlikte özen yükümlülüğü kural olarak sona erecektir. Bu kapsamda TTK m. 553 uyarınca sorumluluk da aynı şekilde sona erecektir. Yine TTK m. 367 kapsamında yönetim yetkisinin devrildiği üçüncü kişiler ile tasfiye memurları gibi maddi veya şekli organ konumunda bulunan diğer kişilerin de özen yükümlülüğü göreve başlayarak ilgili sıfatı kazanmaları ile birlikte başlayacaktır. Tıpkı yönetim kurulu üyelerinde olduğu gibi bu sıfatı kaybetmeleriyle de özen yükümlülüğü ortadan kalkacaktır. Bu husus TTK m 553 ile hüküm altına alınan organ sorumluluğu için de geçerlidir. Ancak fiili organ konumunda bulunan kişilerin şirket üzerindeki fiili etkileri herhangi bir şekle veya atamaya tabi olmadığı için bu kişilerin özen yükümlülüğünün zamansal boyutu diğer kişilere göre farklılık arz edecektir. Bu kapsamda bu kişilerin özen yükümlülüğü şirket yönetimi üzerinde organ sayılmayı gerektirecek bir etki yarattıkları zaman ortaya çıkacaktır. Bahse konu fiili etki ortadan kalktığında özen yükümlülüğü de aynı şekilde sona erecektir. Anılan bu hususlar çalışmada detaylı olarak değerlendirilmiştir.

Bu çalışmada ayrıca ilgili pozisyon için gerekli bilgi ve birikime sahip olmayan bir kişinin buna rağmen bu görevi kabul etmesi durumunun ayrıca görevi esnasında gerçekleştirdiği işlemlere bakılmaksızın kendi başına özen yükümlülüğünün ihlali olduğu açık ve net bir şekilde ifade edilmiştir. Bu kapsamda bir kişi eğer kendisine tevdii edilen görevi yerine getirecek bilgi ve beceriye sahip değilse bu görevi kabul etmemesi gerekmektedir. Aksi yöndeki tavır özen yükümlülüğünü ihlal olarak değerlendirilecektir.

Çalışmada yönetim kurulu üyeleri açısından yönetim kurulu toplantılarına katılmanın bir hak konumunda olduğu gibi bir yükümlülük olduğu da ifade edilmiştir. Bu kapsamda yönetim kurulu üyelerinin görevi sadece fiziksel olarak veya elektronik ortamda toplantıya katılıp oy vermekle sınırlı olmayıp karar alma sürecine etkin bir katılım sağlanmasını da içermektedir. Aynı zamanda yönetim kurulu üyeleri bu sürece etkin bir şekilde katılırken inceleme ile bilgi alma hakkı da etkin olarak kullanılmalıdır.

Bu çalışmada ayrıca TTK m 369 kapsamında hangi özen ölçütünün esas alınması gerektiği ayrıntılı olarak ele elınmıştır. Nitekim özen yükümlülüğünün temel unsuru özen ölçütüdür. Bu kapsamda yönetici veya yönetim kurulu üyesinin somut olayda göstermiş olduğu özen uygulanacak özen ölçütünü karşılıyorsa özen yükümlülüğüne uygun davranılmış olduğu sonucuna varılacaktır. Aksi yöndeki davranış özen yükümlülüğünün ihlali sonucunu doğuracaktır. Bu kapsamda TTK m 369'a göre yönetim kurulu ve yöneticilerin özen yükümlülüklerinde objektif kriterin esas alınacağı tezde ifade edilmiştir. Objektif özen ölçütü kapsamında yöneticiler veya yönetim kurulu üyeleri tedbirli bir yöneticinin göstermesi gerektiği özen göstermek durumundadırlar. Bu özen ise gösterilmesi gereken özenin alt sınırını teşkil etmektedir. Bu yükümlülük emredici nitelik taşıdığı için kanun veya esas sözleşme ile hafifletilmesi hukuken mümkün değildir.

Bu çalışmada aynı zamanda yönetim kurulu üyeleri ve diğer yöneticilerin kendilerinden beklenen özene riayet etmemeleri halinde kendileri aleyhine uygulanacak yaptırımlara da yer verilmiştir. Bu konunda ilk akla gelen TTK m 553 anlamında düzenlenmiş olan yöneticilerin hukuki sorumluluk davasıdır. Tezde özen yükümlülüğü çerçevesinde yönetim kurulu üyeleri veya diğer yöneticilere karşı açılabilecek olan sorumluluk davasının şartları detaylı bir şekilde tartışılmıştır. Ancak bu konuya ilişkin sadece yönetim kurulunun sorumluluk davası incelenmemiş aynı zamanda beklenen özene riayet etmemenin ilgili yöneticinin veya yönetim kurulu üyesinin görevden men edilmesi için haklı bir sebep teşkil ettiği ve aynı zamanda şartlar mevcut ise anonim şirketin feshi için haklı sebep teşkil edebileceği ifade edilmiştir.

İlk bölümün sonunda iş insanı kararı ilkesine değinilmiş ve iş insanı kararı ilkesinin hukuki çerçevesi Türk hukukundaki uygulama alanı ortaya konulmuştur. İş insanı kararı ilkesi yöneticilerin kendisinden beklenen özeni göstermiş olmasına rağmen piyasa koşulları gibi dışsal etkiler yüzünden beklenen sonucu alamaması durumu olarak açıklanabilir. Bu kapsamda iş insanı kararı ilkesi ilişkin Türk hukukunda herhangi bir yasal düzenleme yoktur. Konuyla ilgili Yargıtay içtihatlarının çoğu iş insanı kararı ilkesini yok saymakta ve net bir şekilde çoğu olayda yöneticilerin özen yükümlülüğüne riayet etmediğini ortaya koymaktadır. Doktrinde ise Yargıtay'ın bu tutumu ciddi bir şekilde eleştirilmekte ve iş insanı kararı ilkesinin uygulanması gerektiği ifade edilmektedir. Kanaatimce, iş insanı kararı ilkesi şirketler hukuku mantığı açısından çok önemli olup şirketin gelişmesi için risk alması bakımından çok önemli kurallardan biridir. O yüzden muhakkak uygulanması gerektiği kanaatindeyim. Bu hususa tezde de yer verilmiştir.

Çalışmanın ikinci bölümünde teknolojik gelişmelerin özen yükümlülüğüne olan etkisinin üzerinde durulmuştur. Bu kapsamda ilk olarak yapay zeka incelenmiş yapay zekanın tanımı yapılmış, yapay zekanın şirketler hukukunda hangi şekillerde yer alabileceği ortaya konmuştur. Daha sonra özen yükümlülüğüne etkisine yer verilmiştir. Bu kapsamda şirketlerin günümüzde yapay zeka kullanmaması özen yükümlülüğünün ihlali olarak değerlendirilebilir mi sorusu gündeme gelecektir. Konuyla ilgili çalışma ifade edildiği üzere yapay zeka günümüzde çok maliyetli olduğu için yaygın bir kullanıma sahip değildir. Dolayısıyla, bugün yapay zekanın özellikle karar alıcı olarak kullanımına şirketlerde yer verilmemesi özen yükümlülüğünün ihlali olarak değerlendirilemez. Ancak gelecekte yapay zeka kullanımı yaygınlaştığı takdirde artık yapay zeka kullanmayan şirketlerin özen yükümlülüğünü ihlal etmiş olacağı tartışm konusu edilecektir. Ayrıca şirketlerde yapay zeka kullanılması sonucunda yapay zekanın vermiş olduğu yanlış karar sonucunda şirketin zarara uğraması halinde TTK m 553 kapsamında şirketin hem hukuki sorumluluğuna gidilebilecek hem de sadece yapay zekaya güvenip işlem yapan yöneticinin özen yükümlülüğüne gidilebilecektir.

Çalışmanın ikinci bölümünün ikinci kısmında yer alan şirketlerde blokzincir teknolojisinin kullanımı da günümüzde önemli bir konudur. Bu çalışmada blokzincirin ne olduğuna hangi durumlarda kullanıldığına değinilmiş olup ayrıca şirketler hukuku kapsamında nasıl kullanılacağı ifade edilmiştir. Bununla birlikte blokzincirin şirketlerde kullanımı özen yükümlülüğü kapsamında değerlendirilmiş ve yapay zekaya ilişkin açıklamalarımıza benzer nitelikte açıklamalar burada da ifade edilmiştir. Blokzincirin şirketler hukuku kapsamında kullanımı bugün çok yaygın olmayıp aynı zamanda çok da maliyetlidir. Çalışmada blokzincir kullanımının özen yükümlülüğü ile ilişkisi incelenirken bu husus gözardı edilmemiş ve değerlendirmeler yapılmıştır.

Çalışmanın üçüncü bölümünde son yıllarda önemine bianen gündemi meşgul eden sürdürülebilirlik hususu özen yükümlülüğü kapsamında değerlendirilmiştir. Bu bölümde öncelikle Çevresel, Sosyal, Yönetişim (ESG) kavramı, kurumsal sosyal sorumluluk kavramı ve sürdürülebilirlik kavramları genel bir şekilde incelenmiştir. Bu kavramların incelenmesinin sebebi hepsinin birbiriyle bağlantılı olması ve sürdürülebilirlik konusunun özen yükümlülüğü ile ilişkisini anlatma hususunda yardımcı olmasıdır. Ayrıca tezde sürdürülebilirliğin özen yükümlülüğüne etkisini değerlendirmek için Avrupa Birliği "Kurumsal Sürdürülebilirlik Özen Yükümlülüğü" yönergesi detaylı bir şekilde incelenmiş ve bu yönergedeki 25'inci maddenin özellikle üzerinde durulmuştur. Bahse konu 25'inci madde açık ve net bir şekilde yöneticilere şirketlere karşı özen yükümlülüklerinin yanında sürdürülebilirlik vb. alanlarda da özen yükümlülüğü yüklemektedir. Öğretide böyle bir düzenlemenin gerekli olup olmadığı tartışılmış olup kanaatimce dünyanın geldiği konum ve karşı olduğumuz tehlike gereği çalışmamda da ifade ettiğim üzere böyle bir düzenleme mutlaka yapılmalıdır. Fakat öğretide bazı görüşler tarafından sürdürülebilirlik konusunu dikkate alarak faaliyet göstermenin uzun vadede şirketler için daha karlı olması nedeniyle şirketler tarafından zaten tercih edileceği dolayısıyla böyle bir düzenlemeye gerek olmadığı öne sürülse de bu görüşe katılmıyoruz. Bu çalışmada bununla birlikte Türk hukukundaki TTK m 369'un sürdürülebilirlik gibi güncel konulara ilişkin olarak mevcut durumu değerlendirilmiş ve öneriler sunulmuştur.

Anahtar Kelimeler: Yönetim Kurulu, Özen Yükümlülüğü, Blokzincir, Yapay Zeka, Sürdürülebilirlik, İş adamı kararı

ABSTRACT

"Directors' Duty of care in Corporate Governance: Legal, Technological, and Sustainability Perspectives"

Kaya, Baran Can
Master's Thesis, Department of Private Law
Supervisor: Asst. Prof. Dr. Meltem Karatepe Kaya, PHD
March 2024

In accordance with Article 365 of the Turkish Commercial Code (TCC), companies are governed by the Board of Directors (BoD) and other directors. Therefore, relevant directors have several obligations to the company and stakeholders. Given the significant responsibilities of the BoD and other directors, they are legally obliged to exercise care in implementing their duties.

The first chapter of the thesis scrutinizes the legal perspective of directors' duty of care, the consequences of the directors' duty of care, and the application of the business judgment rule as outlined in the TCC. Within this framework, the duty of care of directors is considered an ancillary obligation, complementing their primary performance duties, as per the prevailing opinion in legal doctrine. An objective criterion is applied in evaluating directors' duty of care. Furthermore, the thesis explores the legal repercussions of failing to fulfill the duty of care.

The second chapter of the thesis concentrates upon the impact of emerging technologies on the directors' duty of care. Within this framework, AI and blockchain were defined. Subsequently, the thesis extensively discussed the implications of these technologies on company law. Finally, the thesis explored how the utilization of AI and blockchain technology influences the directors' duty of care.

The third chapter of the thesis addressed sustainability concerns. Within this scope, the concepts of ESG (Environmental, Social, and Governance), CSR (Corporate Social Responsibility), and sustainability were elucidated. Additionally, the thesis examined how sustainability issues impact the directors' duty of care under both Turkish law and EU law.

Key Words: Board of Directors, Duty of care, Blockchain, Artificial Intelligence, Sustainability, The Business Judgment Rule

TABLE OF CONTENTS

THIRD CHAPTER

THE IMPACT OF SUSTAINABILITY ISSUES TO THE DUTY OF CARE OF DIRECTORS

ABBREVIATIONS

AB	: Avrupa Birliği
AGM	: Annual General Meeting
AI	: Artificial Intelligence
BATİDER	: Banka ve Ticaret Hukuku Dergisi
BoD	: Board of Directors
CBAM	: Carbon Border Adjustment Mechanism
CC	: Turkish Civil Code no 4721
CCC	: Corporate Governance Communiqué
C	: Cilt
CML	: Capital Market Law
CSDD	: Corporate Sustainability Due Diligence
CSR	: Corporate Social Responsibility
DAO	: Decentralized Autonomous Organization
DLT	: Distributed Ledger Technology
ESG	: Environmental, Social and Governance

ETS	: Emissions Trading Scheme
EU	: European Union
GDPR	: General Data Protection Regulation
İKÜHFD	: İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi
İUHFD	: İstanbul Üniversitesi Hukuk Fakültesi Dergisi
LLC	: Limited Liability Company
MÜHFHAD	: Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi
N	: Number
OECD	: Organisation for Economic Co-operation and Development
P.	: Page
PDPC	: Personal Data Protection Code no. 6698
TCC	: Turkish Commercial Code no. 6102
TCO	: Turkish Code of Obligation no. 6098
TRR	: Trade Registry Regulation
TTK	: 6102 sayılı Türk Ticaret Kanunu

SDGs	: Sustainable Development Goals
UK	: United Kingdom
UN	: United Nations
UNFCCC	:UN Framework Convention of Climate Change
USA	: United States of America
VITAL	: Validating Investment Tool for Advancing Life Sciences
V.	: Volume
YBHD	: Yıldırım Beyazıt Hukuk Dergisi
Y.	:Year

INTRODUCTION

The duty of care and loyalty of directors within corporations stands as one of the significant and critical elements in overseeing joint-stock companies. Article 365/1 of the Turkish Commercial Code (TCC) states, *"the joint-stock company is managed and represented by the board of directors."* The Board of Directors (BoD) has the right to oversee the company itself or delegate relevant authorization to third parties, provided that the delegation is explicitly outlined and mutually consented to within the articles of association.

BoD has specific duty of care in joint stock companies. This specification is regulated in Article 369 of the TCC, which states, "*Members of the BoD and third parties in charge of management shall be held liable for the prudent performance and protection of the company's interests*." In other words, the BoD and other directors must adhere to Article 396 of the TCC while managing the company.

Furthermore, the advancement of technology has begun to influence the management practices of companies. For instance, the appointment in 2014 of the VITAL (Validating Investment Tool for Advancing Life Sciences) algorithm to the BoD of Deep Knowledge Ventures, a venture company based in Hong Kong, sparked discussions concerning the potential role of artificial intelligence in shaping the future landscape of corporate law.

Additionally, scholars suggest that distributed ledger and blockchain technologies could amplify the influence and participation of shareholders in the decision-making processes of companies. Moreover, it is evident that corporate boards are increasingly finding themselves compelled to respond to shareholder pressure concerning the disclosure and management of sustainability and climate change risks. A case in point is the May 2017 vote by ExxonMobil's shareholders, which mandated a comprehensive assessment of climate change-related risks.

In addition, it is known that boards of companies are increasingly exposed to shareholders' pressure related to disclosing their sustainability and climate change risks. For example, in May 2017, ExxonMobil's shareholders voted for a comprehensive assessment of risks related to climate change.

Firstly, this thesis explains the legal framework surrounding the duty of care that directors owe to the company within the context of Turkish law. Secondly, it will examine the potential impact of new technologies and sustainability concerns on the fiduciary obligations of loyalty and care owed by directors vis-à-vis the company.

AIM AND SCOPE OF THE THESIS

1. To examine the legal framework governing the duties of care of directors in companies across various legal systems, encompassing Turkish law.
2. To examine the impact of emerging technologies on company management within the ambit of the duty of care in companies.
3. To evaluate the influence of climate change and sustainability issues on company management within the framework of the duty of care in companies.
4. To discern the positive and negative ramifications of integrating new technologies and sustainability concerns into corporations from both legal and practical standpoints, and to explore how such integrations may affect the duties of care and loyalty of directors in light of these consequences.
5. To identify the liability and accountability of directors in companies stemming from adverse consequences concerning the integration of new technologies and sustainability concerns into corporations.

PROBLEMS AND KEY RESEARCH QUESTIONS

The proposed study will attempt to find answers to the following questions:

1- Why is it important to draw a legal framework for the obligations of care and loyalty of directors in companies?

2- What are the effects of new technologies on the management of companies within the scope of the obligations of care and loyalty?

3- What are the effects of climate change and sustainability issues on the management of companies within the scope of the obligations of care and loyalty?

4- What are the positive and negative consequences of incorporating new technologies and sustainability issues into corporations from legal and practical perspectives?

5- How will the obligations of care and loyalty of directors be affected due to the positive and negative consequences of incorporating new technologies and sustainability issues into corporations?

6- How will the liability and accountability of directors and boards of directors in joint-stock companies arising from negative consequences of incorporating new technologies and sustainability issues into corporations be determined in different legal systems, including Turkish law?

RESEARCH METHODS

This thesis will be conducted using various research methods. To establish the legal framework regarding the obligations of care and loyalty of directors in joint-stock companies, the qualitative research method will be utilized throughout the thesis. Additionally, various doctrinal opinions will be analyzed in this thesis, thus incorporating the doctrinal research method.

Besides, the descriptive research method will be applied in this thesis to explain the positive and negative consequences of incorporating new technologies and sustainability issues into corporations from both legal and practical perspectives.

STRUCTURE OF THE THESIS

The duty of care of the BoD is a very important issue in corporate governance. Accordingly, ownership and management are mostly separated in companies governed by directors. In corporate law, it is generally agreed that the directors have an obligation of care and loyalty to shareholders and/or the company.

The duty of care and loyalty expected of directors means that a director must exercise the level of care and diligence that an average person would if he/she were in the role of a director at any company. There is a consensus worldwide that directors, members of boards, and other officials have obligations of care and loyalty in the course of company management. The criterion regarding directors' duty of care and loyalty concerns whether relevant officials have power in the company's decisions.

Furthermore, there are different opinions regarding to whom directors owe relevant obligations. In the Continental European system, directors are primarily obliged to the company; in limited situations, they may also owe obligations to shareholders, creditors, and stakeholders. However, in the Common Law system, directors may primarily owe obligations to shareholders if there is a "special factual relationship" between directors and shareholders.

According to scholars, under Turkish law, due to Article 553/1 of the TCC, the (BoD) and other directors are liable not only to the company but also to shareholders, stakeholders, creditors, and other stakeholders. In this context, this thesis will discuss to whom directors, etc., owe obligations under different legal systems.

The thesis will also discuss the legal perspective of the directors' duty of care and loyalty, as determining this perspective is a very important issue. The doctrine debates whether the duty of care and loyalty is a primary obligation or a secondary one. Some scholars argue that it is a primary obligation, while others contend that it is only a secondary one.

It is also significant to determine which criterion should be considered when assessing the directors' duty of care. As the thesis will explain, there are two criteria for determining the duty of care of directors: the objective criterion and the subjective criterion. In this context, the doctrine accepts the objective criterion since the objective duty of care provides transparency for members of BoD and other directors by establishing clear criteria for them to follow while performing their duties.

Another issue that needs to be discussed is the consequences of failing to comply with the duty of care of the directors. One of the most important consequences is the possibility of filing a legal liability case against directors who have violated their duty of care. Furthermore, violation of the duty of care could be a ground for the dismissal of directors and members of BoD, as well as for the termination of the company. These consequences will be discussed in the thesis.

The business judgment rule will play an important role in the thesis due to its relation to the duty of care of the directors. According to the business judgment rule, directors of companies will not be held responsible for decisions they have made in good faith and with sufficient information about the subject, without conflicts of interest with the company, by using their discretion. The thesis will discuss the application of the business judgment rule in Turkish law, including the decisions of the Court of Cassation and the doctrine.

Another issue that will be discussed in the thesis is how new technologies, sustainability, and climate change will affect company law and the duty of care of directors. With technological development, the literature has begun to explore how to integrate artificial intelligence (AI) and blockchain systems into companies. For example, in today's world, AI systems support human decision-making such as Assisted AI or aid humans in creating new things such as as Augmented AI. However, there are also Autonomous AI and Autopoietic AI systems in the literature, where AI can make independent decisions and expand its capabilities. The thesis will discuss how these AI systems will impact the duty of care of directors in companies according to corporate law.

Furthermore, blockchain and distributed ledger systems represent significant breakthroughs in this era. These systems have also begun to influence company and management structures. In the subsequent sections of the thesis, blockchain and distributed ledger technology will be briefly explained. Subsequently, the thesis will examine how blockchain technology products, such as smart contracts, will affect company management and the duty of care of directors.

The number of companies addressing environmental, social, and governance (ESG) issues has dramatically increased in the last few years. The percentage of S&P 500 companies addressing sustainability issues has risen from 5% to 24% in the last five years, and the proportion of released reports concerning sustainability issues has increased from 20% to 80%.

Furthermore, with the enforcement of the legally binding Paris Agreement on climate change dated 4.11.2016, sustainability issues have become very significant for companies as well as for countries. Since directors are the decision-makers in companies, they bear significant responsibilities to address sustainability issues and their impacts on the company.

Therefore, this thesis will provide a detailed explanation of directors' duty of care regarding sustainability issues across different legal systems. As a result, the thesis will first explain the legal perspective of the duty of loyalty and care of directors towards the company, shareholders, and stakeholders in the Turkish legal system.

Secondly, it will examine how new technologies and sustainability issues will affect the duty of care of directors towards the company, shareholders, and stakeholders under different legal systems. It will propose new regulations regarding the relationship between the duty of care of directors and new technologies and sustainability issues to protect companies, shareholders, and other stakeholders.

LITERATURE REVIEW

Literature in company law examines the duty of care within the context of contemporary issues. Firstly, scholars have discussed the legal nature of the duty of care of directors in joint-stock companies. According to one viewpoint, the duty of care is considered the primary obligation, while another viewpoint sees it as a secondary obligation. Furthermore, scholars have debated whether the objective or subjective criterion should be considered in determining the duty of care of directors.

Article 369 of the TCC has adopted the objective criterion for determining the duty of care of directors. In addition, the business judgment rule is one of the most significant subjects discussed in the doctrine concerning the duty of care of directors.

In this context, although the Court of Cassation does not accept the business judgment rule to be applied in Turkish law, the doctrine argues that the business judgment rule should be applied in Turkish law. In fact, the doctrine stipulates that directors of companies should not be held responsible for decisions made in good faith and with sufficient information about the subject, without conflicts of interest with the company, by exercising their discretion.

Company law also focuses on how current issues affect the duty of care of directors. In this context, firstly, the doctrine concentrates on how AI and blockchain technology impact the duty of care of directors. In doing so, the doctrine examines whether or not using AI and blockchain systems in the company could be considered a violation of the duty of care of directors. Additionally, the doctrine has examined the relationship between the negative consequences of using AI and blockchain and the duty of care of directors.

Another issue examined by the doctrine is how sustainability issues have affected the duty of care of directors in company law. Since the entry into force of the legally binding Paris Agreement on climate change dated 4.11.2016, sustainability issues have become a significant issue for companies as well as countries. Therefore, directors have serious duties in this context. The literature discusses how the obligations of directors should be regulated in accordance with sustainability issues.

One opinion states that there is no need for new regulations for sustainability issues because the sole target of the company must be profit-making. However, according to another opinion, relevant regulations are necessary, due to the serious risks the world is facing. Companies must also take action regarding these risks. In this context, directors of companies have substantial duties. Therefore, it should be an obligation.

CONTRIBUTION AND ORIGINALITY OF THESIS

As a contribution to the literature, the thesis will examine AI systems and blockchain. Moreover, the thesis will analyze how new technologies are currently being used and will be used in companies. Subsequently, it will evaluate how these new technologies will affect the duty of care of directors in different legal systems. Lastly, the thesis will focus on sustainability issues within companies and how these issues will impact the obligation of care of directors towards the company, shareholders, and stakeholders across various legal systems.

FIRST CHAPTER

DUTY OF CARE OF DIRECTORS IN JOINT STOCK COMPANIES

1. GENERAL OVERVIEW OF THE DUTY OF CARE OF DIRECTORS IN JOINT STOCK COMPANIES

1.1. Place of the Duty of Care in the Law of Obligations and the TCC

The TCC contains numerous provisions differing from its predecessors.[1] According to TCC Article 365, joint stock companies are directed and represented by the BoD, except for exceptions defined in the law.[2] The BoD may be constituted of shareholders of joint stock companies as well as third parties.[3] In contrast to the repealed TCC Article 320, a clear and direct provision regarding the duty of care and loyalty[4] has been included in Article 369 of the TCC. Both the BoD and other directors manage

[1] Kamil Abdu Oumer, "Duty of Care and Loyalty While Running Joint Stock Companies Under the Turkish Commercial Code," *YBHD Y. 2018 V.3 N.1, p. (153-176),* https://dergipark.org.tr/tr/download/Article-file/428263 , accessed at December 18, 2022.

[2] Reha Poroy, Ünal Tekinalp, and Ersin Çamoğlu, *Ortaklıklar Hukuku C. I Güncellenmiş ve Yeniden Yazılmış 15th Edition*, İstanbul: Vedat Kitapçılık, 2021, 364; Hasan Pulaşlı, *Şirkeler Hukuku Şerhi C.II 4th Edition*, Ankara: Adalet Yayınevi, 2022, 1213; Osman Karaköse, *Anonim Ortaklıklarda Yönetim Kurulu Üyelerinin Mali Hakları*, Ankara: Yetkin Yayınları, 2023, 65; Gizem Özker, *Anonim Şirketlerde Yönetim Kurulunun Toplantı ve Karar Alma Usulleri*, Ankara: Seçkin Yayınları, 2022, 48-49; Yavuz Selim Günay, *Anonim Şirketlerin Temsili*, İstanbul: Onikilevha Yayınları, 2020, 69-75; Fatih Bilgili and Ertan Demirkapı, *Şirketler Hukuku Dersleri*, Bursa: Dora Yayınları, 2021, 266; Mehmet Bahtiyar, *Ortaklıklar Hukuku*, İstanbul: Beta Yayıncılık, 2022, 183.

[3] Ali Murat Sevi, *Anonim Ortaklıkta Yönetim Kurulu Üyeleri ve Yöneticilerin Özen Yükümlülüğü*, Ankara: Seçkin Yayınları, 2021, 23; Poroy, Tekinalp and Çamoğlu, *Ortaklıklar Hukuku C.I,* 365; Pulaşlı, *Şirketler Hukuku C. II,* 1413.

[4] Ali Eskiocak, *Yönetim Kurulu Üyelerinin Şahsi Sorumluluğuna İlişkin Davalarda Maddi Hukukun Usul Hukukuyla Etkileşimi*, Ankara: Seçkin Yayıncılık, 2022, 98.

the company in order to fulfil the business line of the company.[5] Moreover, both the BoD and other directors are obliged to perform their duties with respect to the management of the company as a cautious director.[6]

According to scholars, the duty of care and loyalty to which directors are liable has two basic functions.[7] Firstly, to perform their duty, the BoD and other directors shall adhere to a standard known as the objective duty of care[8]. The relevant standard could be described as the care expected of *"cautious directors."*[9] Directors should possess directorial qualifications to lead joint-stock companies.[10]

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[5] Poroy, Tekinalp, and Çamoğlu, *Ortaklıklar Hukuku C.I*, 365; Pulaşlı, *Şirketler Hukuku C. II*, 1317; Sevi, *Özen Yükümlülüğü*, 23.

[6] Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku, Tek Kişi Ortaklığı, Anonim ve Limited Ortaklıkları Topluluğu, Birleşme, Bölünme ve Tür Değiştirme Değişiklikler ve İkincil Düzenlemelerle Güncelleştirilmiş 5th Edition*, İstanbul: Vedat Kitapçılık, 2020, 286; Hasan Pulaşlı, *Şirketler Hukuku Genel Esaslar Güncellenmiş ve Genişletilmiş 8th Edition* Ankara: Adalet Yayınevi, 2022, 434; Hakan Çebi, *Şirketler Hukuku*, Ankara: Seçkin Yayınları, 2020, 211-212; Tamer Bozkurt, *Şirketler Hukuku Gözden Geçirilmiş 15th Edition*, Ankara: Yetkin Yayınları, 2023, 311; Bahtiyar, 210; Sevi, *Özen Yükümlülüğü*, 23.

[7] İsmail Kırca, Çelik Şehirali, Hayal Feyzan and Çağlar Manavgat, *Anonim Şirketler Hukuku C. I*, Ankara: Banka ve Ticaret Hukuku Araştırma Enstitüsü Yayınları, 2013, 656-657; Sevi, Özen Yükümlülüğü, 23.

[8] Cafer Eminoğlu, "Anonim Şirkette Özen ve Bağlılık Yükümlülüğünün Kişi Bakımından Kapsamına İlişkin Bazı Değerlendirmeler", *Y. 2022 V. 80, N. 1 p. (77 – 105),* , https://doi.org/10.30915/abd.1118331 , 84-85, (accessed at 18.12.2022); Sevi, Özen Yükümlülüğü, .23.

[9] Poroy, Tekinalp, and Çamoğlu, *Ortaklıklar Hukuku C.I*, 420; Tekinalp, *Sermaye Ortaklıkları*, 286-287; Pulaşlı, *Şirketler Hukuku C. II*, 1559; Eminoğlu, *Özen ve Bağlılık Yükümlüğü*,. 84-85; Bahtiyar, 210; Sevi, *Özen Yükümlülüğü*, 23.

[10] Poroy, Tekinalp, and Çamoğlu, *Ortaklıklar Hukuku C.I*, 420; Tekinalp, *Sermaye Ortaklıkları*, 286-287; Pulaşlı, *Şirketler Hukuku C. II*, 1585; Eminoğlu, *Özen ve Bağlılık Yükümlülüğü*, 84-85; Bahtiyar, 210.

Relevant qualifications include the ability to understand the necessity, meaning, and importance[11] of the duty. Technical expertise[12] is not necessarily required. In the objective duty of care standard, the target of of the BoD and other directors is to prevent the company from being exposed to any direct or indirect damages and increase its profit. [13] However, if the director has performed the duty of a cautious director, he/she cannot be held responsible for the non-achievement of the result.[14]

Another function of the duty of care and loyalty is related to legal responsibility; if the director does not comply with the duty of care and loyalty, he/she can be held responsible for losses incurred by the company.[15] This function of the duty of care is related to fault as well as he violation of law and the articles of association[16]. In other words, the behavior of directors contrary to the duty of care constitutes fault and a violation of law and the articles of association.[17] A director who causes the company to suffer losses must indemnify the company.[18]

Furthermore, in order to analyze the duty of care for directors in the company, it is important to comprehend the duty of care within the perspective of the law of obligation. The word "care" could be defined as "*the process of protecting someone*

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[11] Poroy, Tekinalp and Çamoğlu, *Ortaklıklar Hukuku C.I*, 420; Tekinalp, *Sermaye Ortaklıkları*, 286-287; Pulaşlı, *Şirketler Hukuku C. II*, 1585; Eminoğlu , *Özen ve Bağlılık Yükümlüğü*, 84-85; Bahtiyar, 210

[12] Tekinalp, *Sermaye Ortaklıkları*, 286-287; Opinions on Article 369 of TCC; Eminoğlu, *Özen ve Bağlılık Yükümlülüğü*, 85.

[13] Sevi, *Özen Yükümlülüğü*, 23.

[14] Tekinalp, *Sermaye Ortaklıkları*, 286; Pulaşlı, *Genel Esaslar*, 434; Çebi, 211-212; Bozkurt, 311; Bahtiyar, 210; Sevi, *Özen Yükümlülüğü*, 24.

[15] Tekinalp, *Sermaye Ortaklıkları*, 286; Pulaşlı, *Genel Esaslar*, 434; Çebi, 211-212; Bozkurt, 311; Bahtiyar, 210; Sevi, *Özen Yükümlülüğü*, 24.

[16] Mustafa Alper Gümüş, *Türk İsviçre Borçlar Hukukunda Vekilin Özen Borcu*, İstanbul: Beta Yayınevi, 2001, 159; Sevi, *Özen Yükümlülüğü*, 24

[17] Sevi, *Özen Yükümlülüğü*, 24.

[18] Hasan Pulaşlı, *Şirkeler Hukuku Şerhi C.IV Tamamen Yenilenmiş ve Genişletilmiş 4th Edition*, Ankara: Adalet Yayınevi 2022, 2835; Necla Akdağ Güney, *Anonim Şirket Yönetim Kurulu* İstanbul: Vedat Kitapçılık, 2016, 272; Sevi, *Özen Yükümlülüğü*, 24.

or something and providing what that person or thing needs".[19] However, there is no explicit definition for the duty of care in both the TCO and TCC.[20]

In this context, the duty of care is considered in various aspects from the legal perspective. [21]One aspect of the duty of care pertains to its relation with negligence in both tort and contract liability.[22] In this sense, negligence could be defined as the failure of a real or legal person to take reasonable steps to prevent foreseeable legal consequences, even though they do not desire such consequences[23] to occur.

Therefore, the duty of care is crucial for assessing the degree of fault in behaviors that are not intentional.[24] Two criteria are critical for determining fault under the duty of care: the objective and subjective criteria.[25] However, it is accepted by both the doctrine and the Court of Cassation that the objective criterion must be considered[26].

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[19]Cambridge Dictionary, "care," https://dictionary.cambridge.org/tr/s%C3%B6zl%C3%BCk/ingilizce/care, (accessed at 31.12., 2022).

[20] Pulaşlı, *Şirketler Hukuku C. II*, 1559; Sevi, *Özen Yükümlülüğü*, 27.

[21] The duty of care is crucial not just for directors in corporate governance but also for employers under Article 66 of the Turkish Code of Obligations (TCO), especially concerning potential liability for negligent act

[22] Sevi, *Özen Yükümlülüğü*, 27.

[23]M. Kemal Oğuzman and M. Turgut Öz, *Borçlar Hukuku Genel Hükümler C. II Gözden Geçirilmiş 18th Edition*, İstanbul: Vedat Kitapçılık 2023, 62; Andreas Furrer, Markus Muller-Chen and Bilgehan Çetiner, *Borçlar Hukuku Genel Hükümler Gözden Geçirilmiş 2nd Edition,* İstanbul: Onikilevha Yayınları 2022, 397; Mustafa Alper Gümüş, *Borçlar Hukukunun Genel Hükümleri,* Ankara: Yetkin Yayınları, 2021, 450-454; Fikret Eren, *Borçlar Hukuku Genel Hükümler,* Ankara: Yetkin Yayınları, 2022, 661; Haluk N. Nomer, *Borçlar Hukuku Genel Hükümler Gözden Geçirilmiş 19th Edition,* İstanbul: Beta Yayınları, 2023, 187; Gökhan Antalya, *Marmara Hukuk Yorumu Borçlar Hukuku Genel Hükümler C. V/1, 2 ,* Ankara: Seçkin Yayınevi, 2022, 76-77; Sevi, *Özen Yükümlülüğü,* p.27-28.

[24] Sevi, *Özen Yükümlülüğü*, 27-28.

[25] Eren , *Borçlar Hukuku*, 654; Antalya, *Borçlar Hukuku*, 54-57; Sevi, *Özen Yükümlülüğü*, 27.

[26] *"...determining the flaw pursuant to the objective criterion means rendering the flaw objective..."* The Supreme Court Assembly of Civil Chambers, Case No: 2003/11-756 and Decision No: 2003/743 K., 10.12.2003, http://www.kazanci.com.tr/ , accessed at 05.01.2023; Sevi, *Özen Yükümlülüğü*, 28.

The objective duty of care is determined by evaluating the actions of an average person in the same situation and circumstances.[27]

Another aspect of respecting the duty of care is its role in agreements such as construction, agency, and ordinary partnership agreements.[28] In these types of agreements, the relationship between the parties is constructed on trust.[29]In this context, the contractor or agent must fulfill their responsibilities with care.[30] Additionally, concerning the duty of care, the objective criterion should be considered.[31] The objective duty of care in this context is determined by evaluating the conduct of an average contractor or agent facing similar circumstances. If the performance of the contractor or agent falls below the expected standard of an average professional in such situations, it indicates a failure to fulfill their duty and comply with the duty of care.[32]

Furthermore, the duty of care specified in the TCC for directors is also similar to the regulations in the TCO.[33] However, for the subject of this dissertation, the duty of care is related to directing and overseeing the company. In this sense, pursuant to Article 369 of the TCC[34], members of BoD and third parties in management will be liable for their performance. In other words, both the BoD and other directors are obliged to comply with Article 369 of the TCC while managing the company.

In limited liability companies, directors are also required to comply with Article 626 of the TCC regarding the duty of care. Whether the activities of the directors comply with the duty of care is also determined based on the objective criterion, which will be

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[27] Pulaşlı, *Şirketler Hukuku C. II,* 1559; Sevi, *Özen Yükümlülüğü*, 28

[28] Sevi, Özen Yükümlülüğü, 28-29.

[29] Cevdet Yavuz, *Türk Borçlar Hukuku Özel Hükümler C. II* , İstanbul: Beta Yayınevi 2022, 1305; Mustafa Alper Gümüş, *Borçlar Hukuku Özel Hükümler C. II*, İstanbul: Vedat Kitapçılık 2014, 45-47.

[30] Gümüş, *Özel Hükümler*, 45-47; Sevi, *Özen Yükümlülüğü*, 28-29

[31] Yavuz, 1305; Gümüş, *Özel Hükümler*, 45-47; Sevi, *Özen Yükümlülüğü*, 29.

[32] Yavuz, 1305; Gümüş, *Özel Hükümler*, 45-47; Sevi, *Özen Yükümlülüğü*, 29

[33] Pulaşlı, *Şirketler Hukuku C. II*, 1559; Sevi, *Özen Yükümlülüğü*, 29.

[34] Reha Poroy, Ünal Tekinalp, and Ersin Çamoğlu, *Ortaklıklar Hukuku C. II Güncelleştirilmiş 15th Edition*, İstanbul: Vedat Kitapçılık, 2023, 507-508.

explained below. If directors do not comply with Article 369 of the TCC, they will be held liable in accordance with Article 553 of the TCC.[35]

It shall be explained in detail in the following sections that the legal nature of the relationship between the companies and the directors is contractual. However, while the relevant contractual relationship is subject to the mandatory provisions of the TCC, provisions of an agency agreement or employment agreement could be applicable if suitable when necessary, or if the provisions of the TCC are not sufficient.[36]

As a result of this analysis, in this context, the duty of care of the director targets the preservation of the interests of creditors, shareholders, and other stakeholders of the company, and ensures the proper management of the company's assets.

1.2. Legal Nature of the Duty of Care

1.2.1. Legal Nature of the Duty of Care Within the Scope of the Employment Agreement

Various legal opinions exist regarding the precise nature of the duty of care in employment contracts. According to certain viewpoints in legal theory[37], the duty of

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[35] Poroy, Tekinalp and Çamoğlu, *Ortaklıklar Hukuku C.I*, 419-427; Pulaşlı, *Şirketler Hukuku C. II*, 1579; Sevi, *Özen Yükümlülüğü*, 30.

[36] Reha Poroy, Ünal Tekinalp, and Ersin Çamoğlu, *Ortaklıklar Hukuku C. I*, İstanbul: Vedat Kitapçılık, 2017, 389; Akdağ Güney, *Yönetim Kurulu*, 286; Sevi, *Özen Yükümlülüğü*, 31.

[37] Aydın Zevkliler and Emre Gökyayla, *Borçlar Hukuku Özel Borç İlişkileri*, İstanbul: Vedat Kitapçılık, 2021, 652-655; Fikret Eren, *Borçlar Hukuku Özel Hükümler*, Ankara: Legem Yayınevi, 2023, 745-747; Kemale Leyla Aslan and Ahmet Alper Güler, "Vekilin Özen Yükümlülüğü ve Basiretli Vekil Kavramı", İstanbul Aydın Üniversitesi Hukuk Fakultesi *Y.2020, V.6 N.1 p.(51-72)*, https://dergipark.org.tr/tr/download/Article-file/1367744 , 58, (accessed at 20.11.2023) ; Recep Makas, "Türk Borçlar Kanunu ve İş Kanununa Göre İşçinin Özen Borcu ve Borca Aykırılığın Hukuki Sonuçları", *Y.2012, V.16 N.4, p.(149-180)*, ,https://dergipark.org.tr/tr/pub/ahbvuhfd/issue/48111/608437 , 151, (accessed at 20.11.2023).

care is considered a duty of fulfilling one's obligations, specifically as a secondary obligation. According to alternative viewpoints[38], it might be regarded as a distinct manifestation of the obligation of loyalty. Alternatively, it can be seen as an additional requirement that complements the primary performance obligation[39] and guarantees its effective execution.

As explained above, there are different opinions regarding the legal nature of the duty of care. Firstly, some scholars state that it is a primary performance obligation.[40] A performance obligation is the main subject of the agreement, characterized by a behavior realized by the debtor to fulfill its obligation in favor of the creditor.[41] In other words, the performance obligation directly results from the debt relationship and gives the relationship its legal character or type.[42]

Secondly, most scholars state that the duty of care is a side obligation.[43] Side obligations contribute to the realization of the primary performance obligation[44] and

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[38] Ali Avcı, "Türk Borçlar Kanunu'nda Yüklenicinin Sadakat ve Özen Borcu", *TBB Dergisi Y.2015 N.119, p. (367-394),* http://tbbdergisi.barobirlik.org.tr/m2015-119-1499 , 374, (accessed at 20.11.2023).

[39] M. Turgut Öz, Ebru Ceylan, Murat Doğan, Şebnem Akipek Öcal, Hayrunnisa Özdemir, Kemal Şenocak, Emre Cumalıoğlu and Selin Sert Sütçü, *Borçlar Hukuku Özel Hükümler*, Ankara: Seçkin Yayınları, 2023, 522-523; Yaşar Engin Selimoğlu, *Eser Sözleşmesi 5th Edition*, Ankara: Adalet Yayınevi, 2021, 135-136; Gümüş, *Özen Borcu*, 368; Sevi, *Özen Yükümlülüğü*, 32

[40] Veysel Başpınar, *Vekilin (Avukatın, Hekimin, Mimarın, Bankanın) Özen Borcundan Doğan Sorumluluğu*, Ankara: Yetkin Yayınları, 2004, 188.

[41] Sevinc Novruzova, "Elektronik Bankacılıkta Bankaların Özen Yükümlülüğü" , Yayınlanmış Doktora Tezi, Selçuk Üniversitesi, 2021, 56

[42] Novruzova, "Özen Yükümlülüğü", 57

[43] Mustafa Alper Gümüş, *Borçlar Hukuku Özel Hükümler C. II*, İstanbul: Vedat Kitapçılık, 2014, 44-47; Gümüş, *Özen Borcu*, 138; Sevi, *Özen Yükümlülüğü*, 33.

[44] Ahmet Tok and Sabiha Gün Tok, "Vekalet Sözleşmesinde Vekilin Özen Borcu", *İstanbul Barosu Dergisi Y. 2016 V. 90, N. 5 p. (15-44),* https://www.istanbulbarosu.org.tr/files/yayinlar/dergi/doc/ibd20165.pdf , 21-24, (accessed at 08.01.2023); Aslan and Güler, 59; Novruzova "Özen Yükümlülüğü", 57-58.; Sevi, *Özen Yükümlülüğü*, 33.

cannot be sued independently from main performance obligations.[45] As explained above, most scholars in the doctrine hold the view that the duty of care is a side obligation.

A third opinion in the doctrine posits that the duty of care is a special manifestation of the duty of loyalty. This opinion is particularly prominent in construction agreements, where it argues that the obligation of loyalty[46] encompasses the duty of care.

Since loyalty is considered a side obligation[47] according to this opinion, the obligation of care is also regarded as a side obligation. Therefore, explanations regarding side obligations are also applicable to this perspective.

Lastly, according to an alternative viewpoint, the duty of care is perceived as an additional obligation that is added to the main performance requirement to ensure its proper execution.[48]

1.2.2. Legal Nature of the Duty of Care in Joint Stock Companies

Determining the legal nature of the duty of care in joint stock companies is a significant issue. Similar to the duty of care in employment agreements, the discussion revolves around whether it is a primary performance obligation or a side obligation[49].

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[45] Novruzova "Özen Yükümlülüğü", 57-58.; Sevi, *Özen Yükümlülüğü,* 33

[46] Öz, Ceylan, Doğan, Akipek Öcal, Özdemir, Şenocak, Cumalıoğlu and Sert Sütçü, 522-523; Selimoğlu, 135-136; Avcı, "Sadakat ve Özen Borcu", 374; Sevi, *Özen Yükümlülüğü*, 33.

[47] Öz, Ceylan, Doğan, Akipek Öcal, Özdemir, Şenocak, Cumalıoğlu and Sert Sütçü, 522-523; Selimoğlu, 135-136; Avcı, "Sadakat ve Özen Borcu", 374; Sevi, *Özen Yükümlülüğü*, 33-34.

[48] Öz, Ceylan, Doğan, Akipek Öcal, Özdemir, Şenocak, Cumalıoğlu and Sert Sütçü, 522-523; Selimoğlu, 135-136; Avcı, "Sadakat ve Özen Borcu", 374; Sevi, *Özen Yükümlülüğü*, 33-34.

[49] Selahattin Sulhi Tekinay, Sermet Akman, Haluk Burcuoğlu and Atilla Altop, *Tekinay Borçlar Hukuku Genel Hükümler*, İstanbul: Filiz Kitabevi, 1997, 17-18; Sevi, *Özen Yükümlülüğü*, 36.

According to *Çamoğlu*, the duty of care is an independent behavioral obligation. However, due to Article 320 of the repealed TCC, it was considered a side obligation.[50] Furthermore, he argued that the duty of care, along with complying with the law and the articles of association[51], constitutes a side obligation. He also contended that the obligation of loyalty is a superior concept encompassing the duty of care.[52] However, these opinions were applicable under the repealed TCC.[53] He has since revised his stance regarding Article 369 of the TCC. Therefore, according to his current opinion on Article 369 of the TCC, the duty of care could be evaluated as an independent obligation.[54]

According to *Helvacı,* the duty of care stipulated in the TCC for directors of joint-stock companies should be considered a side obligation.[55] In this framework, if any behavior contradicts the duty of care, neither the company, shareholders, nor stakeholders can sue solely based on the duty of care; instead, they could sue under Article 553 of the TCC.[56] Conversely, *İmregün* argues that the duty of care is an independent obligation vested in directors by lawmakers[57] for conducting work in the company.

As mentioned earlier, the debate surrounding the legal nature of the duty of care centers on whether it constitutes a performance obligation or a side obligation. According to

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[50] Ersin Çamoğlu, Anonim Ortaklık Yönetim Kurulu Üyelerinin Özen Borcu, *İmran Öktem'e Armağan*, Ankara: A. Ü. Hukuk Fakültesi Yayınları, 1970, 389; Sevi, *Özen Yükümlülüğü*, 34.

[51] Çamoğlu, *Yönetim Kurulu*, 389.

[52] Çamoğlu, *Yönetim Kurulu,* 392.

[53] Çamoğlu, *Yönetim Kurulu*, 389-392

[54] Poroy, Tekinalp, and Çamoğlu, *Ortaklıklar Hukuku C. I*, 579; Güzin İpek Harma, "Anonim Ortaklıklarda Yönetim Kurulu Üyelerinin Özen Borcu", Yayınlanmış Yüksek Lisans Tezi, Galatasaray Üniversitesi, 2019, 42.

[55] Mehmet Helvacı, *Anonim Ortaklıkta Yönetim Kurulu Üyesinin Hukuki Sorumluluğu*, İstanbul: Beta Yayınları, 2001, 47.

[56] Helvacı, *Hukuki Sorumluluk,* 47-48.

[57] İmregün, *Anonim Ortaklıklar*, İstanbul: Yasa Yayınları, 1989, 229.

doctrine, this distinction is determined by whether an action for fulfillment can be independently filed against the relevant behavior.[58]

In this viewpoint, when evaluating the practical situation of the BoD, neither the company, shareholders, nor stakeholders can independently file an action for fulfillment.[59] Therefore, according to most opinions in the doctrine, the duty of care is predominantly regarded as a side obligation alongside a performance obligation.[60]

In my opinion, since neither the company, shareholders, nor stakeholders can file an action for fulfillment when directors violate the duty of care in joint-stock companies, the legal nature of the duty of care could be considered a side obligation in addition to the performance obligation.

1.3. Fundamental Functions of the Duty of Care in the Management of Joint Stock Companies

The duty of care is essential for the functioning of joint stock companies as it underpins their social and economic roles.[61] The requirement of care necessitates careful management and adherence to corporate governance rules. It functions through the application of the objective criterion, where directors must make decisions and act as

[58] Helvacı, *Hukuki Sorumluluk*, 47-48; Sevi, *Özen Yükümlülüğü*, 36.

[59] Sevi, *Özen Yükümlülüğü*, 36.

[60] Sevgi Bozkurt Yaşar, *Anonim Şirketlerde İş Adamı Kararı İlkesinin (Business Judgment Rule) Uygulanması*, İstanbul: Beta Yayınları, 2015, 137-141. Nedret Füsun Nomer, *Anonim Ortaklıkta Pay Sahibinin Sadakat Yükümlülüğü*, İstanbul: Beta Yayınları, 1999, 47; İbrahim Akan Özdemir,. "Anonim Ortaklık Yönetim Kurulu Üyesinin Görevden Alınması Açısından Haklı Sebep Unsurunun Türk Ticaret Kanunu Düzenlemeleri Bakımından Değerlendirilmesi". *Sakarya Üniversitesi Hukuk Fakültesi Dergisi Y. 2023 V..11, N.1 (p. 301-340),* https://dergipark.org.tr/tr/download/article-file/2849830, 308, (accessed at 09.01.2024).

[61] Sevi, *Özen Yükümlülüğü*, 37.

"cautious directors," as discussed earlier. This duty serves several functions, detailed below.

1.3.1. Providing Transparency and Legal Security

The objective duty of care offers transparency to members of BoD and other directors by establishing clear criteria for them to fulfill their duties.[62] This transparency enables directors to anticipate the terms and conditions they must adhere to, thus preventing potential legal liabilities.[63] Additionally, the objective duty of care allows directors to assess their ability to fulfill their duties and anticipate any associated risks.

1.3.2. Identifying the Duties of Directors

The duty of care empowers directors to execute the responsibilities delineated in the company's legal and corporate documents, and to recognize any obligations that may not be expressly stated in these documents.[64] Consequently, company directors are entrusted to operate as "cautious directors" when assessing and resolving issues within the organization.[65]

1.3.3. Contributing to Corporate Governance

If corporate directors adhere to the rule of duty and operate as diligent directors when studying and resolving company issues, it will also improve the relationship between

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[62] Ali Paslı, *Anonim Ortaklık Kurumsal Yönetimi Corporate Governance*, İstanbul: Çağa Hukuk Vakfı Yayınları, 2005, 9-12; Sevi, *Özen Yükümlülüğü*, 38.

[63] Sevi, *Özen Yükümlülüğü*, 38.

[64] Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 656-657; Sevi, *Özen Yükümlülüğü*, 38.

[65] Paslı, *Corporate Governance*, 13; Sevi, *Özen Yükümlülüğü*, 39.

shareholders and directors.[66] In other words, efficient management in the company can be seen as a means to prevent agency cost problems.[67] As a matter of fact, the primary aim of corporate governance is to decrease agency cost problems. There are five principles of corporate governance: responsibility, accountability, awareness, impartiality, and transparency.[68] As explained earlier, the objective duty of care enhances transparency; consequently, it also boosts directors' responsibility, accountability, awareness, and impartiality.[69]

1.3.4. Role of the Duty of Care in Legal Liability of Directors

The duty of care holds great significance in the legal culpability of directors in joint-stock companies. Article 553 of the TCC establishes the responsibilities of directors, specifying that founders, members of BoD, or liquidators who fail to fulfill their legal obligations outlined in the company's articles of association will be held accountable to the firm, its shareholders, and creditors. Therefore, if directors act in violation of their legal and contractual obligations, they will be held accountable for their actions. The conditions for holding directors liable are outlined in Article 49 of the TCO.[70] In this context, unlawful acts, fault, damage, and a causal link are necessary elements for discussing the legal liability of directors.[71]

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[66] Paslı, *Corporate Governance*, 13; Sevi, *Özen Yükümlülüğü*, 39.

[67] John Armour, Henry Hansmann and Reinier Kraakman, "Agency Problems, Legal Strategies and Enforcement" , *Law Working Paper Y.2009 N.135 p. (1-23)* , https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1436555, 3, (accessed at 26.01.2023).

[68] https://www.thecorporategovernanceinstitute.com/insights/lexicon/what-are-the-five-principles-of-corporate-governance/ , (accessed 26.01.2023).

[69] Sevi, Özen Yükümlülüğü, 40-41.

[70] Pulaşlı, *Şirketler Hukuku C. IV*, 2834; Pulaşlı, *Genel Esaslar*, 655; Tekinalp, *Sermaye Ortaklıkları*, 445; Sevi, *Özen Yükümlülüğü*, 44.

[71] Pulaşlı, *Genel Esaslar*, 655; Tekinalp, *Sermaye Ortaklıkları*, 445; Akdağ Güney, *Yönetim Kurulu*, 293; Sevi, *Özen Yükümlülüğü*, 44.

The duty of care serves as the cornerstone of legal responsibility. Therefore, if directors comply with their duty of care, they will be exempt from legal liability. It is essential to protect the company's assets to comply with rules regarding legal liability. Otherwise, directors may face legal liability[72] cases for failing to protect the company's assets and may also face indemnification cases.

Moreover, directors are obliged to manage the company to enhance profitability and foster business development. Failure to do so would constitute a breach of their duty of care, leading to legal consequences as stipulated in Article 553 of the TCC.[73] In the subsequent sections of the study, the correlation between the duty of care and legal responsibility will be thoroughly examined.

2. EVALUATION OF THE DUTY OF CARE AS TO PERSON AND TIME

2.1. General Overview

According to Article 369 of the TCC, both the BoD and those responsible for managing the company are obliged to exercise due care in their duties. However, under the repealed TCC, only the BoD was obliged to exercise due care. Since the legislation does not specify how the responsibilities for third parties involved in management should be determined, it is important to thoroughly analyze this matter.

As explained earlier, pursuant to TCC Article 365, joint stock companies are directed and represented by the BoD, excluding exceptions defined in the law. Therefore, members of the BoD are the primary contacts in joint stock companies unless

[72] Sevi, *Özen Yükümlülüğü*, 44

[73] Pulaşlı, *Şirketler Hukuku C. IV*, 2834; Pulaşlı, *Genel Esaslar*, 655; Tekinalp, *Sermaye Ortaklıkları*, 445; Akdağ Güney, *Yönetim Kurulu*, 293; Sevi, *Özen Yükümlülüğü*, 44-45.

otherwise stipulated by law.[74] In this context, members of BoD are subject to these obligations.[75] Additionally, some directors are appointed by the BoD.

However, they are not members of the BoD, and their legal position concerning the duty of care will also be examined in the study. Furthermore, it is essential to explore when and how the duty of care and legal liability of the BoD or third parties involved in management begin and end in joint stock companies. Therefore, the thesis will also examine the initiation and termination of the duty of care and legal liability of the BoD or third parties involved in management in the continuation of the study.

Lastly, the study will also examine the legal entity of a joint stock company as a creditor of the duty of care.

2.2. Evaluation of the Duty of Care as to Person

2.2.1. Members of the BoD

In accordance with TCC Article 365, joint stock firms are managed and represented by BoD, with exceptions outlined by law. Article 369 of the TCC establishes specific regulations for each member of the BoD regarding their duty of care. This regulation aligns with the legal accountability of the members of BoD as stipulated in Article 553 of the TCC, as well as the distinct succession outlined in Article 557 of the TCC.

The duty of care begins upon assuming a position on the BoD and concludes upon the termination of one's membership on the board.[76] Nevertheless, the legal responsibility resulting from the breach of this obligation persists throughout the statute of

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[74] Pulaşlı, *Şirketler Hukuku C. II*, 1200; Akdağ Güney, *Yönetim Kurulu*, 3; Sevi, *Özen Yükümlülüğü,* 47.

[75]Pulaşlı, *Şirketler Hukuku C. II*, 1559 ; Akdağ Güney, *Yönetim Kurulu*, 187.

[76] Sibel Hacımahmutoğlu, "Anonim Ortaklığın Yönetim Kurulu Üyelerinin Özen Yükümlülüğü: Fonksiyonel Bir Yaklaşım", *BATİDER Y.2015, V.31 N..3 p. (23-56)*, 23.

limitations.[77] Even though all members of boards have the duty of care as stipulated in Article 369 of the TCC, the extent of this duty may vary depending on the specific circumstances of each case.[78] For instance, in situations where decisions are required in accordance with the Corporate Governance Communiqué (CCC), the duty of care for independent members may be higher than for others.[79]

Additionally, scenarios involving the delegation of management authority to third parties under Article 367 of the TCC, or the presence of executive members without managerial or representative authority in the BoD, may arise.[80] In such cases, the respective members remain accountable for their inherent and essential obligations. The subsequent part of this section will outline exceptional cases related to the duty of care of BoD members.

2.2.2. Characteristics of the Duty of Care for Legal Person Members of BoD

According to the TCC, both legal and real person members are equally obliged to exercise care. Under the repealed TCC, legal persons were not allowed to serve as members of the BoD; only their representatives were eligible for being members of BoD.[81] However, under the current TCC, both legal and real persons are entitled to become members of the BoD.

It is crucial to note that according to Article 359/2 of the TCC, only real persons are permitted to implement management authority. However, legal entities are still subject

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[77]Sevi, *Özen Yükümlülüğü*, 48.

[78] Hacımahmutoğlu, "Özen Yükümlülüğü", 29.

[79] Sevi, *Özen Yükümlülüğü*, 48.

[80] Sevi, *Özen Yükümlülüğü*, 48.

[81]Halil Arslanlı, *Anonim Şirketler C. II- III, Anonim Şirketin Organizasyonu ve Tahviller*, İstanbul: Fakülteler Matbaası, 1960, 98; Haluk Tandoğan, "Hükmi Şahısların Anonim Şirket İdare Meclisinde Temsili", *BATİDER Y.1961, V.1 N.1 p.. (3-35),* 10; Tuğrul Ansay, *Anonim Şirketler Hukuku*, Ankara: Matbaa Yayınevi, 1982, 97-98; Reha Poroy, Ünal Tekinalp and Ersin Çamoğlu, *Ortaklıklar ve Kooperatifler Hukuku*, İstanbul: Vedat Kitapçılık, 2010, 286.

to the duty of care in this regard. Consequently, it could be argued that the representative of the legal entity is not directly liable to the company.[82] However, even though real persons are not directly bound by these obligations, they must still act in accordance with the duty of care and loyalty. Otherwise, the duty of care imposed on legal entities would lose practical significance. Supervision will be conducted to ensure whether legal entities have fulfilled their duty of care or not. In such cases, if a relevant individual fails to attend board meetings without a valid excuse, it may result in legal liability for the respective board member.

As previously discussed, the criterion for the duty of care must be established based on objective standards. However, a question that arises from this scenario is whether, in cases where the board member is a legal entity, the representative of the legal entity is still required to demonstrate the same standard of duty of care[83] as that of a real person. According to the prevailing opinion in legal doctrine, they are indeed obliged to adhere to the same criterion of duty of care[84] as a real person.[85]

As previously indicated, if a legal entity holds a position on the board, it assumes liability for the negligent actions of the individual representing it, as outlined in Article 553 of the TCC. Consequently, in such instances, the legal entity retains the right to seek recourse from the individual for any resulting damages.[86]

2.2.3. Characteristics of the Duty of Care of Directors of Controlled Company

2.2.3.1. Characteristics in Fully Controlled Companies

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[82]İsmail Kırca,"Anonim Şirketlerde Tüzel Kişilerin Yönetim Kurulu Üyeliği", *BATİDER Y.2012 V.. 18 N. 2 p. (51-59),* 57; Sevi, Özen Yükümlülüğü, 49.

[83]Necla Akdağ Güney, "Yeni Yasal Düzenlemeler Çerçevesinde Tüzel Kişi Ortağın Yönetim Kurulunda Temsili", *İKÜHFD Y. 2011, V.. 10 S N. 2 p. (273-294),* 273-275; Sevi, Özen Yükümlülüğü, 50.

[84]Akdağ Güney, *Yönetim Kurulu*, .404; Sevi, *Özen Yükümlülüğü*, 50.

[85]Akdağ Güney, *Yönetim Kurulu*, 405.

[86]Sevi, Özen Yükümlülüğü, 51-52.

According to Article 203 of the TCC, when a commercial entity directly or indirectly owns all the shares and voting rights of another commercial entity, the board of the controlling company has the authority to issue directives for the management of the controlled company, even if these directives may result in losses[87] for the controlled company. Relevant organs of the controlled company are required to adhere to these directives.[88] Therefore, as the controlling company possesses all the shares and voting rights of the controlled company, the duty of care for directors of the controlled company will be analyzed in two contexts: those not subject to instruction and those subject to instruction.[89]

Furthermore, in accordance with Article 205 of the TCC, if directors of the controlled company adhere to the instructions of the controlling company, they cannot be held accountable for their actions. In other words, since the directors of the controlled companies lack the authority to make final decisions, they[90] will not be held accountable if they diligently follow the instructions provided to them.

Even though the TCC specifies that these directors cannot be held liable to the company and shareholders, they are also immune from liability to the company's creditors.[91] Since the consequences of the actions taken by the directors of the controlled company under the guidance of the controlling company are an exception

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[87]Hasan Pulaşlı, *Şirketler Hukuku Şerhi C.I Tamamen Yenilenmiş ve Gözden Geçirilmiş 4th Edition*, Ankara: Adalet Yayınevi, 2022, 563; Tekinalp Sermaye Ortaklıkları, 687; Sevi, Özen Yükümlülüğü, 53-58.

[88]Pulaşlı, *Şirketler Hukuku Şerhi C.I*, 563-567; Tekinalp *Sermaye Ortaklıkları*, p.689; Sevi, *Özen Yükümlülüğü*, 53-58.

[89] Pulaşlı, *Şirketler Hukuku Şerhi C.I*, 563-567; Tekinalp *Sermaye Ortaklıkları*, p.689; Sevi, *Özen Yükümlülüğü*, 53-58.

[90] Gül Okutan Nilsson, *Türk Ticaret Kanunu Tasarısına Göre Şirketler Topluluğu Hukuku*, İstanbul: Onikilevha Yayıncılık, 2009, 422; Kürşat Göktürk, *Şirketler Topluluğunda Sorumluluk Esasları,* Ankara: Adalet Yayınevi, 2022, 325-326; Sevi, *Özen Yükümlülüğü*, 54.

[91] Büşra Emine Yalın Aydın, *Bağlı Şirket Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu*, İstanbul: Onikilevha Yayınları, 2024, 97; Nilsson, *Şirketler Topluluğu*, 429; Sevi, *Özen Yükümlülüğü*, 54.

to legal liability, they also fall outside the scope of the duty of care. Therefore, in the absence of free will, there is no duty of care or legal liability.[92]

Additionally, although directors of the controlled company cannot be held liable solely due to instructions from the controlling company, they are still obliged to exert their best effort in carrying out these instructions. Failure to do so may result in liability for the directors of the controlled company towards the company, shareholders, and creditors, as per Article 553 of the TCC.[93]

It is also crucial to note that Article 205 of the TCC, which pertains to the exemption of legal liability for directors of the controlled company, is applicable only if the instructions issued by the controlling company adhere to the conditions outlined in Articles 203 and 204 of the TCC.[94] Article 204 specifies that these instructions must be predetermined and significant policies of the group, while also ensuring they do not surpass the solvency threshold of the controlled company[95] or jeopardize its existence.

If the relevant instruction fails to meet these conditions, directors of the controlled company cannot avail themselves of the exemption from legal liability and duty of care as stipulated in Article 205 of the TCC.[96] In this regard, Article 369/2 of the TCC refers to Articles 203 and 205, meaning directors of the controlled company are not obliged to comply with instructions that do not meet the conditions outlined in Articles 203 and 204 of the TCC.

Another significant issue in this context is determining who will act as the plaintiff in cases brought against directors of the controlled company due to their compliance with

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[92]Göktürk, Şirketler Topluluğu, 331-332.

[93]Pulaşlı, *Şirketler Hukuku Şerhi C.I*, 563-567; Tekinalp, *Sermaye Ortaklıkları*, 687- 689; Sevi, *Özen Yükümlülüğü*, 55.

[94] Pulaşlı, *Şirketler Hukuku Şerhi* C.I, 531; Göktürk, *Şirketler Topluluğu*, 327; Nilsson, *Şirketler Topluluğu*, 429-430; Sevi, *Özen Yükümlülüğü*, 55.

[95]Pulaşlı, *Şirketler Hukuku Şerhi C.I*, 563-567; Tekinalp, *Sermaye Ortaklıkları*, 687-689; Sevi, *Özen Yükümlülüğü*, 55.

[96]Pulaşlı, *Şirketler Hukuku Şerhi C.I*, 563-567; Tekinalp *Sermaye Ortaklıkları*, 687-689; Sevi, *Özen Yükümlülüğü*, 55.

instructions that do not meet the conditions stipulated in Articles 203 and 204 of the TCC. While creditors of the company can certainly serve as plaintiffs, the controlling company, being the issuer of the instruction, cannot act as a plaintiff unless its shares are transferred to third parties. Furthermore, the controlled company itself retains the right to sue the directors under Article 553 of the TCC.

2.2.3.2. Characteristics in Partially-Controlled Companies

In partially controlled companies, where management issues are independent of the controlling company, the directors of the controlling company are liable according to Articles 369 and 553 of the TCC.[97] In such cases where dominance is not exercised, the directors of the controlled companies do not possess unique liabilities or duties of care.

Unlike a fully controlled company, a partially controlled company is not obliged to follow instructions[98] from the controlling company. Additionally, they cannot claim exemption from legal liability even if they do follow such instructions. However, despite these differences, the status of a partially controlled company remains distinct from that of an independent company. In this context, the issue of equivalent claim, as regulated in Article 202 of the TCC, becomes relevant.

As previously discussed, directors of partially controlled companies have the discretion to decide whether to comply with instructions[99] from the controlling company. Therefore, they must carefully consider Article 369 of the TCC when making this decision. In essence, partially controlled companies are obliged to

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[97]Sevi, *Özen Yükümlülüğü*, 58.

[98]Fatma Beril Özcanlı, *Şirketler Topluluğunda Hâkimiyetin Hukuka Aykırı Kullanılması*, İstanbul: Onikilevha Yayınları, 2021, ;Yalın Aydın, *Bağlı Şirket*, 107; Sevi, *Özen Yükümlülüğü*, 59.

[99]Okutan Nilsson, *Şirketler Topluluğu*, 368; Ünal Tekinalp, Bağlı Yönetim Kurulunun "Kayıp İle" İlgili Sorumluluğu, *Prof Dr. Hamdi Yasaman'a Armağan*, İstanbul: Onikilevha Yayıncılık, 2017, 615; Sevi, *Özen Yükümlülüğü*, 59.

scrutinize instructions in terms of their duty of care. If, as prudent directors, they determine that following the instruction will not result in any loss for the partially controlled company, then adhering to it typically does not incur legal liability.

In other words, even if executing the instruction from the controlling company results in a loss for the controlled company, as long as the transaction aligns with the duty of care for the directors of the controlled company, they will generally not be held liable under Articles 369 and 553 of the TCC. This is because Article 202/d of the TCC stipulates that directors who can demonstrate they acted prudently while carrying out the instruction will not be held liable.

If the action undertaken by the partially-controlled company violates the duty of care and results in a loss for the company, the suitability of the resulting loss for the equivalent claim will be examined.[100] The equivalent claim can only be pursued when permitted by the TCC.[101]

According to Article 202/1-a of the TCC, it should be noted that the equivalent claim cannot be sought if the transaction overseen by the controlling company results in a loss for third parties that is not attributable to the controlled company. Furthermore, if the managed transaction is not in the best interest of the group but benefits third parties instead, the equivalent claim cannot be pursued.[102] Additionally, if it is impossible to quantify the loss incurred by the controlled company and the equivalent claim, then it cannot be sought.[103] Article 204 of the TCC, as mentioned earlier, also applies to partially controlled companies.[104]

If the law does not permit an equivalent claim, directors of the partially controlled company must refrain from carrying out the relevant instructions. Failure to do so will render them liable for implementing such instructions. If an equivalent claim is

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[100]Okutan Nilsson, *Şirketler Topluluğu*, 371; Göktürk, *Şirketler Topluluğu*, 313-314.

[101]Okutan Nilsson, *Şirketler Topluluğu*, 371; Göktürk, *Şirketler Topluluğu*, 313-314; Sevi, *Özen Yükümlülüğü*, 62.

[102] Göktürk, *Şirketler Topluluğu*, 313-314.

[103] Sevi, *Özen Yükümlülüğü*, 62.

[104] Murat Can Atakan, *Şirketler Topluluğunda Hakimiyet*, İstanbul: Aristo Yayınevi, 2021, 303.

permissible under the law, the directors of the controlled company may pursue it against the controlling company. However, if adequate compensation cannot be obtained or an equivalent claim right is not provided, Article 202/1-b grants every shareholder of the controlled company the right to demand action[105] from the controlling firm and its members of BoD.

2.2.4. Characteristics of the Duty of Care of Independent Members of BoD

The definition of independent members of BoD is stipulated in Article 360 of the TCC.[106] Article 360/1 of the TCC specifies that, if provided for in the articles of association, certain classes of shares, specific shareholders, or the minority shareholders may have representation on the board. The articles of association may mandate that members of BoD be elected from these specific groups, and they may also have the right to nominate candidates for the board.

Unless there is a valid reason, the general assembly must elect a board member nominated by a specific class or the minority. In publicly held joint-stock companies, the number of members elected through this method cannot exceed half of the total members of BoD. Additionally, Article 17 of the CML and CCC also address this matter.

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[105] Okutan Nilsson, *Şirketler Topluluğu*, 360; Göktürk, Şirketler Topluluğu, 313-314; Atakan, 300.

[106] Hatice Kübra Kandemir, "Kurumsal Yönetim Aracı Olarak Bağımsız Yönetim Kurulu Üyeliği: Tam Bağımsızlık Mümkün Mü?", YBHD, *Y.2020 V.5 N.2 p.(435-472)*, https://dergipark.org.tr/en/download/article-file/1230920 , 443, (accessed at 10.01.2024); Sevi, *Özen Yükümlülüğü*, 65.

It is well-known that independent members of the BoD are subject to the same principles regarding the duty of care.[107] In this regard, independent members of BoD[108] are required to fulfill their duties in accordance with Article 369 of the TCC. When determining the duty of care for independent members of BoD, an objective criterion is utilized, which is determined based on the specific duties assigned to them.

According to principle 4.3.6 of the CCC, independent members of BoD must possess the necessary professional knowledge, experience, and ethical standards to effectively carry out their duties.[109] They must also demonstrate impartiality in conflicts between the company and shareholders and contribute to collective decision-making. Additionally, in certain instances, the duty of care expected from independent members of BoD may exceed that of other directors, particularly when they play a significant role in decision-making processes.[110]

2.2.5. Characteristics of the Duty of Care of the Chairman and Vice Chairman of the BoD

In accordance with Article 366/1 of the TCC, the BoD is required to appoint a chairman and at least one vice-chairman to act on behalf of the chairman in his/her absence.[111] Despite being subject to the same duty of care as other members of BoD[112], the chairman and vice-chairman carry additional responsibilities outlined in the

[107]Ayşe Odman Boztosun, *Hukuksal Açıdan Bağımsız Yönetim Kurulu Üyeliği*, Ankara: Seçkin Yayınları, 2013, 131-132; Korkut Özkorkut, *Bağımsız Yönetim Kurulu Üyeleri*, Ankara: Bankacılık Enstitüsü, 2007, 162; Çağlar Manavgat, "Bağımsız Yönetim Kurulu Üyelerinin İşlevleri ve Sahip Olması Gereken Nitelikler," *BATİDER Y.2014, V..30. N.1, p. (33-75),* 37; Sevi, *Özen Yükümlülüğü*, 67.

[108] Odman Boztosun, 131-132; Sevi, *Özen Yükümlülüğü*, 67.

[109] Manavgat, "Bağımsız Yönetim Kurulu", 55 etc; Sevi, *Özen Yükümlülüğü*, 67-68.

[110] Sevi, *Özen Yükümlülüğü*, 68.

[111] Akdağ Güney, *Yönetim Kurulu*, 78-81.

[112] Akdağ Güney, *Yönetim Kurulu*, 78-81; Sevi, *Özen Yükümlülüğü*, 68-69.

TCC[113], which elevate their level of duty of care. Specifically, the chairman and vice-chairman, in the absence of the chairman, are mandated to convene board meetings and ensure that every board member has access to necessary information.[114] These obligations extend beyond the ones mentioned above.

Furthermore, scholarly discourse[115] has addressed the duty of care of the chairman and vice-chairman. In instances where these officials hold more decisive roles, their duty of care is perceived to be weightier compared to that of other members of BoD.[116] We concur with this perspective, as their increased role in decision-making necessitates heightened accountability.

2.2.6. Characteristics of the Duty of Care in Joint Stock Companies with Sole Shareholder

According to Article 338 of the TCC[117], solely a shareholder of the company could also be the sole board member of the company pursuant to legal regulations. However, even though the shareholder and board member of the company are the same person, since the company has a distinct legal entity, the board member is still liable to the company in accordance with Article 369 of the TCC.[118] Additionally, legal liability in accordance with Article 553 of the TCC still persists.

2.3. Third Persons in Charge of Management

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[113] Pulaşlı, *Şirketler Hukuku Şerhi C.II*, 1575; Akdağ Güney, *Yönetim Kurulu*, 78-81; Sevi, *Özen Yükümlülüğü*, 69.

[114] Metin Kıratlı, *Yönetim Kurulu Başkanı*, Ankara: Yetkin Yayınları, 2021, 61 and etc.

[115] Akdağ Güney, *Yönetim Kurulu*, 317.

[116] Akdağ Güney, *Yönetim Kurulu*, 317; Sevi, *Özen Yükümlülüğü*, 69-70.

[117] Sevi, *Özen Yükümlülüğü*,.70-71.

[118] Pulaşlı, *Şirketler Hukuku Şerhi C.II*, 1575; Akdağ Güney, *Yönetim Kurulu*, 78-81.

2.3.1. General Overview

As there is no explicit definition in the TCC concerning the third person in charge of management[119], it is worth noting that the term "director" is often used instead. Upon examining the legislative reasoning behind this, it becomes evident that lawmakers intentionally distinguish between members of BoD and directors to underscore the significance of transferring management authority.[120] In essence, the term "third person in charge of management" is used interchangeably with "director" by lawmakers, encompassing individuals to whom management authority has been delegated.[121]

The term "director" is employed with varying interpretations across different articles of the TCC in accordance with company law.[122] For instance, in several articles, it refers to a third person tasked with administrative duties in company management.[123] This usage can be observed in Article 392 concerning the right to information and inspection, Article 400 regarding eligibility for election as an auditor, and Article 552 pertaining to fundraising from the public.[124] Additionally, beyond these instances, the term "director" serves as the "subject and bearer of liability" as outlined in Article 424 and 553[125] of the TCC.

As explained earlier, it is crucial to scrutinize the conditions of legal liability, such as fault and the breach of the articles of association or law, in determining whether the

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[119] For the jusitification of TCC: https://www.lexpera.com.tr/mevzuat/gerekceler/turk-ticaret-kanunu-madde-gerekceleri/1 , accessed at 07.03.2023.

[120] For the jusitification of TCC: https://www.lexpera.com.tr/mevzuat/gerekceler/turk-ticaret-kanunu-madde-gerekceleri/1 , accessed at 07.03.2023; Sevi, Özen Yükümlülüğü, 71.

[121] Pulaşlı, *Şirketler Hukuku Şerhi C. IV*, 1284; Sevi, Özen Yükümlülüğü, 71.

[122] Veliye Yanlı, "Şirkete Verilen Zarar Sebebiyle Sorumluluk Bağlamında "Yönetici" Kavramı ve Genel Kurul Kararlarının Geçerliliği Sorunu", *Terazi Hukuk Dergisi Y.2019 V.14 N. 151 p. (46-57)*, 49.

[123] Pulaşlı, *Şirketler Hukuku Şerhi C. IV*, 2824; Sevi, *Özen Yükümlülüğü*, 71-72.

[124] Sevi, *Özen Yükümlülüğü*, 72.

[125] Sevi, *Özen Yükümlülüğü*, 72.

duty of care[126] has been fulfilled. This underscores a significant correlation between Articles 369 and 553 of the TCC. Consequently, those subject to the duty of care align with those subject to legal liability.[127] Moreover, it is widely accepted in doctrine that the term "third person in charge of management" in Article 369 of the TCC and the term "directors" in Article 553 of the TCC carry identical meanings.[128] Therefore, we concur with the viewpoint asserting the equivalence of these terms.

2.3.2. Examination of Third Persons in Charge of Management

2.3.2.1. Third Parties to Whom Management or Representation Authority Has Been Transferred

As is commonly understood, joint stock companies are governed and represented by a BoD to fulfill the company's founding objectives. In addition to their inherent and essential responsibilities, the BoD has the authority to delegate management, either partially or entirely, to one or more members of BoD or third parties, as outlined in Article 367 of the TCC. Therefore, according to Article 367, such delegation can occur following the regulations set forth in the company's articles of association and internal directives.

As mentioned earlier, if the delegation is specified in the articles of association and internal directives, in addition to their inherent and essential obligations, the authorization for management delegation is permissible.[129] However, this raises a significant question regarding how the duty of care outlined in Article 369 of the

[126] Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 656-657.

[127] Sevi, *Özen Yükümlülüğü*, 72.

[128]Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 655; Hacımahmutoğlu, "Özen Yükümlülüğü" , 29; Sevi, *Özen Yükümlülüğü*, 72-73.

[129]Tekinalp, *Sermaye Ortaklıkları*, 253; Bahtiyar, 196; Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 604.

TCC[130] will be impacted by such delegation. Generally, it is doctrinally accepted that those delegated authority under Article 367 of the TCC are also bound by the duty of care stipulated in Article 369 of the TCC.

When the BoD[131] transfers management authority in accordance with TCC 367 and the internal directive, it's important to note that this delegation involves not only top-level directors but also lower-level directors. As a result, it cannot be definitively stated that those assigned in accordance with the internal directive are directly subject to the duty of care outlined in Article 369 of the TCC.

As previously mentioned, the concept of third parties in charge of management as outlined in Article 369 of the TCC corresponds to the concept of directors as defined in Article 553 of the TCC. Therefore, it is essential to assess the functional role to ascertain whether the appointed director aligns with the third parties in charge of management as per Article 369.

In this context, for third parties to qualify as being in charge of management under TCC 367, they must possess the ability to autonomously make critical strategic decisions regarding the company's management and exert a significant impact on the company's direction and operations through the authority delegated to them. Failure to meet these criteria would render them ineligible to be considered third parties in charge of management under Article 369 of the TCC, thereby subjecting them to liability under general provisions.

2.3.2.2. Commercial Representatives and Commercial Agents

Joint stock companies are entitled to designate commercial representatives and commercial agents to facilitate the operations pertinent to the company's business

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[130]Tekinalp, *Sermaye Ortaklıkları*, 253- 257; Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 655.

[131] Sevi, *Özen Yükümlülüğü*, 87.

scope.[132] As per Article 368 of the TCC, the board of the company holds the authority to appoint commercial representatives and commercial agents.[133] Unlike Article 367 of the TCC[134], which allows for provisions concerning interior directives, this provision operates independently and does not require supplementary regulations regarding internal directives.

To ascertain whether commercial representatives and commercial agents are subject to the duty of care stipulated in Article 369 of the TCC, it is important to evaluate their capacity to independently make significant strategic decisions regarding the management of the company and substantially influence its course and activities with the authority granted to them.[135]

In simpler terms, if the commercial agent or commercial representative possesses the authority akin to a functional body within the company, they will be held accountable to the duty of care outlined in Article 369 of the TCC. Conversely, if they do not hold such authority, they will only be required to adhere to general provisions.

2.3.2.3. De Facto Bodies of Companies

In both Turkish law and comparative law, individuals who effectively wield authority over the management of a company and thus share the same liability as the legally recognized leadership are termed "de facto bodies[136]". Similarly, there exists the

[132]Sabih Arkan, *Ticari İşletme Hukuku Son Değişikliklere Göre Hazırlanmış 29th Edition*, Ankara: Banka ve Ticaret Hukuku Araştırma Enstitüsü, 2023, 190; Mehmet Bahtiyar, Ali Ayli, Mehmet F. Şua and Argun Karamanlıoğlu, *Ticari İşletme Hukuku*, İstanbul: Beta Yayınları 2022, 274.

[133] Arkan, 190; Bahtiyar, Ayli, Şua and Karamanlıoğlu, 274.

[134] Arkan, 190; Bahtiyar, Ayli, Şua and Karamanlıoğlu, 274; Kırca, Şehirali and Manavgat, *Anonim Şirketleri*, 630.

[135] Sevi, *Özen Yükümlülüğü*, 94-98.

[136]Cafer Eminoğlu, *Anonim Şirket Özelinde Fiili Yönetim Organı*, Ankara: Adalet Yayınları, 2023, 39; Mithat Yusuf Akın and Özge Kuru, "Anonim Şirketlerde Fiili Organın Temsil Yetkisinin Varlığı

concept of "de facto members of BoD[137]," who, despite lacking legal membership status, exercise the authority of members of BoD. These de facto members can influence company operations directly or indirectly through members of BoD or directors.[138] Consequently, individuals such as directors or company employees who significantly impact company affairs by either exceeding their legal authority or operating without it altogether are held accountable as de facto bodies of the company.[139] As such, these relevant de facto bodies are also bound by the duty of care outlined in Article 369 of the TCC.

Moreover, even if they are not officially directors or employees of the company, shareholders or stakeholders who wield significant influence over the decisions of the BoD or other directors through instructions are still held accountable under the duty of care outlined in Article 369 of the TCC and the legal liability stipulated in Article 553 of the TCC.[140]

2.3.2.4. Trustees

It is known that trustees can be appointed to companies by the court or in various situations as required by law. Since the duties and powers of the trustee, determined by law or by the court, require making decisions independently on behalf of the company, the trustee has a body qualification. Hence, due to having a body

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Sorunu İsviçre Federal Mahkemesinin 9 Ekim 2019 Tarihli Kararı Çerçevesinde Bir Değerlendirme (BGE 146 III 37)", *İstanbul Aydın Üniversitesi Hukuk Fakültesi Dergisi Y.2022, V. 8 N. 1, p. (17-42), ,* https://dergipark.org.tr/tr/pub/iauhfd/issue/72628/1131166, 24, (accessed at 10.01.2024); Tekinalp, *Sermaye Ortaklıkları*, 222; Akdağ Güney, *Yönetim Kurulu*, 356; Pulaşlı, *Şirketler Hukuku C.II*, Ankara, 1266.

[137]Eminoğlu, *Fiili Yönetim Organı*, 39; Tekinalp, *Sermaye Ortaklıkları*, 222; Akdağ Güney, *Yönetim Kurulu*, 356; Sevi, *Özen Yükümlülüğü*, 99.

[138] Akdağ Güney, *Yönetim Kurulu*, 361.

[139] Sevi, *Özen Yükümlülüğü*, 100.

[140] Yağız K. Sekban, *Anonim Ortaklıkta Fiili Organ*, İstanbul: Vedat Kitapçılık, 2022, 95; Sevi, Özen Yükümlülüğü, 100.

qualification[141], they could be evaluated as third parties in charge of the management and they have to comply with the duty of care in their duties in accordance with Article 369 of TCC.[142] They also have legal liability according to Article 553 of TCC.

2.3.2.5. Liquidators

Article 542/1-e of the TCC stipulates the obligations of liquidators, stating that they must take necessary precautions to protect the assets and rights of the company and complete the liquidation process promptly, as expected from a cautious director. This provision aligns with Article 369 of the TCC. However, although the source of the duty of care for the liquidators seems to be Article 542/1-e of the TCC, they are also subject to the duty of care according to Article 369 of the TCC, as they are formal bodies and third parties in charge of the management. Therefore, they also have legal liability according to Article 553 of the TCC.

2.4. Evaluation of the Duty of Care as to Time

2.4.1. General Overview

According to Article 369 of the TCC, it is crucial to determine the commencement[143] and cessation of the duty of care of directors subject to such duty to establish the temporal application. Therefore, this section of the study examines the initiation and

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[141] Tekinalp, *Sermaye Ortaklıkları*, 216; Sevi, *Özen Yükümlülüğü*, 115.

[142] Özge Ayan, *Anonim Şirket Yönetim Kurulu Üyelerinin Sadakat Yükümlülüğü ve Bu Yükümlülüğü İhlalin Sonuçları*, Ankara: Adalet Yayınları, 2021, 118; Sevi, *Özen Yükümlülüğü,* 115.

[143] Pulaşlı, *Şirketler Hukuku C.II,* Ankara, 1560-1561; Akdağ Güney, *Yönetim Kurulu*, 196; Sevi, *Özen Yükümlülüğü*, 118.

conclusion of the obligation of care for the BoD and other relevant parties responsible for management, as outlined in Article 369 of the TCC.

2.4.2. Beginning Period of the Duty of Care

Initially, for members of BoD, the rights and obligations commence upon their membership in the BoD, as stipulated in Article 359 and Article 363 of the TCC. The same principle applies to the duty of care under Article 369 of the TCC.[144] However, it is pertinent to note the following: an individual appointed or elected as a BoD member assumes this duty[145] upon acceptance, which could be explicit or implicit. Registration in the trade registry serves an explanatory purpose.[146]

Furthermore, before joining the BoD, individuals may engage in negotiations with regard to the duties they will undertake. However, during this period, it is imperative for the individual to withhold any critical information that could potentially harm the company.[147] This principle is derived from general provisions. It is significant to note that Article 369 of the TCC cannot be applied prior to assuming the role of a board member.[148]

Furthermore, the situation regarding the invalidation of election decisions made by BoD members should also be evaluated. In doctrine, it is accepted that since the decision becomes invalid, the individual in question cannot remain a member of the BoD and thus would not be subject to Article 369 of the TCC as a BoD member.[149] However, some opinions argue that they could still be subject to Article 369 of the

[144] Ayan, *Sadakat Yükümlülüğü*, 118.

[145] Akdağ Güney, *Yönetim Kurulu*, 196; Sevi, *Özen Yükümlülüğü*, 118-119.

[146] Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 452; Akdağ Güney, *Yönetim Kurulu*, 20.

[147] Sevi, *Özen Yükümlülüğü*, 119.

[148] Pulaşlı, *Şirketler Hukuku C.II,* Ankara, 1560-1561; Akdağ Güney, *Yönetim Kurulu*, 196; Sevi, *Özen Yükümlülüğü*, 119-120.

[149] Sevi, *Özen Yükümlülüğü*, 121.

TCC as third parties responsible for management. We also align with this perspective, provided the individual in question acknowledges their duty as a company director.

Another important issue is when the first violation by both members of BoD and third parties responsible for management will be recognized. One viewpoint suggests it occurs with the first instance of violating the "principle of the cautious director," while another viewpoint suggests it is realized upon accepting the duty without possessing the relevant qualifications.[150] Since accepting the duty without the necessary qualifications could be deemed behavior contrary to the "principle of the cautious director," we endorse the latter opinion.

In addition, regarding third parties responsible for management, the same procedure applies as with the BoD, except for the de facto body. Their obligation commences upon accepting the duty. However, for the de facto body, the duty of care begins upon engaging in an activity that qualifies them as a body.

2.4.3. Ending Period of the Duty of Care

For the BoD, termination of membership primarily occurs due to the expiration of the term, inability to be re-elected, dismissal by the general assembly, loss of membership eligibility conditions, resignation, or death.[151] As previously mentioned, registration in the trade registry serves an explanatory purpose.

Furthermore, with the termination of BoD membership, the rights and obligations of members of BoD, including the duty of care as per Article 369, terminate.[152] Additionally, legal liability under Article 553 ceases. Similarly, the same procedure applies to third parties responsible for management. Therefore, upon termination of directorship, the rights, obligations, and duty of care as per Article 369 also cease for

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[150] Akdağ Güney, *Yönetim Kurulu*, 196-197.

[151] Kırca, Şehirali ve Manavgat, *Anonim Şirketler*, 458; Akdağ Güney, *Yönetim Kurulu*, 56; Sevi, *Özen Yükümlülüğü*, 123.

[152] Ayan, *Sadakat Yükümlülüğü* ,118; Sevi, *Özen Yükümlülüğü*, 123.

directors. As for the de facto body, the relevant obligation terminates when the relevant activity ceases.

As previously discussed, the duty of care serves as a supplementary obligation that accompanies the primary performance obligation of the BoD and other directors, ensuring its proper execution.

Consequently, given the inherent connection between the directors' duty of care and their primary performance obligation, they incur responsibility to the company's legal entity for any actions that contravene the duty of care. In simpler terms, members of BoD or other directors are accountable to the company for breaching the duty of care outlined in Article 369 of the TCC.

2.5. Joint Stock Company as the Incumbent of the Duty of Care

As explained earlier, the duty of care functions as an ancillary obligation, complementing the primary performance duties of the BoD and other corporate officers, and ensuring their proper execution. Consequently, given the intrinsic link between the duty of care[153] and the primary obligations of directors, they bear liability to the corporate entity for any actions contravening the duty of care. In other words, members of the board or other corporate directors are accountable to the company for breaches of the duty of care delineated in Article 369 of the TCC.

3. SUBJECT OF THE DUTY OF CARE AND CRITERIA REGARDING THE DUTY OF CARE

3.1. General Overview

[153] Sevi, *Özen Yükümlülüğü*, 116-117.

As explained in the legal nature of the duty of care of the directors, the duty of care could be defined as a secondary obligation that facilitates main performances, such as complying with the rules stipulated in the articles of association and the law, to be executed more effectively. In other words, the objective of the duty of care is to enhance the work performance of the BoD and other directors. In this context, it could be stated that members of the BoD and other directors[154] must exhibit behaviors that they consider necessary, based on their knowledge and experience, to effectively address the current business matters of the company.[155]

In accordance with TCC Article 374, members of BoD of the company are authorized to implement any operations and transactions necessary to achieve the business objectives of the company, provided that the relevant operation or transaction does not fall under the duty of the general assembly of the company. However, they must execute relevant operations or transactions while adhering to the duty of care stipulated in Article 369 of the TCC.

Additionally, the aforementioned duty of care encompasses the tasks performed by the members of the BoD or other directors in compliance with the law and the articles of association, as well as the tasks performed within the scope of discretion. Therefore, the criterion of objective care is significant in this context.[156]

Furthermore, as explained above, third parties in charge of management are also obliged to comply with the duty of care in accordance with Article 369 of the TCC. However, the aforementioned duty of care solely applies to third parties in charge of management when they undertake operations or transactions related to the management of the company.[157] Apart from this, they are liable to the company in accordance with general provisions.

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[154] Gümüş, *Özen Borcu*, .142.

[155] Aral ve Ayrancı, *Borçlar Hukuku Özel İlişkileri*, 462; Sevi, *Özen Yükümlülüğü*, 130.

[156] İsmail Kırca, "Anonim Şirket Yönetim Kurulu Kararlarında Takdir Yetkisi-Özen Borcu," *BATİDER Y. 2004, V. 22, N. 3, p. (85-98)*, 85; Sevi, *Özen Yükümlülüğü*, 131.

[157] Sevi, *Özen Yükümlülüğü,* 131.

It is beyond the scope of this study to examine the duty of care of the BoD or other directors of the joint-stock company to the company in terms of each task. Therefore, the duty of care in certain tasks will be referred to as an example below.

3.2. Acceptance of the Duty of Care

The duty of care for members of BoD and other directors begins with the acceptance of their duty, as explained above. Therefore, since the criterion stipulated in Article 369 of the TCC is objective, relevant members of BoD or directors must have the knowledge and experience necessary to fulfill their duties.[158] In this context, there has been a discussion in doctrine about whether accepting the duty constitutes a violation of the duty of care, in cases where the relevant person is not suitable to be a board member or director.[159]

Regarding real persons, some opinions in doctrine argue that not having the knowledge and experience to fulfill the duty properly, without a specific event, cannot be considered a violation of the duty of care.[160] However, according to the prevailing opinion in doctrine, accepting the duty even when a board member lacks the necessary knowledge and experience will be deemed a violation of the duty of care.[161]

As a consequence, the relevant person is obliged to decline the duty if they do not meet the required knowledge and experience standards. However, it is important to note that individuals who do not meet the standards outlined in Article 363/2 of the TCC are not within the scope of this discussion. Moreover, some authors directly connect this issue

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[158] Akdağ Güney, *Yönetim Kurulu*, 193; Sevi, *Özen Yükümlülüğü*, 132.

[159] Pulaşlı, *Şirketler Hukuku C.II*, 1560-1561; Akdağ Güney, *Yönetim Kurulu*, 196-197; Sevi, Özen Yükümlülüğü, 132.

[160] Ünal Tekinalp, *Fondaki Bankanın Hukuku*, İstanbul: Lebib Yalkın Yayınları, 2003, 78-79; Ayhan Kortunay, *6102 Sayılı Türk Ticaret Kanununa Göre Anonim Şirketlerde Yönetim Kurulu ve Üyelerin Bilgi Alma Hakkı,* İstanbul: Onikilevha Yayınları, 2015, 198.

[161] Pulaşlı, *Şirketler Hukuku C. II*, 1447; Akdağ Güney, *Yönetim Kurulu*, 196, 197; Sevi, *Özen Yükümlülüğü*, 133.

with legal liability.[162] In order to discuss legal liability according to Article 553 of the TCC, there must be tangible harm or damage. Since the mere acceptance of duty does not cause any damage by itself, the duty of care cannot be discussed in this particular situation.

It can be argued that although there is a connection between Article 553 and Article 369 of the TCC, they are not identical. Therefore, it is not necessary for damage to occur in order to establish a violation of the duty of care. Additionally, in my opinion, it can be stated that the relevant person is obliged to decline the duty if they do not meet the required knowledge and experience standards.[163]

For legal entities, it is not possible to assert that a board member or director of a legal entity must possess knowledge and experience to fulfill their duties, as a legal entity is not a real person. However, it is reasonable to expect that a representative appointed by the relevant legal entity, who is a real person, has the necessary knowledge and experience to carry out the duties.[164]

3.3. Duty of Care in the Process of Decision-Making

Members of the board exercise their powers by making decisions in principle.[165] These decisions can be made in two different ways: through written decisions made without meetings and decisions made during meetings.[166]

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[162] Sevi, *Özen Yükümlülüğü*, 134.

[163] Tekinalp, *Ortaklıklar Hukuku C. I,* 422; Pulaşlı, *Şirketler Hukuku C.II,* 1560-1561.

[164] Tekinalp, *Ortaklıklar Hukuku C. I,* 419-420; Pulaşlı, *Şirketler Hukuku C.II*, 1560-1561.

[165] Akdağ Güney, *Yönetim Kurulu*, 247; Pulaşlı *Şirketler Hukuku C. II*., 1312; Members of BoD cannot give decisions regarding matters that they have delegated other than their inherent powers.

[166] Hülya Çoştan, "Yönetim Kurulunun Karar Alma Usulleri, Oy Hakkı, Yetersayılar ve Toplantı Talep Hakkı", *BATİDER Y. 2012 V. 28 N.3 p. (155-190),* 155-156; Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 481.

In cases where the BoD comprises more than one person, it is crucial to hold a meeting. This is because during these meetings, BoD members exchange information and engage in discussions regarding the decisions[167] to be made. Therefore, even though it is possible to make decisions without holding a meeting, it is essential to prioritize conducting meetings to ensure effective communication and collaboration among BoD members.

Attending board meetings is not only a right but also an obligation as stipulated in Article 369 of the TCC.[168] Moreover, this obligation extends beyond simply voting and encompasses responsibilities such as preparing for the topics to be discussed before the meeting and actively participating in the deliberations conducted during the meeting.[169]

Firstly, requesting the chairman to call the board to a meeting on urgent and important issues is a substantial part of this obligation. Inasmuch as Article 392/7 of TCC states any board member has the authorization to request the chairman to call the board to a meeting.[170] In case the chairman is absent, the relevant duty is realized by the deputy of the chairman. Calling the BoD to a meeting by the chairman or his deputy is an obligation as well as a right.[171] The same issue is valid if a member of BoD invites the chairman or his deputy to call a meeting when necessary.

When any of the members of BoD request the chairman or his/her deputy to call a meeting, the chairman or his/her deputy is required to convene a meeting unless the respective board member harbors malicious intent. In case the aforementioned request is rejected without due cause, pursuant to different opinions in the doctrine, either relevant members apply to the court to call a meeting or he/she can call the board to a

[167] Sevi, *Özen Yükümlülüğü*, 137.

[168] Pulaşlı, *Şirketler Hukuku C. II.*, 1312; Çoştan, "Karar Alma Usulleri", 176.

[169] Sevi, *Özen Yükümlülüğü*, 137.

[170] Çoştan "Karar Alma Usulleri", 163.

[171] Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 485.

meeting by himself/herself.[172] According to the opinion that we agree with, the relevant member should, in any case, apply to the court as a requirement of his/her duty of care.[173]

Moreover, it is imperative that members are summoned to the meeting within a reasonable timeframe by either the chairman or his/her deputy.[174] In addition, the chairman or his/her deputy should provide necessary information and documents to members of BoD in advance of the meeting in accordance with their duty of care.[175] Members of BoD must review the pertinent information and documents in accordance with their duty of care. If a member identifies any deficiencies in information or documentation, they are obliged to request it from the chairman or his/her deputy, as outlined by their duty of care.[176]

Secondly, a board member is expected to attend board meetings unless they have valid excuses.[177] Otherwise, it is accepted that the relevant member has violated the duty of care stipulated in Article 369 of the TCC. In addition, the relevant member will be liable in accordance with Article 553 of the TCC for the damage resulting from the decisions made in the meeting that he/she did not attend.[178] Nonetheless, even if a relevant board member has a valid excuse, they should share in advance any thoughts

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[172] Çoştan, "Karar Alma Usulleri", 169; Akdağ Güney, *Yönetim Kurulu*, 249; Pulaşlı, *Şirketler Hukuku C. II*, 1315; Sevi, *Özen Yükümlülüğü*, 139.

[173] Sevi, *Özen Yükümlülüğü*, 139-140

[174] Çoştan, "Karar Alma Usılleri", 174-175; Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 486.

[175] Hasan Pulaşlı, "Yeni Türk Ticaret Kanunu'na Göre Yönetim Kurulu Üyelerinin Bilgi Alma ve İnceleme Hakkı" , *MÜHFHAD Y. 2012 V.18, N.2, p.(587-600)*, 588; Savaş Bozbel, "Anonim Şirket Yönetim Kurulu Üyelerinin Bilgi Alma ve İnceleme Hakkı(6102 Sayılı TTK m.392)", *Antalya Bilim Üniversitesi Hukuk Fakültesi Dergisi, Y. 2013 V.1, N.1 p. (76-96)*, 83; Sevi, *Özen Yükümlülüğü*, 140.

[176] Pulaşlı, *Şirketler Hukuku C. II.*, 1386.

[177] Valid excuses could be exemplified as the death of first-degree relatives, serious illness, being in another place due to a task assigned by the company, and so on.

[178] Pulaşlı, *Şirketler Hukuku C. II.*, 1477; Akdağ Güney, *Yönetim Kurulu*, 324.

and warnings that would be in the interest of the company. Otherwise, they remain subject to accountability.[179]

As there is no prescribed rule regarding adherence to a predetermined agenda in board meetings, individuals unable to attend must request all pertinent information and documents related to the meeting the meeting in accordance with their duty of care.[180] Thirdly, as previously indicated, board meetings serve not only as forums for decision-making but also as platforms for the dissemination of information and deliberation upon decisions.[181] In this regard, each board member is required to actively engage in deliberations and express dissent when a decision is perceived to potentially jeopardize the interests of the company.[182]

The meticulous documentation of all participants' perspectives during meetings is considered essential. If a decision contravenes legal statutes or the company's regulations, a board member is obliged to substantiate that they exerted maximum effort to forestall its enactment, thereby mitigating potential repercussions.[183]

Fourthly, members of BoD are obliged to seek expert opinions when necessary, as the failure to do so may be interpreted as a violation of their duty of care. Since they cannot be experts in every subject matter[184], members of BoD may rely on external expertise. Considering their potential lack of expertise across all domains, failing to seek expert guidance at crucial moments, which leads to consequential damages, may subject members of BoD to liability under Article 553 of the TCC.

Finally, voting represents a crucial aspect for members of BoD. As previously elucidated, voting encompasses not only a privilege but also an imperative duty. In this regard, in instances where a decision runs counter to the company's interests, each board member is compelled to cast a dissenting vote and provide rationale for their

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[179] Akdağ Güney, *Yönetim Kurulu*, 324-325.

[180] Sevi, *Özen Yükümlülüğü*, 143.

[181] Sevi, *Özen Yükümlülüğü*, 144-145

[182] Sevi, *Özen Yükümlülüğü*, 144-145

[183] Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 506.

[184] Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 714.

stance. In case of failure to do so, the member may be held accountable to the company.[185]

3.4. Duty of Care in Determining the Company's Management Organization

A joint-stock company requires a well-structured organization with the requisite competencies to effectively execute its intended business activities.[186] In this regard, there are three main approaches: firstly, members of BoD may choose to retain all powers without delegation; secondly, powers of the board, other than those deemed inalienable, may be distributed among members of BoD as specified in the articles of association; thirdly, in accordance with provisions outlined in the articles of association and internal guidelines, powers of the board, excluding inalienable ones, may be entrusted to professional, expert third parties.[187]

In this regard, it is imperative to establish a robust management structure to effectively conduct the company's operations in a sustainable manner. Indeed, in today's business landscape, managing a company without a well-defined management organization[188] is rendered infeasible. This is only feasible in small companies. Given the complexity and scope of operations in contemporary enterprises, characterized by numerous employees and diverse business endeavors, effective management necessitates a robust organizational structure. Such a structure is indispensable in fulfilling the duty of care incumbent upon corporate governance.

Consequently, the establishment of the management organization constitutes one of the inherent powers vested in the BoD, as delineated in Article 375/1-b of the TCC. Accordingly, both the board as an entity and individual members of BoD are bound by

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[185] Sevi, *Özen Yükümlülüğü*, 151.

[186] Pulaşlı, *Şirketler Hukuku C. II.*, 1563; Sevi, *Özen Yükümlülüğü*, 152.

[187] Pulaşlı, *Şirketler Hukuku C. II.*, 1563; Sevi, *Özen Yükümlülüğü*, 152.

[188] Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 546; Pulaşlı, *Şirketler Hukuku C II.*, 1449

the duty of care outlined in Article 369 of the TCC while undertaking the process of determining the management organization.

3.5. Other Areas

As previously discussed, all actions undertaken by members of the BoD and other directors on behalf of the company fall within the purview of the duty of care as outlined in Article 369 of the TCC. Given the breadth of responsibilities entrusted to BoD members of joint-stock companies, it is beyond the scope of this study to comprehensively examine their duty of care with regard to each task. Therefore, our focus will be narrowed to three specific areas mentioned earlier.

Furthermore, it is essential to emphasize that members of BoD and other directors are obliged to take necessary precautions in the event of the company's financial deterioration, in accordance with Article 369 of the TCC. Additionally, it is noteworthy that the duty of care stipulated in Article 369 of the TCC extends to the selection of business partners by members of BoD or other directors. Moreover, it is important to highlight that members of BoD and other directors must demonstrate the duty of care outlined in Article 369 of the TCC in enacting decisions made by the company's general assembly.[189]

3.6. Criteria Regarding the Duty of Care

3.6.1. General Overview

The criterion pertaining to the duty of care plays a pivotal role in evaluating the alignment of members of BoD' actions with the provisions of Article 369[190], thus

[189] Sevi, *Özen Yükümlülüğü*, 193-199.

[190] Pulaşlı, *Şirketler Hukuku C. II.*, 1585; Sevi, *Özen Yükümlülüğü*, 199.

constituting a cornerstone of the duty of care framework. Adherence to the relevant criterion indicates the fulfillment of the duty of care by a board member or director.

As a general rule, the objective criterion is typically considered in determining the criteria related to the duty of care, according to doctrine.[191] In such contexts, members of BoD or directors may be held accountable to the company for instances of both negligence and intention.[192] Judicial scrutiny in such cases typically involves an assessment of whether negligence occurred and whether the objective duty of care was observed, as delineated in Article 557 of the TCC.

3.6.2. Subjective Criterion

Company law delineates two distinct types of criteria, one of which is known as the subjective criterion, contingent upon an individual's inherent characteristics. This criterion finds frequent application in ordinary partnerships.[193] Under the subjective criterion, a board member or director is only deemed liable if they neglect to fulfill the expected standard of care, irrespective of their earnest endeavors.

In other words, liability does not arise if the individual, despite exerting their utmost efforts, fails to meet their responsibilities. Owing to the significant influence of individuals' inherent traits in the subjective criterion, it is generally considered as less stringent than the objective criterion.[194]

However, the subjective criterion is not applied to the duty of care of the members of BoD and other directors as per Article 369 of the TCC.[195] Although the normative framework generally dictates the duty of care[196] for members of BoD of joint-stock

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[191] Akdağ Güney, *Yönetim Kurulu*, 188; Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 657.

[192] Sevi, *Özen Yükümlülüğü*, 199.

[193] Poroy, Tekinalp and Çamoğlu, *Ortaklıklar ve Kooperatifler*, 67.

[194] Poroy, Tekinalp and Çamoğlu, *Ortaklıklar ve Kooperatifler*, 67 ; Sevi, *Özen Yükümlülüğü*, 200.

[195] Sevi, *Özen Yükümlülüğü*, 200-201.

[196] Sevi, *Özen Yükümlülüğü*, 202.

companies based on objective standards, there are scenarios where imposing such standards may be impractical. In such exceptional circumstances, the subjective duty of care might warrant consideration.

3.6.3. Objective Criterion

The objective duty of care entails the level of care that an ordinary individual would exhibit under similar circumstances, irrespective of their personal attributes. Individual characteristics hold no significance in assessing fault within this criterion. As a consequence, if the care demonstrated in a specific incident falls below the expected standard for an average person, it signifies a breach of the duty of care.[197] As stated earlier, the objective criterion is applied in assessing the duty of care for members of BoD and other directors as per Article 369 of the TCC.

3.6.4. Objective Criterion in Accordance With Applicable Law

As previously discussed, the criterion regarding the duty of care of members of BoD and other directors is defined as the "cautious director" in Article 369 of the TCC.[198] Consequently, the minimum standard for a director's duty of care is the objective duty of care. This duty of care entails the level of care that an ordinary individual would demonstrate under identical circumstances, irrespective of their personal attributes.

When assessing whether members of BoD adhere to Article 369 of the TCC, the level of care exhibited by the relevant director is compared to that expected from an average

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[197] Pulaşlı, *Şirketler Hukuku C. II.,* 1585; Pulaşlı, *Genel Esaslar*, 434; Akdağ Güney, *Yönetim Kurulu*, 193-194; Sevi, *Özen Yükümlülüğü*, 202.

[198] Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 656-657; Tekinalp, *Sermaye Ortaklıkları*, 287; Pulaşlı, Genel Esaslar, 434; Çebi, 211-212; Bozkurt, 311; Bahtiyar, 210; Akdağ Güney, *Yönetim Kurulu*, 188; Hacımahmutoğlu, "Özen Yükümlülüğü", 21-29.

person in the same situation and conditions.[199] If the level of care demonstrated by the relevant director falls below what an average person would exhibit under the same circumstances, it is deemed that the director has violated Article 369 of the TCC.[200]

In the context of the aforementioned evaluations, it is not expected that a cautious director possesses the same level of expertise as a specialist in any given field.[201] For instance, a cautious director is not required to possess the legal acumen of a lawyer, the technical expertise of an engineer, or the financial knowledge of a financial advisor. However, there exists an exception to this rule.

If the articles of association stipulate that a director must be an expert in a particular field, this may constitute an exception to the aforementioned rule. However, the pertinent director cannot claim that the level of caution required exceeds their capacity to demonstrate, by suggesting that it necessitates a more extensive and challenging action than they are capable of undertaking.[202]

Furthermore, it is imperative to tailor the criterion of the objective duty of care to each board member by considering the specifics of each case.[203] This customization enables the determination of the objective duty of care expected from a hypothetical average board member or director.

Additionally, the relevant director, in fulfilling their obligations as a board member or director, should also take into account their own professional knowledge and qualifications when necessary. In this context, it could be argued that, based on their professional expertise and qualifications, they are required to exercise greater

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[199]Tekinalp, *Sermaye Ortaklıkları*, 287; Pulaşlı, *Genel Esaslar,* 434; Çebi, 211-212; Bozkurt, 311; Bahtiyar, 210; Akdağ Güney, *Yönetim Kurulu*, 188; Hacımahmutoğlu, "Özen Yükümlülüğü", 21-29; Sevi, *Özen Yükümlülüğü*, 213.

[200]Sevi, *Özen Yükümlülüğü*, 213.

[201]Sevi, *Özen Yükümlülüğü*, 215.

[202]Pulaşlı, *Genel Esaslar,* 434-435; Akdağ Güney, *Yönetim Kurulu,* 194-195; Kırca, Şehirali and Manavgat, *Anonim Şirketler,* 622.

[203]Pulaşlı, *Şirketler Hukuku C. II*. 1457; Akdağ Güney, *Yönetim Kurulu,*.193; Sevi, *Özen Yükümlülüğü*, 216.

diligence than an average prudent director. Otherwise, it is acknowledged that the relevant director would be deemed to have contravened Article 369 of the TCC.

Finally, it is crucial to delineate the temporal parameters within which directors are obliged to discharge their duty of care. Within this context, doctrinal discourse posits that directors ought to predicate their decisions on the information and prevailing circumstances existing at the time of action. The expectation for directors or members of BoD to forecast future harm is regarded as impractical and inequitable. Consequently, the discernible knowledge and prevailing circumstances accessible to directors serve as pivotal factors in delineating their objective duty of care.

4. LEGAL CONSEQUENCES OF THE DUTY OF CARE OF THE MEMBERS OF BoD

4.1. Legal Liability

There are legal consequences for members of BoD or directors who violate the duty of care outlined in Article 369 of the TCC. One of the most significant ramifications is the filing of cases based on legal liability.[204] Shareholders, creditors, and other affected parties can seek damages resulting from the actions of the directors. In this context, they have recourse under not only Article 553 of the TCC but also Articles 549-552 and 193 of the same code.[205] The conditions for such legal liability typically involve proving an unlawful act, fault, damage, violation of the law or the articles of association, and establishing a causal link.

Given that Article 553 of the TCC lacks explicit regulations on how legal culpability will be determined in the legal liability of directors, the assessment typically revolves

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[204] Pelin Özçelik, *Anonim Şirketlerde Kuruluştan Doğan Sorumluluk*, Ankara: Seçkin Yayıncılık, 2020, 57-58.

[205] Üstün Köprücü, *Anonim Şirket Yönetim Kurulu Üyelerinin Sorumluluğu Davası*, Ankara: Seçkin Yayıncılık, 2022, 25-28.

around whether the relevant board member/director has adhered to the duties outlined in Article 369 of the TCC.[206] If it is determined that the board member/director in question failed to exercise the requisite level of care mandated by Article 369, they may be deemed to have violated Article 369 of the TCC and held accountable under Article 553 of the same code.[207]

Furthermore, the degree of fault holds no significance in incurring legal liability; even the slightest fault on the part of members of BoD/directors can render them accountable.[208] Nevertheless, in cases involving multiple individuals, each person's fault is assessed separately to determine the extent of compensation, a situation referred to as differentiated succession in legal doctrine.[209] In this regard, Article 557 of the TCC specifies, "*Where more than one person is liable to recoup the same loss, each shall be liable for that loss jointly with the others, to the extent that the loss is personally attributable to him depending on him/her negligence and as the case may be*." Thus, the concept of differentiated succession underscores the importance of assessing the degree of fault in our legal system.

The correlation between the duty of care and the legal culpability of directors extends beyond mere negligence. If directors fail to fulfill their duty of care in managing and representing the company, they may be held legally responsible for violating the law or the articles of association.[210] There exists no distinction between the responsibilities delineated in the Articles of organization and those outlined in the legislation.[211] Consequently, members of BoD and directors are obliged to adhere to the regulations

[206] Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 656-567; Sevi, *Özen Yükümlülüğü*, 226.

[207]Akdağ Güney, *Yönetim Kurulu*, 313 etc; Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 656, 657; Gümüş, *Özen Borcu*, 58.

[208] Hasan Pulaşlı, *Şirketler Hukuku Şerhi C.III. Tamamen Yenilenmiş ve Genişletilmiş 4th Edition*, Ankara: Adalet Yayınevi 2022, 2631; Akdağ Güney, *Yönetim Kurulu*, 312.

[209]Sıtkı Anlam Altay, "Anonim Ortaklıklar Hukukunda Farklılaştırılmış Teselsül", *Terazi Hukuk Dergisi, Y.2019, V. 14, N. 151 p (68-75)*, 72; Sevi, *Özen Yükümlülüğü*, 226-227.

[210] Tekinalp, *Sermaye Ortaklıkları*, 436.

[211] Sevi, *Özen Yükümlülüğü*, 228.

set forth in both the legislation and the articles of association. Failure to comply will result in legal liability, as delineated in Article 553 of the TCC.

Another crucial aspect of legal liability pertains to the resultant damages. While there is no strict rule mandating loss upon violation of the duty of care, the initial repercussion often manifests as a decrease in the company's assets.[212] As a consequence of the actions of members of BoD and directors contravening the duty of care, the company incurs direct losses, while creditors and shareholders suffer indirect damages.[213]

As per Articles 555 and 556 of the TCC, in the event of a company's bankruptcy, creditors, the company itself, and any shareholder possess the right to seek compensation from the responsible board member or director, with the proceeds intended for the company.[214] Moreover, irrespective of the company's incurred losses, any shareholder or creditor reserves the right to initiate legal proceedings against the members of BoD or other directors for the damages they have sustained.[215] Lastly, in discussing legal liability, establishing a causal link between the actions of the directors and the resultant damage is imperative; without this link, legal liability cannot be established.[216]

Another crucial aspect concerning legal liability is the burden of proof. There are two opinions regarding the burden of proof in legal liability.[217] According to one perspective, the plaintiff bears the burden of proof, as per the rule that the claimant must substantiate their claim unless there is a contrary provision in the law.[218] However, another perspective suggests that the burden of proof depends on the legal

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[212] Sevi, *Özen Yükümlülüğü*, 228

[213] Pulaşlı, *Şirketler Hukuku, C. III*., 2565; Akdağ Güney, *Yönetim Kurulu*, 295; Tekinalp, *Sermaye Ortaklıkları*, 444.

[214] Pulaşlı, *Şirketler Hukuku C.III*., 2565; Akdağ Güney, Yönetim Kurulu, 228 and etc; Tekinalp, *Sermaye Ortaklıkları*, 447.

[215] Sevi, *Özen Yükümlülüğü*, 228.

[216] Akdağ Güney, *Yönetim Kurulu*, 306.

[217] Sevi, *Özen Yükümlülüğü*, 233.

[218] Sevi, *Özen Yükümlülüğü*, 233.

basis of the case. In instances where there exists a contractual relationship between the members of BoD and the company, as in cases filed by the company, any shareholder, or creditor, the burden falls on the members of BoD to demonstrate their lack of fault, as outlined in Article 112 of the TCO.[219]

Nonetheless, the burden of proof regarding demonstrating harm and establishing a direct connection rests with the plaintiff. For this reason, we align with the second viewpoint.

4.2. Due Cause for Dismissal of the Members of BoD and the Directors

Another significant consequence of breaching the duty of care is dismissal by the company's general assembly. Dismissing members of BoD is within the inherent authority of the general assembly.[220] In this regard, the general assembly retains the right to dismiss a board member without specifying a reason, provided it is listed on the meeting agenda in adherence to procedural rules.[221]

However, if the dismissal lacks a justifiable cause, the affected members of BoD can seek compensation from the company under Article 364 of the TCC.[222] Nevertheless, if there is a valid excuse for dismissal, adherence to the agenda principle is not

[219] Mehmet Helvacı, "Yönetim Kurulu Üyelerinin Hukuki Sorumluluğunda Farklılaştırılmış Teselsül," *Galatasaray Üniversitesi Hukuk Fakültesi Dergisi Y.2013 N.2 p.(77-97),* https://dosya.gsu.edu.tr/Docs/HukukFakultesi/TR/FakulteDergisi/GUHFD-2013_2.pdf , 80-81, (accessed at: 10.01.2024); Emin Çamurcu, *Anonim Ortaklıklarda Farklılaştırılmış Teselsül İlkesi Uyarınca Yönetim Kurulu Üyelerinin Sorumluluklarının Belirlenmesi*, İstanbul: Onikilevha Yayınları. 2015, 74-79; Akdağ Güney, *Yönetim Kurulu*, 200; Pulaşlı, *Şirketler Hukuku C. II*., 1535.

[220] Tekinalp, *Sermaye Ortaklıkları*, 235; Pulaşlı, *Şirketler Hukuku C. II,* 1249; Akdağ Güney, *Yönetim Kurulu*, 61; Özge Karaege, "Anonim Şirketlerde Genel Kurulun Yönetim Kurulu Üyelerini Görevden Alma (Azil) Yetkisi (TTK m. 364)", *Ankara Barosu Dergisi Y.2014 N..1 p.(69-110),* https://dergipark.org.tr/tr/pub/abd/issue/33815/374453, 73, (accessed at 10.03.2024).

[221] Tekinalp, *Sermaye Ortaklıkları*, 235; Akdağ Güney, *Yönetim Kurulu*, 64-65; Karaege, "Yönetim Kurulu", 77.

[222]Tekinalp, *Sermaye Ortaklıkları*, 235; Karaege, *Yönetim Kurulu*, 90.

necessary.[223] The legislator does not delineate specific justifications for dismissal. Hence, a breach of the duty of care could constitute valid grounds for dismissing a board member.[224]

In this context, consequently, directors who fail to fulfill their obligation regarding the duty of care could be dismissed by the board, irrespective of their agreement with the company.[225]

4.3. Due Cause for Terminating Joint Stock Companies

According to Article 531 of the TCC, minority shareholders have the right to petition the court for the termination of joint stock companies. As per the rationale behind this provision, the grounds for such termination shall be determined by the courts from an equitable perspective.[226] In essence, since Article 531 does not specify the grounds, the courts are tasked with delineating them. One of the circumstances that may constitute grounds for termination is mismanagement of the company.[227]

Mismanagement can be construed as the improper management of the company from an economic standpoint, resulting in adverse effects on the interests of stakeholders and shareholders. It is widely recognized in legal doctrine that mismanagement often stems from a breach of the directors' duty of care.[228] However, given that termination is considered a last resort, other remedies such as liability lawsuits should be pursued

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223 Tekinalp, *Sermaye Ortaklıkları*, 235; Karaege, "Yönetim Kurulu", .80.; Kırca, Şehirali and Manavgat, *Anonim Şirketler*, 459.

224 Sevi, *Özen Yükümlülüğü*, 235.

225 Sevi, *Özen Yükümlülüğü*, 235.

226 Nuri Erdem, *Anonim Ortaklığın Haklı Sebeple Feshi*, İstanbul: Vedat Kitapçılık, 2019, 101-102; Ayşe Şahin, *Anonim Ortaklığın Haklı Sebeple Feshi*, Ankara: Yetkin Yayınları, 2013, 108; Sevi, *Özen Yükümlülüğü*, 236.

227 Tolga Ayoğlu, "Anonim Ortaklıkların Haklı Nedenle Feshi" *GSÜHFD Y. 2013, N. 2 p.(219-252), 228*; Sevi, Özen Yükümlülüğü, 236..

228 Sevi, *Özen Yükümlülüğü*, .236-237.

initially, with termination being the ultimate course of action.[229] Consequently, it can be argued that a breach of the duty of care may serve as grounds for the termination of joint stock companies under certain circumstances.

5. BUSINESS JUDGMENT RULE AND THE DUTY OF CARE

5.1. General Overview

As previously explained, members of BoD and other directors are mandated to adhere to Article 369 of the TCC in their decision-making processes and the execution of transactions. This obligation extends to both internal decisions within the company and external activities, encompassing commercial and industrial endeavors.[230] Despite the meticulousness exercised by company directors, decisions may yield varied outcomes due to the inherent risks associated with business operations and commercial ventures.

If directors were to be held liable for every consequence of their actions, it would stifle risk-taking and promote overly cautious behavior, impeding innovative investments and entrepreneurial initiatives.[231] Such a scenario would not only undermine the company's economic interests but also hinder its growth potential. Hence, the business judgment rule plays a crucial role in fostering a conducive environment for effective decision-making and promoting sustainable business development.

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[229] Sevi, *Özen Yükümlülüğü*, p. 237.

[230] Emrullah Kervankıran, Alman Hukukunda Business Judgment Rule'nin Kodifikasyonu – Türk ve Amerikan Hukuku ile Karşılaştırmalı Bir Değerlendirme, *Prof Dr. Hüseyin Ülgen'e Armağan*, İstanbul: Vedat Kitapçılık, 2007, 249 etc; Pulaşlı, *Şirketler Hukuku C. II.*, 1576; Akdağ Güney, *Yönetim Kurulu*, 189; Sevi, *Özen Yükümlülüğü*, 239-240.

[231] Lori McMillan,. "The Business Judgment Rule As An Immunity Doctrine." *William & Mary Business Law Review, Y.2013 V.4 N.2 p.(521-574),* , https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2266489, 526-527, accessed at 20.05.2023.

The business judgment rule traces its origins back to the nineteenth century in the USA, yet despite its extensive history, it remains one of the least understood regulations in commercial law. Its emergence stemmed from a necessity for greater judicial consensus amidst the evolving landscape of intricate corporate transactions and decisions.[232] According to evolving legal practices, directors of companies are shielded from liability for decisions made in good faith, provided they were sufficiently informed on the matter and acted without conflicts of interest that may compromise the company's interests.[233]

While the business judgment rule has been formalized into law in certain legal systems, it has evolved primarily through judicial precedents in others. Consequently, this study will investigate the implementation of the business judgment rule within the framework of Article 369 of the TCC.

5.2. Application of the Business Judgment Rule in Turkish Law

In Turkish law, there is currently no statutory provision specifically addressing the business judgment rule. Nonetheless, most legal scholars argue for its applicability within the Turkish legal framework. The stance of the Court of Cassation on the business judgment rule remains ambiguous, with the court generally not recognizing its application in most rulings, as explained below.[234] However, scholars contend that

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[232] McMillan, "Business Judgment Rule," 526.

[233] Pulaşlı, *Şirketler Hukuku C. II.*, 1576; Akdağ Güney, *Yönetim Kurulu*, 189; Sevi, *Özen Yükümlülüğü*, 240.

[234] 11th C.C. of Court of Cassation, Case No: 3677 and Decision No: 3733, 17.12.1974 (Göner Eriş, *Açıklamalı-İçtihatlı 6335-6552-6728 Sayılı Kanunlarla Güncellenmiş TTK Hükümlerine Göre Ticari İşletme ve Şirketler*, Ankara: Seçkin Yayınevi, 2017, 1844-1845); 11th C.C. of Court of Cassation, Case No: 3677 and Decision No: 3733, 17.12.1974 (Göner Eriş, *Açıklamalı-İçtihatlı 6335-6552-6728 Sayılı Kanunlarla Güncellenmiş TTK Hükümlerine Göre Ticari İşletme ve Şirketler*, Ankara: Seçkin Yayınevi, 2017, 1844-1845); 11th C.C. of Court of Cassation, Case No: 2016/14540 and Decision No: 2018/7108, 15.11.2018 (www.kazancı.com (accessed at: 18.08.2023)); The Supreme Court Assembly of Civil Chambers, Case No: 2017/11-4 and Decision No: 2017/1051, 31.5.2017 (www.kazancı.com (accesed at: 20.08.2023)).

the business judgment rule should indeed be incorporated into Turkish law when assessing the level of care expected from directors.

The Court of Cassation has yet to establish a definitive position regarding the interplay between the business judgment rule and the duty of care outlined in Article 369 of the TCC.[235] In its treatment of the business judgment rule, the Court of Cassation has issued diverse rulings. In the era predating the repeal of the former TCC, the Court of Cassation relied on the criterion of a "responsible businessman" to ascertain the standard of care. Evaluations of a merchant's conduct were conducted against objective criteria to determine its prudence.

However, the Court of Cassation has occasionally adopted a broader perspective when considering the objective criterion. In this respect, a prudent director is expected to anticipate all potential risks, as per the court's relevant rulings. Therefore, the Court of Cassation primarily evaluates the economic viability of decisions made by the BoD. Within this specific framework, a meticulous analysis is conducted to ascertain whether actions such as contract terminations or other measures taken by the BoD were beneficial for the company.

This evaluation encompasses factors such as the stock value at the time, sales performance, prevailing market conditions, and pricing considerations.[236] In one instance, the Court of Cassation ruled that the nominal value and market price of shares should be assessed through expert examination to determine if shares owned by the company were undersold.[237] This decision indicated that selling shares at a low price could be construed as a breach of the duty of care.

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[235] Pulaşlı, *Şirketler Hukuku C. II.,* 1600; Kürşat Göktürk, "Amerikan, Alman, İsviçre ve Türk Hukukunda İşadamı Kararı İlkesi", *İUHFD Y. 2011, V. 2, N .2 p. (207-247),* 237; Sevi, *Özen Yükümlülüğü,* 284.

[236] 11th C.C. of Court of Cassation, Case No: 3677 and Decision No: 3733, 17.12.1974 (Göner Eriş, *Açıklamalı-İçtihatlı 6335-6552-6728 Sayılı Kanunlarla Güncellenmiş TTK Hükümlerine Göre Ticari İşletme ve Şirketler*, Ankara: Seçkin Yayınevi, 2017, 1844-1845).

[237] 11th C.C. of the Court of Cassation, Case No: 2016/14540 and Decision No: 2018/7108, 15.11.2018 (www.kazancı.com, accessed at: 18.08.2023).

Moreover, in a recent ruling by The Supreme Court Assembly of Civil Chambers, the court scrutinized the economic rationale behind the sale of company-owned real estate.[238] In line with pertinent judgments from both the Court of Cassation and the Supreme Court Assembly of Civil Chambers, directors are expected to anticipate all potential risks and act in the least risky manner for the company's benefit.[239]

However, despite these considerations, there have been rulings by both The Supreme Court Assembly of Civil Chambers and the Court of Cassation that align with the principles of the business judgment rule. For instance, in one such decision, it was asserted that it would be unjust to attribute responsibility to a director solely due to a loss in earnings incurred by the company.[240]

Furthermore, in another ruling, the Supreme Court acknowledged that a director should not be held liable for damages if an expert report was obtained for the purchase of commercial raw materials.[241] Nevertheless, there has yet to be a specific ruling by the Supreme Court addressing the criteria for applying the business judgment rule.[242]

According to the prevailing view in Turkish legal scholarship, directors should not be held accountable for the economic viability of their decisions as long as they demonstrate their utmost effort in making them.[243] In this context, according to *Kırca*, the judge should not examine the economic plausibility of the decisions of the directors

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[238] The Supreme Court Assembly of Civil Chambers, Case No: 2017/11-4 and Decision No: 2017/1051, 31.5.2017 (www.kazancı.com , (accessed at: 20.08.2023)).

[239] Sevi, *Özen Yükümlülüğü*, 287.

[240] 11th C.C. of Court of Cassation, Case No: 2998 and Decision No: 3161 23.05.1986 (Gönen Eriş, *Açıklamalı-İçtihatlı 6335-6552-6728 Sayılı Kanunlarla Güncellenmiş TTK Hükümlerine Göre Ticari İşletme ve Şirketler*, Ankara: Seçkin Yayınevi, 2017, 1847-1848)

[241] 11th C.C. of Court of Cassation, Case No: 1982/3596 and Decision No:1982/3884, 14.10.1982 (www.kazancı.com, (accessed at: 20.08.2023)).

[242] Pulaşlı, *Şirketler Hukuku C. II.,*1600.

[243] Ersin Çamoğlu, *Anonim Ortaklık Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu,* İstanbul: Vedat Kitapçılık 2010, 75; Kırca "Takdir Yetkisi", 88; Tekinalp, *Sermaye Ortaklıkları,* 280; Göktürk, "İş Adamı Kararı", 238; Pulaşlı, *Şirketler Hukuku C. II.,* 1581; Sevi, *Özen Yükümlülüğü,* 288.

in case the decision is made by showing necessary efforts.[244] According to *Pulaşlı*, for the business judgment rule to find an application area, the decision must be taken correctly, consulted with the necessary experts, comply with the articles of association and internal regulations, and the decision makers must be impartial and independent.[245] According to *Göktürk*, Article 369 and Article 553 of TCC do not involve business judgment rule.[246]

However, *Akdağ Güney* believes that the business judgment rule is applicable in Turkish law. He argues that courts should not only consider the formal aspects but also examine the content to determine if decisions were made arbitrarily.[247] According to him, there are no legal barriers to applying the business judgment rule in Turkish law, as long as the decision aligns with imperative legal provisions and the company's articles of association, is in the best interests of the company, and is made by independent and impartial directors.[248]

5.3. Evaluation Regarding the Application of the Business Judgment Rule in Turkish Law

As previously mentioned, Turkish law lacks specific legal provisions regarding the application of the business judgment rule. Furthermore, the Court of Cassation has not issued any explicit rulings specifically addressing the concept of the business judgment rule. As previously noted, the Court of Cassation generally does not endorse the application of the business judgment rule in most of its decisions. Instead, its focus primarily lies in assessing the economic viability of decisions.

However, the predominant view within Turkish legal doctrine strongly advocates for the adoption of the business judgment rule. In my assessment, achieving widespread

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[244] Kırca “Takdir Yetkisi”, 88.

[245] Pulaşlı, *Şirketler Hukuku C. II.,* 1581; Sevi, *Özen Yükümlülüğü,* 290.

[246] Sevi, *Özen Yükümlülüğü,* 290.

[247] Göktürk, “İş Adamı Kararı”, 238-240.

[248] Necla Akdağ Güney, *Anonim Şirket Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu*, İstanbul: Vedat Kitapçılık, 2010, .81-84.

implementation of the business judgment rule may prove challenging under Article 369 and 553 of the TCC. Nonetheless, its applicability may be feasible if the decision in question does not contravene mandatory legal provisions and the articles of association of companies. Moreover, such decisions must be in line with the interests of the company and made by directors who demonstrate independence and impartiality.

SECOND CHAPTER

THE IMPACT OF DIGITALISATION OF COMPANIES TO THE DUTY OF CARE OF DIRECTORS

1. EFFECT OF AI (ARTIFICIAL INTELLIGENCE) TO THE DUTY OF CARE OF DIRECTORS

1.1. Definition of AI

AI should not be evaluated solely within the context of contemporary discussions; its origins can be traced back to the mid-1950s[249], commonly attributed to John McCarthy and Marvin Minsky. However, there is no universally accepted definition of AI.[250]

Therefore, this thesis will explore various definitions of AI. According to the broadest definition, AI is often equated with algorithms.[251] On the contrary, defining AI solely as algorithms is not entirely logical, as the term "algorithm" is commonly used beyond the scope of AI. Moreover, the term "algorithm" originates from the name of the ninth-century Persian mathematician Mohammed ibn Musa al-Kharizmi and denotes a specific set of instructions for solving a problem or performing a calculation.[252]

According to another definition, AI is described as an imitation of human intelligence; however, since current AI applications are relatively simplistic, this definition may not

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[249] John Armour and Horst Eidenmueller, “Self-Driving Corporations?”, *Harvard Business Law Review, Forthcoming, European Corporate Governance Institute Law Working Paper Y. 2019 N. 475 p. (1-38)*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3442447 ,8 , (accessed at: 30.08.2023).

[250] Haroon Sheikh, Corien Prins and Erik Schrijvers, *Mission AI The New System Technology*, Switzerland: Springer, 2023, https://link.springer.com/book/10.1007/978-3-031-21448-6 , (accessed at: 30.08.2023).

[251] Sheikh, Prins and Schrijvers, *Mission AI*, 15.

[252] Sheikh, Prins and Schrijvers, *Mission AI*,.15.

be entirely applicable today.[253] If this definition were to be strictly adhered to, one might argue that true AI does not yet exist in today’s world. The most widely accepted definition of AI characterizes it as a technology that enables machines or algorithms to replicate various complex human abilities. There exist numerous definitions of AI, many of which emphasize the specific skills performed by AI systems.

Hence, it is evident that there are multiple interpretations of AI. Nonetheless, despite these variations, there are four fundamental components common to these definitions: "systems that can think like humans," "systems that can act like humans," "systems that can think rationally," and "systems that can act in a rational manner.[254] In the contemporary landscape, the most significant advancement in AI is arguably machine learning, which involves AI not only deriving responses from existing data and rules but also generating new data and rules based on existing information. [255]

As previously mentioned, AI stands as one of the most pivotal and cutting-edge technologies of our time. Consequently, it would be erroneous to suggest that AI does not influence companies; rather, it can be argued that AI significantly impacts company management. Hence, the incorporation of AI into company management practices inevitably affects the duty of care incumbent upon company directors. In the subsequent sections of this thesis, we will delve into the role of AI within companies and explore how its utilization affects the duty of care owed by company directors.

1.2. Regulations Regarding AI

As advancements in technology unfold, they often prompt regulatory changes. Among the notable regulations concerning Artificial Intelligence (AI) are the "Artificial

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[253] Sheikh, Prins and Schrijvers, “Mission AI”, p.15-16.

[254] Joost N. Kok, Egbert J. W. Boers, Walter A. Kosters, and Peter van der Putten, “Artificial Intelligence : Definition, Trends, Techniques and Cases”, *Encyclopedia of Life Support Systems (EOLSS), p. (1-5),* https://www.eolss.net/sample-chapters/c15/e6-44.pdf , 1-5 , (accessed at: 30.08.2023),

[255] Armour and Eidenmueller, “Self Driving Corporations”, 10.

Intelligence for Europe"[256] and the "Coordinated Plan on Artificial Intelligence."[257] Additionally, following these regulations, publications such as the "White Paper on AI"[258] and the "Report on the safety and liability implications of AI and other technologies"[259] have been released. Moreover, significant regulations such as the "Digital Markets Act" and the proposed "AI Liability Directive" [260] hold considerable importance in AI.

Given the subject matter of this thesis regarding the duty of care of directors, the pivotal regulation under consideration is the AI liability directive. The primary objective of this proposed directive is to ensure adequate protection for victims of AI-enabled products and services, at a level no less than that afforded to victims of conventional technology and services.[261]

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[256] "Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, and the Committee of the Regions, Artificial Intelligence for Europe COM/2018/237 Final," 25 April 2018, https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=COM%3A2018%3A237%3AFIN (accessed at 30.08.2023).

[257] "Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Coordinated Plan on Artificial Intelligence", 7 December 2018, https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A52018DC0795 (accessed at: 30.08.2023).

[258] "White Paper on Artifical Intelligence—a European Approach to Excellence and Trust. COM (2020) 65 Final", 19 February 2020, https://ec.europa.eu/info/publications/white-paper-artificial-intelligenceeuropean-approach-excellence-and-trust_en. (accessed at: 30.08.2023).

[259] "Report on the Safety and Liability Implications of Artificial Intelligence, the Internet of Things and Robotics. COM (2020) 64 Final", 19 February 2020, https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A52020DC0064, (accessed at: 30.08.2023).

[260] "Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)", 1, accessed 30 November 2022, https://eur-lex.europa.eu/legalcontent/EN/TXT/?toc=OJ%3AL%3A2022%3A265%3ATOC&uri=uriserv%3AOJ.L_.2022.265.01.00 01.01.ENG , (accessed at: 30.08.2023).

[261] "Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive) COM(2022) 496 Final", 28 September 2022, https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contractrules/digital-contracts/liability-rules-artificial-intelligence_en , (accessed at: 30.08.2023).

Another aim of the directive is to alleviate the legal uncertainties surrounding AI-enabled products and services. This clarification will also benefit the BoD by providing them with a clearer understanding of their responsibilities. Conversely, before examining these regulatory aspects, the relationship between AI and companies will be scrutinized in this thesis.

1.3. Incorporating AI into Companies

Even though AI is currently at the forefront of global discussions, it is not a novel concept.[262] As mentioned earlier, the origins of AI can be traced back to John McCarthy and Myron Minsky in the mid-1950s. Initially, its relevance to corporate or company management was disregarded.[263]

However, over time, AI has gained significant importance in the management of companies. In fact, several scholars now consider AI as a 'General Purpose Technology'.[264] It is widely regarded as a 'general solution technology' by many scholars[265], capable of addressing various directorial, commercial, and societal

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[262] "Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive) COM(2022) 496 Final", 28 September 2022, https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contractrules/digital-contracts/liability-rules-artificial-intelligence_en , (accessed at: 30.08.2023).

[263] Thomas H. Davenport and Rajeev Ronanki, " Artificial Intelligence for the Real World", *Harvard Business Review Y. 2018 p. (108-116)* ,https://blockqai.com/wp-content/uploads/2021/01/analytics-hbr-ai-for-the-real-world.pdf ,109-116, (accessed at: 01.09.2023); Alvin Toffler, *Üçüncü Dalga,* İstanbul: Koridor Yayıncılık 2008, 292.

[264] Peter F. Drucker, "The manager and the moron", https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/the-manager-and-the-moron#/ , (accessed at: 01.09.2023).

[265] Jesus B. Mantas, "Intelligent Approaches to AI", *nacdonline.org Y. 2019 p.(40-45),* http://boardleadership.nacdonline.org/rs/815-YTL-682/images/AI_IN_THE_BOARDROOM_FINAL_12419.pdf ,40, (accessed at: 01.09.2023).

challenges.[266] Therefore, it is imperative to assess the role of AI in the governance of companies.

Insomuch as, in today's world, there are also examples of AI systems that take positions in corporate boardrooms. Firstly, in 2014 Hong Kong-based venture capital firm appointed AI system VITAL[267], which is a machine learning system, to make investment recommendations in the life science sector to its board.[268] Secondly, two years later, Finnish IT company Tieto appointed AI system as a member of the leadership team of its new data-driven business unit.[269]

Thirdly, in 2018 the CEO of California-based firm SalesForce revealed that he appointed an AI machine whose name is Einstein to join weekly staff meetings and make comments regarding the proposals of the staff.[270] As it can be perceived from the aforementioned examples, AI is increasingly being integrated into various aspects of companies.

However, before evaluating how AI will impact the duty of care of directors, it is crucial to understand the role AI systems currently play or are poised to play in corporate management. In this regard, considering the level of proactivity and

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[266] Michael Hilb, "Toward artificial governance? The role of artificial intelligence in shaping the future of corporate governance", *J Manag Gov Y.2020 N.24, p.(851–870)* https://link.springer.com/Article/10.1007/s10997-020-09519-9 , 851-852, (accessed at 01.09.2023).

[267] Nicky Burridge, "Aritificial Intelligence Gets a Seat in the Boardroom", *Y. 2017,* https://asia.nikkei.com/Business/Artificial-intelligence-gets-a-seat-in-the-boardroom, (accessed at 17.03.2024).

[268] See at https://www.globenewswire.com/news-release/2014/05/13/635881/10081467/en/Deep-Knowledge-Venture-s-Appoints-Intelligent-Investment-Analysis-Software-VITAL-as-Board-Member.html, (accessed at 01.09.2023).

[269]See at https://www.tietoevry.com/en/newsroom/all-news-and-releases/press-releases/2017/02/tieto-new-data-driven-businesses-unit-aims-to-bring-artificial-intelligence-to-healthcare/ (accessed: 01.09.2023).

[270] Martin Petrin, "Corporate Management in the Age of AI", *Columbia Business Law Review, Forthcoming, UCL Working Paper Series, Corporate Management in the Age of AI ,Faculty of Laws University College London Law Research Paper Y. 2019 N.3 p. (1-54),* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3346722 ,2-3, (accessed at: 01.09.2023).

autonomy exhibited by AI becomes pertinent. It can be argued that AI systems have the theoretical capacity to support or even replace human involvement across various functions within companies.[271]

AI systems encompass a diverse array of tools and techniques, including symbolic logic, artificial neural networks, fuzzy systems, evolutionary computing, intelligent agents, and probabilistic reasoning models.[272] These tools facilitate various functions such as coordinating data delivery, analyzing data trends, providing forecasts, ensuring data consistency, quantifying uncertainty, anticipating users' data needs, presenting information in optimal formats, and suggesting courses of action.[273]

In essence, AI systems leverage these tools and techniques to aid in human decision-making[274] and, in some cases, replace it entirely. Given their capacity to process vast amounts of data into manageable segments, AI systems are particularly useful for decision-making in situations characterized by uncertainty or complexity.[275]

The advent of AI in companies has raised crucial questions about its positive and negative implications and its impact on the duty of care of directors. [276] Nonetheless, before delving into these considerations, it is imperative to delineate how AI is currently integrated into our world and how it may evolve in the future.

Presently, the predominant applications of AI revolve around enhancing human decision-making ('Assisted AI') and aiding humans in generating novel solutions ('Augmented AI'), predominantly through the use of machine learning systems.[277]

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[271] Petrin, "Corporate Management", 14.

[272] Florian Möslein, "Robots in the Boardroom: Artificial Intelligence and Corporate Law", *Handbook Chapter, Law Y.2018 N.28 p.(1-21)* , https://www.elgaronline.com/display/edcoll/9781786439048/9781786439048.00039.xml , 7, (accessed at: 01.09.2023).

[273] Möslein, "Artificial Intelligence and Corporate Law", 7

[274] Möslein, "Artificial Intelligence and Corporate Law", 7.

[275] Möslein, "Artificial Intelligence and Corporate Law", 7.

[276] Möslein, "Artificial Intelligence and Corporate Law", 7-8.

[277] Armour and Eidenmueller, "Self Driving Corporations" 13.

However, should AI advance to the point where it autonomously makes decisions, expands its capabilities, and challenges existing norms, it would represent the most advanced stage of AI ('Autonomous AI').[278] Subsequently, the intricate dynamics of how artificial intelligence and humans collaborate within companies will be explored in detail.

1.3.1. Use of AI to Support Human Decision Making

It is commonplace for companies to leverage technology to enhance their operations. During the Industrial Revolution, advancements such as tractors and cranes replaced manual labor and greatly facilitated company activities.[279] Similarly, more advanced tools like computers and printers have significantly improved communication and data management within companies.[280] In the present day, technologies such as AI and Distributed Ledger Technologies are poised to further increase productivity within companies.

Utilizing AI machines to endorse directorial decisions, leveraging their capacity to rapidly analyze vast quantities of data, is a crucial and indispensable approach for the advancement of firms.[281] Furthermore, AI systems possess the capacity to gather, analyze, process, and assess information pertaining to both financial and nonfinancial knowledge, the business performance of companies, social media accounts of companies, and the activities of competitors. This ability can provide significant assistance to companies.[282]In this context, according to the doctrine, AI could take

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[278] Petrin, "Corporate Management", 16.

[279] Sevda Bora Çınar, *Şirket Yönetiminde Yapay Zeka*, Ankara: Seçkin Yayıncılık, 2022, 167.

[280] Bora Çınar, *Yapay Zeka*, 167.

[281] Sergio Alberto Gramitto Ricci, "Artificial Agents in Corporate Boardrooms", *Cornell Law Review, Y. 2020, V.. 105, N. 3 p. (870-908),* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677627 , 895, (accessed at 02.09.2023).

[282] Gramitto Ricci, "Artificial Agents", 895-896

place in corporate boardrooms as assisting or supporting in two ways: “Assisted AI” and “Augmented AI”.

1.3.1.1. Assisted AI

In the company, the initial function of AI is termed "Assisted AI". In this AI model, there is either no autonomous system or a system with minimal autonomy, resulting in less productivity gains compared to other AI models.[283] However, the majority of current AI applications in today's world fall under the categories of "Assisted AI" or "Augmented AI" models. In the "Assisted AI" model, AI systems support and enhance human decision-making processes.[284]

The primary objective of employing AI is to enhance productivity. In this model, humans remain the decision-makers, while AI systems assist and enhance human decision-making processes.[285] There are numerous practical applications of AI systems in various areas such as information and communication management, investor profiling, product development, and monitoring (including profitability, risks, and compliance). These systems also play a role in decision-making concerning corporate strategy, investment, personnel selection, procurement, production planning and control, pricing, sales, and marketing.[286]

Examples of Assisted AI systems widely used include Apple's Siri and its Android counterpart, Google Assistant. These systems assist users of mobile phones by performing tasks such as placing calls or composing text/email messages based on voice commands. [287]Additionally, they can set reminders and alarms, manage

[283] Petrin, “Corporate Management” ,14.

[284] Armour and Eidenmueller, “Self Driving Corporations” 13.

[285] Hilb, “Artificial Governance”, 861.

[286] Armour and Eidenmueller, “Self Driving Corporations” 13.

[287] Petrin, ”Corporate Management”, 15.

appointments and schedules, control smart home devices like lights and music players, and search for information on the internet.[288]

1.3.1.2. Augmented AI

In the "Augmented AI" system, humans remain the decision-makers, but AI-based solutions are more advanced, enabling decision-makers to leverage technology in a manner that exceeds human intelligence compared to "Assisted AI" models.[289] Similar to Assisted AI, Augmented AI finds practical applications in various areas such as information and communication management, investor profiling, product development, and monitoring (including profitability, risks, and compliance). It also aids decision-making regarding corporate strategy, investment, personnel selection, procurement, production planning and control, pricing, sales, and marketing.[290]

In the "Augmented AI" system, humans remain the decision-makers, but AI-based solutions are more advanced, enabling decision-makers to leverage technology in a manner that exceeds human intelligence compared to "Assisted AI" models. Similar to Assisted AI, Augmented AI finds practical applications in various areas such as information and communication management, investor profiling, product development, and monitoring (including profitability, risks, and compliance). It also aids decision-making regarding corporate strategy, investment, personnel selection, procurement, production planning and control, pricing, sales, and marketing.

One notable application of the "Augmented AI" system is its ability to identify outliers within large datasets or automate reporting processes.[291] This model is currently at the forefront of technological advancements, with IBM Watson serving as a prominent

[288] Petrin, ”Corporate Management”, 15.

[289] Hilb, “Artificial Governance”, 861.

[290]Armour and Eidenmueller, “Self Driving Corporations”, 13.

[291] Hilb, “Artificial Governance”, 861.

example. Watson gained widespread recognition for defeating two human champions at Jeopardy[292] in 2011, showcasing the capabilities of the "Augmented AI" model.[293]

1.3.2. Hybrid Model (Amplified AI)

Another model of AI in the company boardroom is the hybrid model, which is also called “Amplified AI”. This system could be defined as joint co-decision-making by AI and human beings.[294]As explained above, in today’s world, “Assisted AI” and “Augmented AI” models are on the top agenda; therefore, the hybrid model is not on the agenda of today’s world.

According to this model, one possible approach to integrating AI-based directors with human directors[295] in companies and forming hybrid boards of directors is by employing similar AI machines. Some scholars suggest that AI-based directors may make better decisions than human directors because they can manage key attributes such as competence, loyalty, diligence, care, and legal compliance more effectively.[296]

However, there are several drawbacks to having AI-based members of BoD. Firstly, there may be concerns about the authority and capabilities of AI-based directors.[297] Secondly, human directors may feel pressure to conform to decisions made by the AI system. Lastly, there may be challenges related to holding AI-based directors accountable for their actions.

As previously discussed, this system is currently not feasible both legally and technically in today's world. Additionally, while anthropomorphism (human physical

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[292] Petrin, “Corporate Management”, 16.

[293]See at techrepublic.com/Article/ibm-watson-the-inside-story-of-how-the-jeopardy-winning-supercomputer-was-born-and-what-it-wants-to-do-next/ , (accessed at: 02.09.2023)

[294] Hilb, “Artificial Governance”, 861.

[295] Gramitto Ricci, “Artificial Agents”, 901.

[296] Gramitto Ricci, “Artificial Agents”, 901.

[297] Gramitto Ricci, “Artificial Agents”, 901.

features) is not a requirement for AI, examples like Hanson Robotics' Sophia, a "humanlike robot," provide a glimpse into how AI members of BoD may evolve in the future.[298]

1.3.3. Use of AI to Replace Human Beings in Company Boardrooms

First and foremost, it must be acknowledged that the decision to replace human beings with AI in company boardrooms is ultimately made by humans themselves.[299] In other words, it will be the choice of human decision-makers who perceive AI systems as more rational and logical, leading them to delegate decision-making authority to AI on the company board. However, it is conceivable that, according to several viewpoints in the doctrine, AI systems will not merely assist human beings in companies but rather supplant them entirely.[300] Moreover, some scholars in the doctrine argue that while AI systems may excel at making predictions, human judgment remains essential.[301]

Despite AI's ability to learn from experience, it lacks the capacity for nuanced judgment inherent in human decision-making. [302]Additionally, humans possess qualities such as creativity and innovation, which AI lacks. [303]This discrepancy could pose challenges for decisions made by AI-based directors in the future.

Consequently, if AI systems were to replace human beings entirely in the future, such systems could be classified as "Autonomous AI" and "Autopoietic AI," which will be elaborated on below.

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[298] See at https://www.hansonrobotics.com/being-sophia/, (accessed at: 02.09.2023)

[299] Bora Çınar, *Yapay Zeka*, 177.

[300] Möslein, “Artificial Intelligence and Corporate Law”, 13.

[301] Möslein, “Artificial Intelligence and Corporate Law”, 13-14.

[302] Möslein, “Artificial Intelligence and Corporate Law”, 13-14.

[303] Möslein, “Artificial Intelligence and Corporate Law”, 13-14.

1.3.3.1. Autonomous AI

As explained above, AI-based systems not only will take place in corporate boardrooms, but also they could replace human directors in the future.[304]Therefore, it could be mentioned that in the autonomous AI system AI machines will have an ability to make decisions independently and work without constant decision inputs.[305] In other words, it could be stated that in this model AI-based machines are able to "proactively and autonomously" evaluate options and make decisions; therefore, this model challenges the status quo.[306]In this respect, contrary to the "Assisted AI" and "Augmented AI" models, right to make decisions belongs to the machines when it comes to autonomous AI.[307]

Autonomous vehicles, such as those developed by Alphabet Inc.'s subsidiary Waymo and Tesla,[308] represent notable examples of autonomous machines. It is foreseeable that these autonomous AI technologies will occupy a central position on the global agenda in the near future. However, numerous challenges will arise, including questions about whether autonomous AI systems will possess legal personhood and how accountability and liability will be attributed to these systems.[309]

It may be claimed that autonomous AI systems will not be immediately present in corporate boardrooms[310] in the near future, but they are destined to find their way into

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[304] Eleanore Hickman and Martin Petrin, "Trustworthy AI and Corporate Governance: The EU's Ethics Guidelines for Trustworthy Artificial Intelligence from a Company Law Perspective" , *European Business Organization Law Review Y.2021 N.22 p.(593–625)* https://link.springer.com/Article/10.1007/s40804-021-00224-0 , 600 (accessed at: 02.09.2023).

[305] Hilb, "Artificial Governance", 861

[306] Petrin, "Corporate Management",16

[307] Petrin, "Corporate Management", 16

[308] Petrin, "Corporate Management", 16

[309] Hickman and Petrin, "AI and Corporate Governance", 600; Hilb, "Artificial Governance", 861.

[310] Meltem Karatepe Kaya, "Yapay Zekanın Şirket Yönetimine Olası Katkılarının Türk Şirketler Hukuku Kapsamında Değerlendirilmesi ve Yapay Zekanın Hukuki Statüsünün Belirlenmesinde

these settings eventually. As a result, it is highly likely that they will acquire legal personhood in the future.

1.3.3.2. Autopoietic AI

This model of AI is well developed when compared to an autonomous AI system because in this system AI is not only able to make decisions but also expand and develop relevant decisions.[311] In this model of AI, intelligence of AI easily passes the human brain, and therefore, in the course of the existence of these systems, human intelligence will be marginalized.[312] Since this model of AI could only be subject of science fiction novels and movies, there is no legal debate regarding this situation in today's world.

1.3.4. Evaluation of AI Models in Company Boardrooms

As cited earlier, there are different types of AI models that take place or will take place in the management of the company. These models are assisted AI, augmented AI, amplified AI, autonomous AI, and autopoietic AI. In today's world, solely assisted AI and augmented AI could be discussed because there is not enough technological development and legal base for amplified AI, autonomous AI, and autopoietic AI. However, this does not mean there will not be an autonomous AI system in the world.

The lack of a legal framework poses significant challenges for autonomous AI systems, particularly in terms of accountability and liability for their actions. Despite some scholars arguing for AI systems to have legal personality, questions remain about

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Şirketler Hukukundan Çıkarılabilecek Dersler", *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakultesi Dergisi, Y. 2021, V.25 N. 3 p. (69-106)* , https://dergipark.org.tr/en/download/Article-file/1912476, 77-83, (accessed at 23.10.2023).

[311] Hilb, Artificial Governance", 861.

[312] Hilb, Artificial Governance", 861.

how accountability and liability would be determined even if such a status were granted. Consequently, the focus in today's world is primarily on assisted AI and augmented AI. In the subsequent sections of the thesis, I will delve into how existing AI systems impact the duty of care and liability of company directors and members of the board.

1.3.5. Evaluation of AI Models in Company Boardrooms According to TCC

According to Article 359 of the TCC, the BoD of joint-stock companies consists of one or more individuals or legal entities appointed by the General Assembly or the articles of association. Real persons elected as members of BoD must be fully competent[313], although additional conditions may be set by the articles of association.[314]

Legal persons elected or appointed as members of BoD[315] must designate a real person to represent them at meetings, who is then registered and announced accordingly. As per the TCC, only real [316] and legal persons can be BoD members. Therefore, AI machines cannot serve as BoD members under Turkish law. Consequently, amplified AI, autonomous AI, and autopoietic AI cannot be utilized as BoD members in Turkey; they can only function as assisted AI and augmented AI.

As explained above AI systems could solely be used as a supportive mechanism in Türkiye according to TCC. In this context, AI systems could be used by Audit Committee and Early Detection of Risk and Risk Management Committee. According to Article 366/2 of TCC, the BoD may establish committee or commissions to follow up the course of operations, to prepare reports relating to matters that will be submitted

[313] Pulaşlı, *Genel Esaslar*, 373; Bahtiyar, .202; Akdağ Güney, *Yönetim Kurulu*, 29-46.

[314] Relevant conditions could be age limit, residence at company headquarter, being expert in a specific topic and etc

[315] Pulaşlı, *Genel Esaslar*, 373; Bahtiyar, 202; Akdağ Güney, *Yönetim Kurulu*, 29-46.

[316] Pulaşlı, *Genel Esaslar*, 373; Bahtiyar, 202; Akdağ Güney, *Yönetim Kurulu,* 29-46.

to the board, to implement the resolutions of the board, and to carry out the internal audit.[317]

Non-delegable and inalienable duties are regulated in Article 375 of the TCC. One such duty is accounting, financial control, and the establishment of necessary systems for financial planning purposes, as stipulated in Article 375/1-c of the TCC. According to the rationale[318] provided, there must be an organization and an internal audit system in place to arrange financial planning and internal audits in joint-stock companies.[319] This obligation is particularly crucial for companies whose shares are traded on the stock exchange.[320] To fulfill this obligation, the BoD establishes a committee comprising BoD members without executive authorization.

Another important committee is the Early Detection of Risk and Risk Management Committee, as regulated in Article 378 of the TCC. This committee is established for the early detection of factors that jeopardize the existence, development, and continuity of the company. Its responsibilities include implementing necessary precautions and remedies, as well as managing risks. This committee is mandatory for companies whose shares are traded on the stock exchange. For other companies, the committee is established based on a written notification[321] from the auditor. The BoD forms this committee from members who do not hold executive authorization, along with independent experts.[322]

In my opinion, it is significant that AI systems be integrated into both the Audit Committee and the Early Detection of Risk and Risk Management Committee. The use of AI can greatly enhance the efficiency of these committees, as AI possesses

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[317] Pulaşlı, *Şirketler Hukuku C. II.*,1188-1189; Pulaşlı, *Genel Esaslar*, 398-399.

[318] For the justification of TCC: https://www.lexpera.com.tr/mevzuat/gerekceler/turk-ticaret-kanunu-madde-gerekceleri/1 , accessed at 28.01.2024.

[319] Pulaşlı, *Şirketler Hukuku C. II.*, 1188-1189; Pulaşlı, *Genel Esaslar*, 398-399.

[320] Pulaşlı, *Şirketler Hukuku C. II.,* 1188-1189; Pulaşlı, *Genel Esaslar*, 398-399.

[321] Pulaşlı, *Şirketler Hukuku C. II.*, 1190-1191; Pulaşlı, *Genel Esaslar*, 399-400; Bilgili, and Demirkapı, 288; Akdağ Güney, *Yönetim Kurulu*, 133-134.

[322] Pulaşlı, *Şirketler Hukuku C. II.*, 1190-1191; Pulaşlı, *Genel Esaslar*, 399-400; Bilgili, and Demirkapı, 288; Akdağ Güney, Yönetim Kurulu, 133-134

superior information processing capabilities. By analyzing vast amounts of data and distilling it into manageable chunks,[323] AI can generate accurate predictions and forecasts. Unlike humans, AI can provide more realistic projections for the future, enabling the calculation of long-term profits and strategic plans. This helps in avoiding missed opportunities and potential pitfalls that may impact the company's future.[324] Therefore, failure to incorporate AI into these committees could potentially lead to a breach of the duty of care by the directors.

1.4. Evaluation of AI Systems in Terms of Principles of Corporate Governance

Before delving into the implications of AI-based technology on the duty of care of directors, it is essential to underscore the principles of corporate governance and their interaction with AI systems. Corporate governance can be defined as the framework through which a company manages its operations. This term draws an analogy between the governance of corporations[325] and the governance of cities, nations, or states.

Furthermore, corporate governance encompasses norms derived from regulations within company law and stipulations outlined in the articles of association. These rules are also shaped by economic incentives, customary practices, and other relevant factors.[326] They govern the organization and decision-making processes within the company.[327]

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[323] Möslein, “Artificial Intelligence and Corporate Law”, 11-12.

[324] Bora Çınar, *Yapay Zeka*, 208.

[325] Marco Becht, Patrick Bolton and Ailsa Röell, “Corporate Governance and Control”, *Working Paper No. Y.2002 N.2, (p.1-122),* https://deliverypdf.ssrn.com/delivery.php?ID=564097067103026125101112082102008066055084000087056003103002087014072097098099115124007057116106052004021005065022013089082009091056029028065002021125090126069028076076104002023127067086094080091013119090007087079074098109117071003106124078020113&EXT=pdf&INDEX=TRUE ,2 , (accessed at 22.01.2024).

[326] Aybüke Keskin, *The Impact of Digitalisation on Company Law*, Ankara: Adalet Yayınları, 2024 , 115.

[327] Keskin, 115.

As such, the rights and responsibilities of directors are delineated based on these principles of corporate governance.[328] The overarching objective of corporate governance is to regulate the relationships among shareholders, stakeholders, and the company, thereby delineating their respective rights and obligations.[329] Through this framework, all involved parties can participate in company-related processes more effectively and efficiently.[330] It's important to note that stakeholders extend beyond shareholders and directors to include creditors, employees, other market participants, and financial markets.[331]

If corporate governance is implemented more effectively within companies, several benefits can be realized. Resources will be utilized more productively and efficiently, thereby boosting the company's competitive edge. Additionally, crisis management capabilities will improve, leading to a decrease in costs.[332] Corporate governance also serves as an early detection mechanism[333] for directorial and accounting issues within the company.

Moreover, efficient management within the company helps mitigate agency costs arising from the separation of ownership and control.[334] In fact, reducing agency costs is a primary objective of corporate governance. The fundamental principles underlying corporate governance include ‘’transparency’’, ‘’fairness’’, ‘’accountability’’, and

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[328] Keskin, 115.

[329] Cafer Eminoğlu, *Türk Ticaret Kanunu'nda Kurumsal Yönetim*, İstanbul: Onikilevha Yayınları 2014, 1.

[330] Eminoğlu, *Kurumsal Yönetim*, 1-2.

[331] Ünal Tekinalp, Türk Ticaret Kanunu Tasarısının Kurumsal Yönetim Felsefesine Yaklaşımı (KY Felsefesine Yaklaşım), *Uğur Alacakaptan'a Armağan s.1 C.II*, İstanbul: İstanbul Bilgi Üniversitesi Yayınları, 2008, 635; Eminoğlu, *Kurumsal Yönetim*, 1-2.

[332] Eminoğlu, *Kurumsal Yönetim*, 2.

[333]Hasan Pulaşlı, *Corporate Governance – Anonim Şirket Yönetiminde Yeni Model*, Ankara: Banka ve Ticaret Hukuku Araştırma Enstitüsü, 2003, 13.

[334]Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property*, Revised Edition, New York: Harcourt, Brace & World, Inc., 1968; Armour, Hansmann and Kraakman, "Agency Problems", 3.

‘’responsibility’’.[335] These principles will be elaborated on further in the following section.

Transparency stands as the foremost pillar of corporate governance. It embodies openness and disclosure, aimed at enlightening the public by revealing information concerning the corporation's management, wealth, and financial status.[336] The only restriction on this principle pertains to confidential business information. However, all other information accessible to the public must be truthful, clear, sufficient, and comparable.[337] This approach effectively eliminates information asymmetry issues.

Fairness represents another cornerstone principle of corporate governance. It serves as a crucial rationale behind the establishment of corporate governance, endeavoring to safeguard the rights of minority shareholders.[338] Consequently, it can be argued that investments flourish in an environment characterized by fairness.[339] Therefore, legislators enact legal regulations to uphold shareholders'[340] rights. For instance, the right to access information may be seen as a protective mechanism in terms of fairness.

Accountability represents another fundamental principle of corporate governance, often described as "internal responsibility.[341]" This principle mandates that every transaction within companies must be accounted[342] for. Accordingly, all company transactions should be explainable and backed by justified reasons. Under this principle, members of the board are held accountable to the company and shareholders for losses resulting from their decisions. Consequently, this principle can be viewed as embodying "internal liability."[343]

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[335] Paslı, *Corporate Governance*, 5-13; Eminoğlu, *Kurumsal Yönetim*, 14.

[336] Paslı, *Corporate Governance*, 53-54; Eminoğlu, *Kurumsal Yönetim*, 15.

[337] Eminoğlu, *Kurumsal Yönetim*, 15.

[338] Keskin, 125.

[339] Eminoğlu, *Kurumsal Yönetim*, 17; Keskin, 125.

[340] Eminoğlu, *Kurumsal Yönetim*, 17.

[341] Paslı, *Corporate Governance*, 55-56; Eminoğlu, *Kurumsal Yönetim*, 19.

[342] Eminoğlu, *Kurumsal Yönetim*, 19.

[343] Keskin, 126.

Responsibility stands as yet another core principle of corporate governance, also referred to as "external responsibility."[344] Before delving into the responsibility principle, it's important to distinguish between shareholders and stakeholders. Shareholders encompass individuals who hold shares in the company, whereas stakeholders include creditors, employees, suppliers, participants in capital markets, potential shareholders, consumers, and distributors.[345] In essence, stakeholders are parties with an interest in the company, and their interests need safeguarding.[346] According to the responsibility principle, the company must consider all stakeholders affected by its operations when making decisions.[347]

As explained earlier, corporate governance is guided by four fundamental principles. The incorporation of AI into company operations significantly impacts corporate governance, with its effects directly linked to these principles. AI technology can enhance operational efficiency, decision-making processes, and profitability[348] for companies. However, the utilization of AI may also entail negative repercussions. Therefore, it is crucial for companies[349] to prioritize ethics and transparency in their AI implementations.[350]

In this regard, it is essential to outline the fundamental approaches to integrating AI into business strategies while ensuring its effective and responsible use.[351]

Understanding both the positive and negative effects of integrating AI into corporate governance is crucial. AI systems can contribute to businesses by automating processes, optimizing operations, predicting market trends, and enhancing customer

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[344]Paslı, *Corporate Governance*, 57.

[345] Paslı, *Corporate Governance*, 57; Eminoğlu, *Kurumsal Yönetim*, 19-20.

[346] Keskin, 134.

[347] Paslı, *Corporate Governance*, 57; Eminoğlu, *Kurumsal Yönetim*, 23.

[348] Fouad Daidai and Larbi Tamnine, "Artificial Intelligence and Corporate Governance", *Persuasive 2023, Adjunct Proceedings of the 18th International Conference on Persuasive Technology Y.2023 N.6. p. (1-5)* , https://ceur-ws.org/Vol-3474/paper6.pdf ,1-2, (accessed at at 27.01.2024).

[349] Daidai and Tamimine, 2.

[350] Daidai and Tamimine, 2.

[351] Daidai and Tamimine, 2.

experience.[352] However, to leverage AI fully, companies must choose systems with the necessary skills and talents while considering risks such as loss of control and biased decisions.[353]

Unbiased AI systems can make significant contributions to corporate governance. Firstly, they can enhance transparency by providing clear and predetermined criteria[354] in the selection process, thereby reducing information asymmetry. Similarly, when AI is involved in decision-making[355], it can transparently demonstrate its decision-making processes. However, this requires unbiased programming of AI systems.

Secondly, fairness can also be improved through the use of AI systems, as they rely on clear and predetermined criteria.[356] Thirdly, as previously mentioned[357], responsibility and accountability principles are interrelated. While one pertains to internal responsibility, the other relates to external responsibility.

The contribution of AI to the accountability and responsibility principles in corporate governance[358] is undeniable. Unbiased AI systems can adeptly address complex problems, considering accountability and responsibility principles more effectively than human beings. Therefore, it can be concluded that if AI systems remain unbiased

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[352] Thommie Bursström,Vinit Parida, Tom Lati and Joakim Wincent, "AI-enabled business-model innovation and transformation in industrial ecosystems: A framework, model and outline for further research", *Journal of Business Research, Elsevier, Y.2021 V.127(C) p.(85-95).*, https://ideas.repec.org/a/eee/jbrese/v127y2021icp85-95.html ,85-95, (accessed at 27.01.2024).

[353]Bursström, Parida, Lati and Wincent, 85-95; Daidai and Tamnine, 2; For example; a retail company may use an AI system which could develop the accuracy of demand forecasts, or financial service company could use an AI system which provides to automate compliance process and improve fraud detection.

[354] Keskin, 115.

[355] Keskin, 115.

[356] For example; rights of disadvantaged groups such as minority shareholders and foreign shareholders could be used more effectively owing to AI systems but the AI system must be unbiased in order to ensure fairness.

[357] Karatepe Kaya, 93.

[358] Bora Çınar, *Yapay Zeka,* 200-201.

and maintain control, they will make significant contributions to corporate governance.

1.5. Effect of AI-based Technology to the Duty of Care and Liability of Directors

1.5.1. General Overview

As outlined in the initial chapter of this thesis, directors have a duty of care in carrying out their responsibilities, as per Article 369 of the TCC. Failure to adhere to this duty of care may lead to legal liability for both directors and the BoD.

With the introduction of advanced technologies such as AI systems and distributed ledger technologies into corporate boardrooms, questions have arisen regarding how these developments will impact the duty of care and legal liability of directors and the BoD.

In a management environment increasingly influenced by AI, traditional liability frameworks for technology-related damages are currently being applied, as there are no specific liability provisions for AI systems.[359] Consequently, the liability of the BoD may be implicated in such scenarios. Fundamental principles of liability law, including establishing a causal connection between the damage and AI systems[360], must be adhered to. However, in today's context, there is a lack of judicial mechanisms to ascertain this connection, exacerbated by a shortage of experts capable of identifying it.

The crux of the matter revolves around determining who bears responsibility for damages resulting from AI system activities. While BoD members may be held liable in some cases, the responsibility of the manufacturer could also be called into question. Additionally, if AI systems evolve to a level where they exhibit consciousness and

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[359] Bora Çınar, *Yapay Zeka*, 200-201.

[360] Bora Çınar, *Yapay Zeka*, 201.

autonomous decision-making capabilities, they may acquire legal personality, thereby becoming subjects of legal liability[361]. However, since this thesis primarily concerns the duty of care and liability of members of BoD, the focus will primarily be on how AI systems affect the liability and duty of care of directors and BoD members.

1.5.2. Evaluation of Effect of AI-based Technology Regarding the Duty of Care

Given the near-perfect and error-free nature of AI systems compared to human intelligence, it becomes necessary to assess whether members of BoD are obliged to utilize AI systems[362].

As elucidated in the initial chapter, directors and other members of BoD can evade liability by demonstrating that they have exercised the utmost effort and care in their duties. However, the commercial realm is fraught with missed opportunities and potential pitfalls. Therefore, directors[363] may be held accountable if they cause harm to the company for any reason.

In this context, members of BoD or directors who opt not to leverage AI systems, which offer superior capabilities compared to humans in boardrooms or other areas of the company[364], may be deemed as failing to fulfill their obligations regarding the duty of care.

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[361] Möslein, "Artificial Intelligence and Corporate Law", 7.

[362] Salih Karadeniz, "Yapay Zekanın Anonim Şirket Yönetim Kuruluna Üyeliği ve Üyelikten Doğan Sorumluluğunun Değerlendirilmesi", *TAAD Y.2023 N.54 p.(255-288)* https://taad.taa.gov.tr/yuklenenler/dosyalar/dergiler/taad/taad-54/4666af08-3281-4800-b976-c5b64f8abf81-makale-3-1433-salih-karadeniz.pdf , 271, (accessed at 13.03.2024); Bora Çınar, Yapay Zeka, 208.

[363] Bora Çınar, *Yapay Zeka*, 208.

[364] Bora Çınar, *Yapay Zeka*, 209.

In contrast to human directors who may focus on short-term profits, AI systems are capable of calculating long-term profits and plans, thus mitigating the risk of missed opportunities and potential pitfalls for the company's future.

Given the increasing complexity of commercial processes, even seemingly simple decisions can have significant consequences for a company in today's business environment. The inherent uncertainty in commercial life underscores the importance of utilizing AI systems, which excel at addressing complex problems and navigating uncertain situations compared to human beings.

Therefore, if directors opt not to incorporate AI systems into corporate boardrooms, they must provide a rationale for their decision. Moreover, directors are responsible for selecting a suitable AI system tailored to the company's business needs. Failure to do so could constitute a breach of the duty of care, leading to potential legal liability for the directors.

1.5.2.1. Missed Opportunities

The integration of AI-based technological systems has become increasingly significant in driving technological advancements across various industries, including the corporate sector. Despite this trend, some companies may remain steadfast in adhering to traditional methods in their operations. However, it is inevitable that these companies will eventually have to embrace the transformation brought about by artificial intelligence[365].

Companies that persist in relying solely on traditional methods risk missing out on the numerous benefits and opportunities that AI technology can offer. From enhancing operational efficiency to facilitating data-driven decision-making, AI systems have the potential to revolutionize various aspects of business operations. Therefore, companies

[365] Bora Çınar, *Yapay Zeka*, 209.

that fail to adapt to the changing technological landscape may find themselves at a disadvantage compared to their competitors who embrace AI-driven innovations.

The increasing prevalence of AI technologies in company management is reshaping various aspects of business operations, from mergers and acquisitions to distribution and export agreements. Furthermore, AI is revolutionizing data usage and integration, enabling companies to derive valuable insights and make more informed decisions.

Small and medium-sized enterprises (SMEs) that leverage the advantages of AI are experiencing rapid growth and are increasingly competitive with larger companies in their respective industries[366]. Conversely, companies that resist adopting AI innovations risk missing out on the opportunities and benefits that these technologies offer.

As technology continues to advance, the influence of AI systems on business operations will only grow stronger. Therefore, companies that wish to remain competitive and relevant in the market must embrace AI technologies and integrate them into their operations to stay ahead of the curve and capitalize on the opportunities presented by AI-driven innovations.

1.5.2.2. Falling Traps

Finding talented individuals in specific fields can be challenging, and even when such individuals are identified, they may face emotional or other personal challenges that can impact their productivity. In contrast, AI systems are not subject to these limitations and can provide consistent and reliable performance[367] in various tasks.

In today's rapidly evolving business landscape, companies that resist technological advancements risk becoming obsolete in the market.[368] Therefore, it is imperative for

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[366] Bora Çınar, *Yapay Zeka*, 210.

[367] Bora Çınar, *Yapay Zeka*, 212.

[368] Möslein, “Artificial Intelligence and Corporate Law”, 11-12; Karatepe Kaya, 97.

boards of directors and company executives to stay abreast of the latest technological trends and ensure that their companies have a culture of embracing innovation. Failure to adapt to technological changes could result in the company[369] losing its competitive edge and facing elimination from the market.

By leveraging AI systems and other advanced technologies, companies can minimize risks, enhance productivity, and stay ahead of the competition. Embracing technological developments and integrating them into company operations is essential for long-term success and sustainability in the modern business environment.

1.5.2.3. Effect of Not Using AI-based Technologies in Companies to the Duty of Care of the Directors

In case it is accepted whether the members of BoD or other directors could assign their duties or some authorizations to AI-based systems, it is important to evaluate whether the members of BoD or other directors could be held liable if they do not use AI systems in the companies. [370]As explained above, both directors and boards of directors have an duty of care in the course of doing their job in accordance with Article 369 of the TCC.

Additionally, members of BoD or other directors can avoid liability solely in the case that they prove that they have shown their best effort and care. In this context, if AI has superior information processing capabilities due to its capability to create predictions by translating large amounts of data into small and manageable chunks, and if it is necessary for the board to make this kind of examination, then it could be asserted that boards could be held liable for not using AI systems in the management of the companies[371].

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[369] Bora Çınar, *Yapay Zeka*, p. 213.

[370] Möslein, "Artificial Intelligence and Corporate Law", 11.

[371] Möslein, "Artificial Intelligence and Corporate Law", 11-12.

Bora Çınar's perspective highlights the current limitations and challenges associated with the widespread adoption of AI systems in corporate governance. He argues that it is currently unreasonable to hold directors liable for not utilizing AI systems due to various factors such as high costs, uncertain effectiveness compared to human decision-making, and the lack of widespread adoption in the business world.

Additionally, he suggests that the decision to use AI should be evaluated within the context of the business judgment rule, which allows directors to make decisions based on their best judgment without being held liable for unfavorable outcomes as long as they act in good faith and in the best interests of the company.

However, *Bora Çınar* acknowledges the potential future implications as AI technologies become more prevalent[372] and suggests that the landscape may change in the future as AI systems become more widespread and integral to business operations. Accordingly, whether a board can be held liable for not using AI systems in company[373] management would be subject to legal interpretation and the specific facts of each case. As AI technologies continue to evolve and become more prevalent, legal frameworks and standards may also adapt to address the implications of AI adoption in corporate governance[374].

1.5.2.3.1. Evaluation of the Use of AI Systems in Companies in Terms of the Business Judgment Rule

As explained in the first chapter, directors have to comply with article 369 of TCC in the course of performing their duties. The criterion that they have to take into consideration is "cautious director". Pursuant to the cautious director criterion, the

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[372] Möslein, "Artificial Intelligence and Corporate Law", 11-13.

[373] Möslein, "Artificial Intelligence and Corporate Law", 11-13.

[374] Möslein, "Artificial Intelligence and Corporate Law", 11-13

directors could make decisions with good intentions that are feasible to corporate governance principles[375], and then they cannot be held responsible[376].

In this context, the business judgment rule could be defined as decisions made by directors concerning the company[377]. Therefore, the business judgment rule serves as a criterion used to determine whether the relevant director has acted as a prudent director in those decisions[378].

Whereas business judgment rule principle has been regulated as the positive norm in German law and American law, it has entered our law system in justification of TCC[379]. In this context, directors who act feasible to business judgment rule criteria, will not be held responsible from their acts, because they will be evaluated as they performed their duty of care as necessary[380].

This principle aims to ensure that the decisions made within the scope of the business judgment rule will not be reviewed by the judge in terms of content[381].

The directors of a company cannot be held responsible for decisions that adhere to the business judgment rule[382]. However, certain conditions must be met for decisions to qualify under the business judgment rule. These conditions include ensuring that decisions do not violate mandatory legal regulations, align with the company's objectives and interests, are made during meetings conducted in accordance with the law, and are defensible in terms of their content[383].

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375 Möslein, "Artificial Intelligence and Corporate Law", 11-13.

376 Pulaşlı, *Genel Esaslar*, 435-436.

377 Pulaşlı, *Genel Esaslar*, 436.

378 Akdağ Güney, *Yönetim Kurulu*, 189; Sevi, *Özen Yükümlülüğü*, 301.

379 For the justification of the TCC: https://www.lexpera.com.tr/mevzuat/gerekceler/turk-ticaret-kanunu-madde-gerekceleri/1, accessed at 28.01.2024; Akdağ Güney, Yönetim Kurulu, 189.

380 Akdağ Güney, *Yönetim Kurulu*, 189; Sevi, *Özen Yükümlülüğü*, 301.

381 Sibel Hacımahmutoğlu, "The Business Judgment Rule: İşadamı Kararı mı Yoksa Ticari Muhakeme Kuralı mı?", *BATİDER Y.2014 V.30 N.4, p. (97-144)*, 144; Akdağ Güney, Yönetim Kurulu, 189

382 Pulaşlı, *Şirketler Hukuku C. II.*, 1577; Akdağ Güney, *Yönetim Kurulu*, 190.

383 Akdağ Güney, *Yönetim Kurulu*, 190.

Additionally, members participating in these meetings must be independent and impartial[384]. Nevertheless, as discussed in the first chapter, the Court of Cassation primarily evaluates directors' decisions based on their economic feasibility[385].

The use of AI as a support mechanism can be assessed within the framework of the business judgment rule. In today's business landscape, the adoption of AI is becoming increasingly common, particularly among companies with substantial capital. Therefore, the decision not to utilize AI systems in such companies could be viewed as a breach of the directors' duty of care. This is because opting out of AI usage would likely run counter to the company's objectives and interests in the current business environment.

Specifically, the non-implementation of AI systems, especially in functions like the Audit Committee and Early Detection of Risk and Risk Management Committee, could be seen as neglecting crucial tools for efficient operation and risk mitigation. However, for companies with smaller capital, mandating the use of AI might be impractical and financially burdensome. In such cases, the decision regarding AI usage should be subject to evaluation within the business judgment rule, considering the unique circumstances and resources of these companies.

In summary, while the usage of AI in companies with significant capital should be considered a necessary step aligned with corporate objectives, for smaller-scale companies, the decision should be made with consideration of their specific needs and capabilities, within the framework of the business judgment rule.

1.5.3. Evaluation of the Effect of AI-based Technology Regarding Legal Liability

As explained above, as technology develops daily, AI system usage is also increasing. It has been discussed the liability in the conditions where AI systems are not used

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[384] Akdağ Güney, *Yönetim Kurulu*, 190.

[385] For detailed information, please refer to the first chapter.

above. However, there could also be problems in the company boardrooms where the AI system is used. Therefore, how liability will be attributed in situations where unlawful decisions or supports made by AI that harm business partners of the company and third parties is an important question. In this context, general tort law, agency theory product liability, and liability of directors could be applied in these situations.[386]

Primarily, it should be asserted that since AI systems do not have a legal entity, relevant systems could not be held responsible for relevant failures. It could be mentioned that pursuant to general tort law, the owner of the AI system will be held liable due to unlawful acts of AI systems[387].

In this context, in case owners of the AI system give damages to third persons intentionally or negligently; they will be held liable by general tort law.[388] Because, liability based on tort has four basic conditions which are unlawful act, fault, damage and causality[389]. However, based on some opinions in the doctrine strict liability based on tort liability must be applied to the damages which have occurred due to AI[390].

Still, the owner of AI will be responsible due to these acts. The same outcome could be attained upon the determination that the AI system operates as an agent of the company in accordance with agency theory[391]. Because, according to agency theory, one party (principal) authorizes another (agent) to do a specific job, and the authorized

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386 Floris Mertens., "The Use of Artificial Intelligence in Corporate Decision-Making at Board Level: A Preliminary Legal Analysis", *Financial Law Institute Working Paper Series Y.2023 N.1 p. (1-30)* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4339413, 29 (accessed at: 02.09.2023), .; Seda Gayretli Aydın, *Yapay Zekanın Ürün Sorumluluğu*, Ankara: Adalet Yayınevi 2023, 133.

387 Mertens, "Artificial Intelligence", 23-24; Gayretli Aydın, 133.

388 Gayretli Aydın, 133.

389 Oğuzman and Öz, 7; Eren, *Genel Hükümler*, 592; Gümüş, *Genel Hükümler*, 422; Gayretli Aydın, 133.

390 Anat Lior, "AI Entities as AI Agents: Artificial Intelligence Liability and the AI Respondeat Superior Analogy", *Mitchell Hamline Law Review, Y 2020. V.46, N.5 p.(1043-1102),* 1096 etc; Ugo Pagallo, *The Laws of Robot Crimes, Contracts and Torts*, New York: Springer 2013, 130; Pursuant to Turkish law it could be employer liability which is regulated under Article 66 of TCO for detailed explanation please see at Gayretli Aydın, 138-139.

391 Mertens, "Artificial Intelligence", 23-24.

party performs the job on behalf and account of the other party.[392]Therefore, under agency theory AI system will be evaluated as agent of the owner company and company will be held responsible due to the actions of AI systems. Furthermore, the liability of BoD and other directors may be discussed within the company[393]. However, it will be not easy to prove the correlation between the damage and the AI system[394].

However, concerning the product liability of AI, the proposed product liability directives of the EU encompass the producer's strict liability for defective products, mandating compensation for various damages, particularly those suffered by individuals[395]. This directive aims to ensure that victims of AI-based machines receive protection at a level equivalent to victims of traditional products.

As previously discussed, under traditional rules, victims are required to prove wrongful action or omission by a person to seek compensation for their damages. Failure to establish this may result in the inability to recover losses under traditional rules. Hence, it becomes imperative to establish strict liability for both the owner and producer of such products[396]. In line with this, the "proposed AI liability directive" outlines strict liability for both the owner and producer of AI products[397].

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[392] Kathleeen M. Eisenhardt, "Agency Theory: An Assessment and Review", *The Academy of Management Review Y.1989. V.14, N.1, p.(57-74),* https://www.jstor.org/stable/258191?origin=crossref, 58, (accessed at: 31.01.2024).

[393] Çınar, *Yapay Zeka* , 201.

[394] Çınar, *Yapay Zeka*, 201.

[395] "Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive) COM(2022) 496 Final", 28 September 2022, https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contractrules/digital-contracts/liability-rules-artificial-intelligence_en , (accessed at: 07.09.2023).

[396] "Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive) COM(2022) 496 Final", 28 September 2022, https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contractrules/digital-contracts/liability-rules-artificial-intelligence_en , (accessed at 07.09.2023).

[397] "Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive) COM(2022) 496

The directive establishes a rebuttable presumption regarding causality for both the owner and producer of AI products[398]. This legal provision is pivotal in ensuring a fair allocation of the burden of proof. Requiring victims to bear this burden would present formidable challenges in establishing causality, significantly hindering their ability to seek recourse for damages incurred[399]. Therefore, by placing this burden on the owner and producer, the directive facilitates a more equitable process for victims seeking compensation for harm resulting from AI products.

For example, bias is one of the most well-known problems of AI systems.[400] In this case, it is essential to provide examples of several AI systems that have been proven to exhibit bias. For instance, some facial recognition systems have been shown to perform well in recognizing white men but poorly in recognizing black people[401]. Proving the source of bias can be challenging for the victims. Consequently, these situations, where liability arises from AI, such as a biased system, will be discussed. These scenarios will prompt the question of who will be liable for the AI system's actions or decisions.

Final", 28 97 September 2022, https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contractrules/digital-contracts/liability-rules-artificial-intelligence_en , (accessed at: 07.09.2023).

[398] Proposal for a Directive of the European Parliament and of the Council on Adapting Non-Contractual Civil Liability Rules to Artificial Intelligence (AI Liability Directive) COM(2022) 496 Final", 28 September 2022, https://ec.europa.eu/info/business-economy-euro/doing-business-eu/contractrules/digital-contracts/liability-rules-artificial-intelligence_en , (accessed at: 07.09.2023).

[399] Sandra Wachter, Brent Mittelstadt and Chris Russell, "Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI," *Computer Law & Security Review Y.2021 N.41 p(1-72)*, 105567 ,https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547922, 4 , (accessed at 07.09.2023).

[400] Muzaffer Eroğlu and Meltem Karatepe Kaya, "Impact of Artifcial Intelligence on Corporate Board Diversity Policies and Regulations", *European Business Organization Law Review Y.2022 N. 23 p.(541–572),* https://link.springer.com/article/10.1007/s40804-022-00251-5 , 558, (accessed at 06.03.2024).

[401] A. Dignam, "Artificial Intelligence: The Very Human Dangers of Dysfunctional Design and Autocratic Corporate Governance", *Queen Mary School of Law Legal Studies Research Paper No. Y. 2019 N.314 p.(1-49)*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3382342 ,14, (accessed at 07.09.2023).

Therefore, it is essential to attribute liability for the actions of AI to both the owner and the producer of the AI. In this context, if the failure in the AI system is determined to have originated from the producer of the AI, then the producer of the AI system must be held liable. However, if there is no clear correlation between the fault of the AI and its production process, then the liability of the AI's owner should be examined. If the legal framework accepts strict liability for AI systems, then both producers and owners will be held liable in all circumstances. Consequently, in cases where the company is found liable, this responsibility will also extend to the BoD. In my opinion, given the difficulty victims face in proving causality between AI systems and faults, strict liability should be applied to both the owner and the producer, rendering them jointly and severally liable. However, there must be a rebuttable presumption for them; if either party proves that there is no correlation between the fault and their actions, they should not be held liable.

1.5.4. Evaluation of the Use of AI in Mergers in Terms of the Duty of Care of the Directors

In today’s world, mergers stand as a pivotal strategy for companies aiming at growth and competitive advantage. With the advancement of technology, particularly AI, mergers have seen a significant transformation. Moreover, the increasing number of mergers[402] underscores their importance in the corporate world.

According to Article 137 of the TCC, mergers can take two forms: merger by acquisition, involving the acquisition of one or more companies by another, and merger by formation of a new company, where companies unite under a new entity.

[402] Marc Eulerich, Raphael Kopp and Benjamin Fligge. “Mergers and Acquisitions Research - A Bibliometric Analysis”, *European Management Journal Y.2022 p.(1-48),* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3667230, 2, (accessed at: 09.10.2023).

The process of mergers entails extensive research, due diligence, negotiation, and post-deal integration, all of which can be facilitated through the use of AI systems[403].

Firstly, achieving accurate valuation and structuring deals are critical factors for the success of mergers. In this regard, AI-based financial modeling and forecasting systems play a pivotal role. These systems leverage vast amounts of data to provide precise and timely valuations, considering factors such as market trends, industry dynamics, and other relevant elements. By harnessing the power of AI, companies can enhance the accuracy and efficiency of their merger processes, ultimately leading to more successful outcomes.

Additionally, advanced AI systems within companies[404] enable optimization of agreed-upon terms and structures during the merger process. Moreover, post-merger integration stands as a critical issue, as it directly impacts the future success of the combined entity. AI systems streamline integration efforts by identifying operational synergies, optimizing workflows, and automating repetitive tasks[405]. Furthermore, these technologies govern the integration process in real-time, empowering companies to make data-driven decisions and align their strategies[406] effectively.

Besides, advanced AI systems within companies enable optimization of agreed-upon terms and structures during the merger process. Moreover, post-merger integration stands as a critical issue, as it directly impacts the future success of the combined entity. AI systems streamline integration efforts by identifying operational synergies, optimizing workflows, and automating repetitive tasks[407]. Furthermore, these

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[403] Şengül Al Kılıç, *Türk Ticaret Kanunu Tasarısına Göre Ticaret Şirketlerinin Birleşmesi*, İstanbul: Beta Yayıncılık 2009, 1; Ferna İpekel Kayalı, *Türk Ticaret Kanunu'na Göre Birleşmeler*, İstanbul: Vedat Yayıncılık, 2014, 95; Pulaşlı, Şirketler Hukuku C. I., 231.

[404] Al Kılıç, 1; İpekel Kayalı, 95; Pulaşlı, *Şirketler Hukuku C. I.,* 231.

[405] See at https://www.acquisition-international.com/how-ai-impacts-mergers-and-acquisitions/, (accessed: 09.10.2023).

[406] See at https://www.acquisition-international.com/how-ai-impacts-mergers-and-acquisitions/,(accessed at: 09.10.2023).

[407] See at https://www.acquisition-international.com/how-ai-impacts-mergers-and-acquisitions/,(accessed at: 09.10.2023).

technologies govern the integration process in real-time, empowering companies to make data-driven decisions and align their strategies effectively.

Furthermore, post-merger integration is essential for ensuring the future success of the combined firm. AI systems facilitate this process by identifying potential operational mechanisms, streamlining workflows, and automating routine tasks. Moreover, AI-based technologies enable real-time governance of the integration process, allowing companies[408] to make data-driven decisions and align their strategies effectively.

Additionally, mergers involve navigating complex legal and regulatory landscapes, which can be costly and time-consuming. AI-powered solutions offer assistance by automating the examination and analysis of contracts, regulatory filings, and other legal documents, thereby reducing human-related risks[409] in mergers.

Therefore, it is crucial to assess whether the omission of AI systems in mergers and acquisitions constitutes a breach of directors' duty of care. Currently, with the limited adoption of AI systems in mergers, it cannot be argued that failing to employ AI systems represents a breach of directors' duty of care. However, as the use of AI becomes more prevalent in corporate mergers, the failure to utilize AI may be viewed as a breach of directors' duty of care.

Furthermore, in the event that AI systems are deployed in the context of mergers and deleterious consequences emerge as a consequence of their utilization, an argument could be posited regarding the potential legal liability of the directors.

2. EFFECT OF BLOCKCHAIN TO THE DUTY OF CARE OF DIRECTORS

[408] See at https://www.acquisition-international.com/how-ai-impacts-mergers-and-acquisitions/,(accessed at: 09.10.2023).

[409] See at https://www.acquisition-international.com/how-ai-impacts-mergers-and-acquisitions/,(accessed at: 09.10.2023).

2.1. Definition of Blockchain

Technological progress is fundamentally altering our world with each passing day. Within this dynamic framework, significant advancements in technology wield a profound influence over the global economic and fiscal systems. Consequently, blockchain[410] technology stands out as one of the most pivotal advancements of our era.

Blockchain technology was initially conceived by an anonymous entity or group operating under the pseudonym Satoshi Nakamoto. Its pivotal role in the cryptocurrency bitcoin was recognized in 2009 when it was implemented as the foundational framework. However, it's important to distinguish between bitcoin and blockchain[411], as they are distinct entities. While blockchain serves as the underlying technology for cryptocurrencies[412], bitcoin represents just one example of such digital

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[410]Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System", *Y. 2008 p.(1-11),* https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2018/Emerging_Tech_Bitcoin_Crypto.pdf, 1, (accessed at 13.03.2024); Emmanuelle Ganne, *Can Blockchain revolutionize international trade?,* Switzerland: World Trade Organization, 2018, 3; Fatih Bilgili and Muhammed Fatih Cengil, *Blockchain ve Kripto Para Hukuku*, Bursa: Dora Yayınları, 2022, 48; Fatih Bilgili and Muhammed Fatih Cengil, "İcra ve İflas Hukuku Yönüyle Kripto Paralara İlişkin Bazı Meseleler", *Kadir Has Üniversitesi Hukuk Fakültesi Dergisi. Y. 2019 V.7 N.1 p.(99-109),*, https://jurix.com.tr/article/19246, 99 (accessed at 06.03.2024); Fatih Bilgili and Muhammed Fatih Cengil, "Bitcoin Özelinde Kripto Paraların Ticaret Şirketlerine Sermaye Olarak Getirilmesi" *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi , Y. 2019 V.23, N..3 p.(3-23),*, https://dergipark.org.tr/tr/download/article-file/790165 , 4, (accessed at 06.03.2024).

[411] Ganne, *Blockchain*, 3.

[412]Ganne, *Blockchain*, 3; Ethereum, Tether USDt, BNB, Solana, XRP, USDC, Cardano, Avalanche, Dogecoin, TRON, Chainlink, Polka Dot, Polygon, Toncoin, Dai, Internet Computer, Shiba Inu, Litecoin, Bitcoin Cash, UNUSED LEO, Uni Swap, Cosmos, Ethereum Classic, Monero, Stellar, Apros and Injective could be given as example of other cryptocurrencies. (See at: https://coinmarketcap.com/ (accessed at 01.02.2024)).

currencies. Contrary to common misconception, the genesis of blockchain was not solely a response to the 2008 financial crisis[413]; its development predates[414] this event.

Blockchain can be defined as a ledger technology that records various types of transactions across decentralized computers[415]. The term "blockchain" derives from the chain formed by a group of blocks[416], and it is an example of Distributed Ledger Technology (DLT)[417]. One of its most significant innovations is its ability to address the double spend problem[418].

As a form of DLT, blockchain leverages established and secure cryptographic technologies. In this system, known as blockchain technology, transactions are managed by distributed computers, or "nodes," without the need for third-party intervention[419]. Data within the blockchain network are distributed among all participants but can only be verified and confirmed by authorized participants based on the consensus protocol[420].

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[413] Ganne, Blockchain, 3-4.

[414] The ancestors of blockchain were developed by "Cypherpunks," network activists who used cryptography for social and political change. These experiments leading to blockchain's creation likely occurred before 2008, though the exact date of its emergence is unknown (Ganne, Blockchain, 3-4).

[415] Lawrence J. Trautman, "Is Disruptive Blockchain Technology the Future of Financial Services?", *The Consumer Finance Law Quarterly Report Y. 2016 p.(232-242)* ,https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2786186 , 237, (accessed at 07.09.2023).

[416] Mete Tevetoğlu, *Hukuki Yönleriyle Kripto Varlıklar ve Kripto Varlıkların İlk Arzı*, İstanbul: Aristo Yayınları, 2021, 7.

[417] E. Eylem Aksoy Retornaz and Osman Gazi Güçlütürk, *Gelişen Teknolojiler ve Hukuk I: Blokzincir*, İstanbul: Onikilevha Yayıncılık Yayıncılık, 2021, 21.

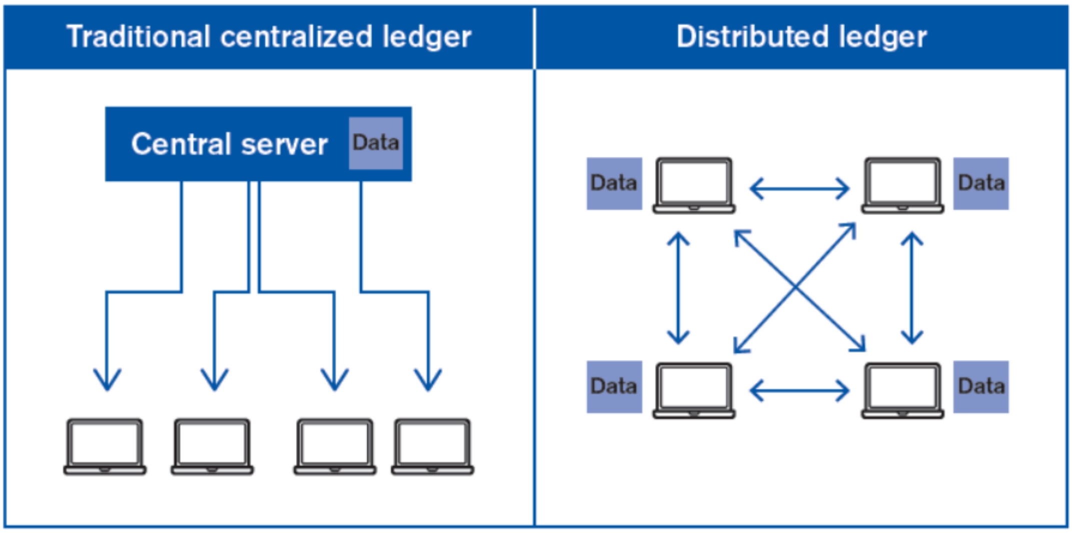
[418]Marc Pilkington, "Blockchain Technology: Principles and Applications", *Research Handbook on Digital Transformations, edited by F. Xavier Olleros and Majlinda Zhegu. Edward Elgar, Y. 2016 p. (1-39)*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662660, 3, (accessed at 07.09.2023).

[419] Ganne, *Blockchain*, 5.

[420] Ganne, *Blockchain*, 5.

The distinction between centralized and decentralized distributed ledger technology is illustrated in Figure 1[421].

(Figure 1: Centralized System and Decentralized DLT System)



Consequently, blockchain can be accurately described as a decentralized database where data is organized chronologically and interconnected through blocks[422]. While it is often conflated with bitcoin, it is important to recognize that blockchain is the underlying technology powering bitcoin. Moreover, blockchain has given rise to various other applications, including smart contracts, non-fungible tokens (NFTs), and Decentralized Autonomous Organizations (DAOs). However, it is noteworthy that the utility of blockchain extends beyond these specific products.

2.2. Operation of Blockchain

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[421] Ganne, *Blockchain*, 6.

[422] Florian Möslein, "Blockchain Applications and Company Law", *Legal Technology Transformation in Practice, Y. 2020 p. (1-7),* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720222 , 1, (accessed at 08.09.2023).

As explained above the term blockchain emerges from transactions being grouped as blocks in the system and relevant blocks generate a chain.[423] In addition, in a type of blockchain system, every single block has a hash value that shows the data entered into the system; aforesaid blocks are linked to each other with hash values[424].

Every block in a blockchain system contains the hash value of the prior block. Therefore, any alterations made to the system would impact the entire chain, ensuring the security of the blockchain system[425].

Transactions on the blockchain system are conducted using public and private keys[426]. Furthermore, the blockchain system enables two strangers to send and receive encrypted messages from each other. Every user in the blockchain system possesses public and private keys consisting of numbers. Messages within this system can be encrypted using either the public or private key, but decryption requires both the public and private keys[427].

Users in the blockchain system can freely share their public key with others to send encrypted messages, but they must keep their private key[428] secure. In a digital signature system, the user sending an encrypted message also provides a public key to the intended recipient[429]. The recipient then decrypts the message using their own public and private keys. These public and private keys conduct the operation of the blockchain system.

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[423] Tuğçe Tomrukçu, *Blockchain Teknolojisinin Eser Sahibi Haklarına Hukuki Yansıması,* Ankara: Seçkin Yayıncılık, 2021, 79.

[424] Vedat Güven and Erkin Şahinöz, *Blokzincir, Kripto Paralar, Bitcoin Satoshi Dünyayı Değiştiriyor*, İstanbul: Kronik Yayıncılık, 2021, 51; Ganne, *Blockchain,* 6.

[425] Güven and Şahinöz, *Kripto Paralar,* 51.

[426] Stephen M. McJohn and Ian McJohn, "The Commercial Law of Bitcoin and Blockchain Transactions", *Uniform Commercial Code Law Journal, Forthcoming, Suffolk University Law School Research Paper Y.2016 N.16-13 p.(1-23),* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874463 ,3 , (accessed at 09.09.2023).

[427] McJohn and McJohn, "The Commercial Law of Bitcoin", 3.

[428] McJohn and McJohn, "The Commercial Law of Bitcoin", p.3.

[429] Güven and Şahinöz, *Kripto Paralar*, p. 49.

2.3. Types of Blockchain Technology

As known, there are different types of blockchain technology. Firstly, public blockchain could be articulated as a major type of blockchain; in this type of blockchain, computer networks are basically accessible to everyone interested in transactions; therefore, it is a non-restrictive blockchain that does not seek any kind of permission for the members to be a part of the system[430]. Secondly, there is a private blockchain which is a restricted and closed system; in this type of blockchain, the system is administrated by an entity and relevant entity allows permission to the users who want to enter the system[431].

Thirdly, there is also consortium blockchain; in this type of blockchain the system is not governed by single legal entity, it is supervised by an organization; in this context, transactions could only be evaluated as valid if they are verified and approved by the organization[432].

2.4. Use of Blockchain in Companies and Company Law

As explained earlier, blockchain could be defined as a technology that records different types of transactions on decentralized computers. This technology starts to affect and transform many things in our lives, and the aforesaid effect will also reflect on company law. In order to evaluate the effect of blockchain on the duty of care of

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430 P . Paul, S. Aithal, R. Saavedra, and Surajit Ghosh, "Blockchain Technology and Its Types—A Short Review," *International Journal of Applied Science and Engineering (IJASE) Y. 2021, N. 2 p (1-11),*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4050933, 5, (accessed at 09.03.2024).

431 Paul, Aithal, Saavedra and Ghosh, "Blockchain Technology and Its Types", 7.

432 Paul, Aithal, Saavedra and Ghosh, "Blockchain Technology and Its Types", 9-10.

directors, it is substantial to evaluate the usage of blockchain in companies. Therefore, this part will discuss the usage of blockchain in companies.

2.4.1. Use of Blockchain in Registration to the Trade Registry

The trade registry functions as a centralized system overseen by governmental authorities to record and store critical information and documents. Its purpose is to facilitate accurate tracking of changes in commercial activities, thereby ensuring transparency and accountability in society[433]'s economic endeavors.

In the Turkish legal system, the regulations governing the trade registry are primarily outlined in the Trade Registry Regulation (TRR), which is founded on the provisions stipulated in Article 24-38 of the TCC and Article 26 of the same legislation[434]. The fundamental objective of this registry is to facilitate accessible and transparent dissemination of crucial information, documents, and alterations pertaining to commercial entities, individual merchants, and trading companies[435].

By providing open access to this repository of data, the trade registry serves to safeguard the legal interests[436] of all stakeholders involved. The adoption of blockchain technology for maintaining national records is steadily gaining momentum and acceptance due to its robust proof of authenticity and efficient management of information transfer.

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[433] Mehmet Emin Bilge, *Ticaret Sicili*, İstanbul: Beta Yayınları 1999, 9; Necla Akdağ Güney, *Yeni Turk Ticaret Kanunu ve Avrupa Birliği Mevzuatı Çerçevesinde Ticaret Sicili,* İstanbul: İstanbul Ticaret Odası Yayınları, 2011, 17; Duygu Demirel, "Ticaret Sicili", Yayınlanmış Yüksek Lisans Tezi, Marmara Üniversitesi 2016, 5.

[434] Demirel, 5.

[435] Bilge, 9 etc; Akdağ Güney, *Ticaret Sicili*, 17 etc.

[436] İrfan Akın, "Dijital Gelişmelerin Şirketler Hukuku Üzerindeki Etkisi", *TAÜHFD Y.2022; V.4 N.1: p.(3-26)* ,https://3fcampus.tau.edu.tr/uploads/cms/hfd.tau/9GCS2QtXQE.pdf ,11 , (accessed at 09.09.2023).

This trend is driven by the significant benefits offered by blockchain, including time and cost savings, as well as its high-level data security features explained above[437]. Moreover, the standardized rules governing blockchain technology internationally enable records stored on such platforms to attain international recognition easily.

Consequently, information stored in the trade registry, for instance, can be readily accessible at the international level[438], enhancing transparency and accessibility across borders.

There are also several disadvantages of blockchain technology. One of the disadvantages of the use of blockchain is high energy use; for example, one Bitcoin transaction requires 1709.93 kWh of electricity, while 100,000 VISA transactions consume 151 kWh of electricity.[439] Second negativity is that it is not easy to remove central control mechanism in the records[440].

However, it could be mentioned that as the usage of blockchain and AI increases, the aforementioned disadvantages will be overcome in the future.

2.4.2. Use of Blockchain in Share Ledger Records

The share ledger, which is under the board's responsibility in joint stock companies and limited liable companies, enables the determination of who owns shares in the company.[441] By virtue of these records, it will be clear who will exercise financial and administrative rights derived from relevant shares.[442] Furthermore, with the aforesaid

[437] Akın, "Dijital Gelişmeler", 11.

[438] Akın, "Dijital Gelişmeler", 11.

[439] Akın, "Dijital Gelişmeler", 11-12.; https://digiconomist.net/bitcoin-energy-consumption, (accessed at 09.09.2023),

[440] Akın, "Dijital Gelişmeler", 11-12.

[441]Ali Murat Sevi, *Anonim Ortaklıkta Payın Devri*, Ankara: Seçkin Yayıncılık, 2018, 258-259; Şafak Narbay, *Anonim Ortaklıkta Pay Defteri*, Ankara: Seçkin Yayıncılık, 2003, 38-39; Tekinalp, *Sermaye Ortaklıkları*, 171.

[442] Sevi, *Pay Devri*, 258-259; Narbay, 38-39.

share ledgers, third persons out of the company can access the information regarding shares easily and with less expenses.[443]

However, it is important to emphasize that shares could be assigned without needing the registry of share ledger. In this context, the principle of publicity, which is valid in the trade registry, does not apply to the shared ledger; this situation facilitates this system to work with blockchain technology.[444] Pursuant to Article 499 of TCC, the company has an obligation to keep record of the names, surnames, business names, and addresses of the owners of the uncertified registered shares, the owners of the certified registered shares, and the usufructuaries in the share ledger. The obligation to register in the share ledger begins with the registration of the company's articles of association. Insomuch as, with the registration of the company in the trade registry, relevant shares are born automatically, even if the certificates have not been issued yet. Moreover, it is substantial to state that keeping a share ledger is the duty of BoD.[445]

The records in the share ledger are descriptive and constitute a rebuttable presumption of share ownership; therefore, it has no contribution to the acquisition of property. In this context, it could be stated that the share ledger creates a rebuttable presumption in terms of ownership and shareholding of shares.[446] Since the principle of trust in the registry does not apply to the share register as in the land registry according to Article 1023 of (Turkish Civil Code) CC, security precautions regarding the accuracy of the information in the records are not required to be at the same level.[447]

Therefore, it could be mentioned that the use of blockchain will be very useful in keeping share ledgers in joint stock companies and limited liable companies. As known, transparency is very substantial for the investors and creditors for healthy

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[443] Akın, “Dijital Gelişmeler”, 12.

[444] Akın, “Dijital Gelişmeler”, 12.

[445] Akın, “Dijital Gelişmeler”, 13.

[446] Ünal Tekinalp, *Anonim Ortaklıkta Yeni Bağlam Sisteminin Esasları Pay Defteri Hukuku*, İstanbul: Vedat Kitapçılık, 2012, 97; Soner Altaş, *Sermaye Şirketlerinde ve Kooperatiflerde Pay Defteri*, Ankara: Seçkin Yayınları, 2020, 26; Tekinalp, *Sermaye Ortaklıkları*, 171; Sevi, *Pay Devri*, 258-259; Akın, “Dijital Gelişmeler”, 13.

[447] Tekinalp, *Sermaye Ortaklıkları*, 171; Sevi, *Pay Devri*, 258-259; Akın, “Dijital Gelişmeler”, 13-14.

market processes. Share ledger records, which are kept by using DLT within companies and are kept under certain standards by virtue of blockchain; the relevant issue provides trust to both the investors and creditors.[448]

However, the biggest challenge blockchain will face in this field will be gaining trust. It could be specified that, by virtue of its decentralized and secured system, it will easily gain the trust of users.

2.4.3. Keeping Financial Records in Blockchain

As explained earlier, BoD has non-delegable and inalienable duties which have been regulated in Article 375 of TCC. Accounting, financial control and establishing necessary systems for financial planning purposes are one of these duties which are regulated[449] in Article 375/1-c of TCC.

As stated in the justification, there must be an organization and "interior audit" system to arrange financial planning purposes and interior audit in joint stock companies. Especially, it is an obligation in companies whose shares are traded in the stock exchange.[450] Blockchain technology may provide serious contribution to the BoD of the joint stock companies[451] regarding financial records. In this context, blockchain technology can enable transparent financial records by using cryptocurrencies.

A crypto-encrypted company's financial records may be available for review by company shareholders and other interest groups to the extent permitted. In this context,

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[448] As explained above, since records are kept in distributed ledgers at the same time in blockchain technology, it will not be easy to make changes to them and this will provide confidence to the users.

[449] For the justification of TCC: https://www.lexpera.com.tr/mevzuat/gerekceler/turk-ticaret-kanunu-madde-gerekceleri/1 , accessed at 28.01.2024.

[450] Pulaşlı, *Şirketler Hukuku C. II*.,.1188-1189; Pulaşlı, *Genel Esaslar*, 398-399; Tekinalp, *Sermaye Ortaklıkları*, 250-251.

[451] Pulaşlı, *Şirketler Hukuku C. II*.,.1188-1189; Pulaşlı, *Genel Esaslar*, 398-399; Tekinalp, *Sermaye Ortaklıkları*, 250-251.

it will become much easier to detect irregularities and untrue statements in financial records.

Furthermore, easy access to records that are appropriate to the real situation also provides convenience in terms of tax calculation. However, companies that are not quoted on the stock exchange will not be happy from this situation, because third parties will have a chance to access their hidden information.[452]

For companies listed on the stock exchange, the transparency afforded by blockchain technology presents significant advantages. With blockchain, the need for auditing activities conducted before and after quarterly financial statements can be minimized.

In Turkey's capital markets, there have been instances where periodic financial statements were misused in the absence of proper oversight and enforcement, resulting in harm to small investors. By providing continuous access to records via blockchain, the potential for market manipulation can be reduced, enhancing investor confidence and market integrity[453].

Moreover, continuous access to financial records prepared using blockchain will ensure that shareholders have regular access to accurate information about the company[454], thus eliminating information asymmetry. An example of this can be seen in Australia, where Computershare and SETL collaborated to pioneer the use of blockchain in their records and securities.[455] This collaboration has not only streamlined internal processes but has also preemptively resolved many potential disputes before they escalate.[456]

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[452]Akın, "Dijital Gelişmeler", 14.

[453]Akın, "Dijital Gelişmeler", 14.

[454]David Yermack, "Corporate Governance and Blockchains", *Review of Finance, Y,2017 p.(7–31),* https://doi.org/10.1093/rof/rfw074 , (accessed at 03.02.2024), 8-9; Keskin, 68; Akın, "Dijital Gelişmeler", 15.

[455]For detailed information please see at: https://setl.io/computershare-and-setl-demonstrate-australias-first-working-blockchain-solution/, accessed at 03.02.2024.

[456] Akın, "Dijital Gelişmeler", 15.

Furthermore, the adoption of blockchain technology is poised to revolutionize the auditing process, leading to cost reductions and enhanced efficiency. Through blockchain, a systematic audit process can be conducted on encrypted and securely recorded data, enabling not only the verification and validation of data accuracy but also facilitating transaction analysis[457].

2.4.4. Use of Blockchain in AGMs

In Türkiye, pursuant to Article 409 of the TCC, the general assembly may convene both ordinary and extraordinary meetings.[458] Ordinary meetings are made every year within three months from the end of each fiscal year. Generally, BoD calls the general assembly to a meeting.[459]

Furthermore, with the requests of shareholders, who hold at least one tenth of the capital, (In publicly held companies, one twentieth of the capital) may request the board to call general assembly to a meeting. Furthermore, AGMs can be also organized without call in case conditions are provided regulated under Article 416 of TCC.[460]

In addition, pursuant to the current TCC, AGMs can be held either physically or electronically.[461] In this context, according to Article 1527 of the TCC, if provided for in the articles of association of a capital company, the BoD and other directors may arrange a meeting where all members attend via electronic means[462] or where certain members attend physically while others attend electronically.

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[457] Akın, "Dijital Gelişmeler", 15.

[458] Pulaşlı, *Genel Esaslar,* 312-313; Tekinalp, *Sermaye Ortaklıkları*, 310-311.

[459] Pulaşlı, *Genel Esaslar,* 312-313; Tekinalp, *Sermaye Ortaklıkları*, 310-311.

[460] Pulaşlı, *Genel Esaslar*, 312-313; Tekinalp, *Sermaye Ortaklıkları*, 310-311.

[461] Mehmet Bahtiyar and Esra Hamamcıoğlu, *Yeni TTK'ya Göre Anonim Ortaklık Genel Kurul Toplantıları*, İstanbul: Beta Yayınları, 2014, 11.

[462] Bahtiyar and Hamamcıoğlu, 12.

However, Article 32/1-b of the Regulation on the Procedures and Principles of General Assembly Meetings of Joint Stock Companies and the Ministry Representatives to Be Present at These Meetings mandates the presence of a ministry representative in electronic AGMs.[463] Attendance at general assembly meetings, making motions, expressing opinions, and casting votes via electronic means result in the same legal consequences as physical attendance and voting.[464] Furthermore, in Türkiye, there is also regulation regarding electronic AGMs, known as the Regulation on General Assembly Meetings to be held electronically in Joint Stock Companies.[465]

As known, main problems with the current systems in AGM have to do with transparency, verification, and identification issues; and aforesaid issues are directly linked to the advantages of blockchain technology.[466] Insomuch as, all transactions which are added to blockchain system does not work without overwriting any previous transactions.[467] The ledger in blockchain system is always updated in identical database and could be easily verified by shareholders.[468]It is also a secured system because in case any changes occur in the system, this will affect the entire system.[469]

In addition, by virtue of blockchain, shareholders in the company can be easily identified with the digital identity of their wallet or the proof of authentication outside

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[463]"Regulation on the Procedures and Principles of General Assembly Meetings of Joint Stock Companies and the Ministry Representatives to be present at these meetings" https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=16800&MevzuatTur=7&MevzuatTertip=5, (accessed at 03.02.2024); Bahtiyar and Hamamcıoğlu, 76

[464]Bahtiyar and Hamamcıoğlu, 12; Keskin, 72.

[465] "Regulation on General Assembly Meetings to Be Held Electronically In Joint Stock Companies" https://www.mevzuat.gov.tr/File/GeneratePdf?mevzuat=16548 mevzuat Tur=Kurum Ve Kurulus Yonetmeligi Mevzuat Tertip=5 , (accessed at 03.02.2024).

[466]Anne Lafarre and Christoph Van der Elst, "Blockchain Technology for Corporate Governance and Shareholder Activism", *Law Working Paper Y.2018 N.390 p.(1-26)* https://www.researchgate.net/publication/324670400_Blockchain_Technology_for_Corporate_Governance_and_Shareholder_Activism , 15, (accessed at 10.09.2023).

[467]Lafarre and Van der Elst, "Blockchain Technology for Corporate Governance" 15.

[468]Lafarre and Van der Elst, "Blockchain Technology for Corporate Governance" 15.

[469]Lafarre and Van der Elst, "Blockchain Technology for Corporate Governance" 15.

blockchain.[470] Therefore, it could be mentioned that blockchain may play a significant role in AGMs.[471]

Thanks to blockchain technology, AGMs can be conducted both physically and online, granting shareholders the ability to vote and express[472] their opinions regardless of their location. This facilitates more effective[473] utilization of the right to receive and review information.

Shareholders can convene a decentralized general assembly meeting without requiring a representative from the ministry[474], and they can securely cast[475] their votes. The need for physical infrastructure to organize AGMs[476] is eliminated, simplifying the process. Consequently, issues encountered in family company or cooperative general assemblies can be addressed through blockchain technology.[477] Complaints such as being denied access to the meeting room, inability to speak at the meeting, or failure to record objections can be eradicated.

By utilizing blockchain in AGMs, the company can overcome a significant barrier to achieving democracy.[478] This innovative approach not only addresses issues related to the operation of AGMs but also delves into matters concerning the company's activities and shareholder rights in greater detail.[479] Nasdaq's pioneering

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[470] Paslı, Corporate Governance, 5-13; Eminoğlu, Kurumsal Yönetim, 14.

[471] Please see at heading 1.4 for the principles of corporate governance.

[472] Lafarre and Van der Elst, "Blockchain Technology for Corporate Governance",.15.

[473] Muhammed Fatih Cengil and Ömer Korkut, "Dijital Çağda Genel Kurul (Anonim Şirket Genel Kurul Toplantılarına İlişkin İsviçre Borçlar Kanunu Değişikliği Hakkında Değerlendirmeler)", *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi Y.2022,V.26 N. 3 p.(275 – 324),* , https://dergipark.org.tr/tr/pub/ahbvuhfd/issue/71369/1101884 , 302-303 (accessed at 03.02.2024); Akın, "Dijital Gelişmeler", 15-16.

[474] As explained above, according to the actual system it is obligatory to hold ministry representatives in electronic AGMs.

[475] Cengil and Korkut, 302-303.

[476] Akın, "Dijital Gelişmeler", 15-16.

[477] Akın, "Dijital Gelişmeler", 15-16.

[478] Akın, "Dijital Gelişmeler", 15-16..

[479] Akın, "Dijital Gelişmeler", 15-16..

implementation of e-voting via blockchain in Estonian AGMs marked the first practical application of blockchain technology in corporate voting.[480]

As a result, measures such as preventing information asymmetry, manipulation by majority shareholders, and internal disputes within the company can be effectively mitigated.

2.4.5. Use of Blockchain in Board Meetings

Electronic board meetings could be held as optional in many countries.[481] In Türkiye, according to Article 390/1 of TCC, it is now possible to hold board meetings electronically.[482] However, there are some conditions for BoD meetings to be held electronically. There is also a communique regarding this issue.[483] Firstly, one of the members of BoD must request it.[484] Also, in order to arrange electronic board meetings there has to be provision in the article of association of the company pursuant to Article 1527 of TCC.[485]

Another vital condition is that the relevant company must have a website regarding this issue. Furthermore, the companies must get technical reports regarding their

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[480] Lafarre and Van der Elst, "Blockchain Technology for Corporate Governance" 21.

[481]For detailed information regarding implementation of electronic board and share holder meeting in different regions see at https://www.brinknews.com/are-virtual-meetings-for-shareholders-and-board-members-the-new-normal/ (accessed at 03.02.2024).

[482] Akdağ Güney, *Yönetim Kurulu*, 255.

[483] "Communique About Meetings to Be Held in Electronic Environment in Trade Companies, Except For the General Assembly of Joint Stock Companies.", https://www.mevzuat.gov.tr/File/GeneratePdf?mevzuatNo=16558&mevzuatTur=Teblig&mevzuatTertip=5, (accessed at 03.02.2024).

[484]Akdağ Güney, *Yönetim Kurulu*, 255.

[485]Akdağ Güney, *Yönetim Kurulu*, 256.

system from an institution that has at least CISA certificate and said company also have to register relevant technical report.[486]

In case aforesaid conditions are provided electronic board meetings are possible in relevant companies. Using blockchain in both electronic and physical meeting is possible. As explained in AGM section of thesis, by blockchain system, BoD members can use their votes and express their opinions regardless of what they may assert.[487]

Similarly, the right to receive and review information can be used more effectively.[488] BoD members can safely vote.[489]There is no need to prepare the necessary physical environment to ensure the organization of the BoD meetings. Furthermore, in order to arrange meeting by using blockchain, there has to be provision in Article of association of the company pursuant to Article 1527 of TCC.

2.5. Contribution of Blockchain to the Corporate Governance Principles

As explained above basic principles of corporate governance are "transparency", "fairness", "accountability", and "responsibility".[490]Since corporate governance principles are covered in detail in heading 1.4 of this chapter, they will not be included in this heading to avoid repetition.[491]Blockchain could have significant importance in

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[486] Communique About Meetings to Be Held in Electronic Environment in Trade Companies, Except For the General Assembly of Joint Stock Companies.", https://www.mevzuat.gov.tr/File/GeneratePdf?mevzuat No=16558&mevzuatTur=Teblig&mevzuatTertip=5, (accessed at 03.02.2024); Akdağ Güney, *Yönetim Kurulu*, p. 256

[487] Cengil and Korkut, 302-303; Akın, "Dijital Gelişmeler", 15-16.

[488] Akın, "Dijital Gelişmeler", 15-16.

[489] Cengil and Korkut, 302-303.

[490] Paslı, *Corporate Governance*, p. 5-13; Eminoğlu, *Kurumsal Yönetim*, p. 14.

[491] Please see at heading 1.4 for the principles of corporate governance.

corporate governance. Blockchain system ensures to record transactions to distributed computers and by this immutable records blockchain system provides transparency.[492]

Actually, transparency is the main advantage of blockchain. It is also robust against censorship and control because it is not easy to change and erase the information in blockchain technology[493]. Blockchain provides direct access to information which are kept in the company and it makes internal communication more transparent and secure.[494] Furthermore, by virtue of blockchain the financial situation will be available not only the company's accounting department but also other stakeholders.[495]

Blockchain also provides transparency for stakeholders and voting system as explained above.[496] Blockchain system also provides contribution to fairness principle by ensuring fair voting processes. E-voting system by blockchain provide equality, authorization, one man one vote principle, authentication, privacy protection, and fairness.[497]

Since blockchain technology provides transparency, it could be stipulated that illegal transactions within companies can be easily detected. Hence, relevant issue also makes contribution accountability, and responsibility principle.

2.6. Evaluation of the Relation Between Blockchain Technology and Data Protection in Terms of the Duty of Care of Directors

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[492] Lafarre and Van der Elst, "Blockchain Technology for Corporate Governance" 6.

[493] Keskin, 115.

[494] Keskin, 115.

[495] Wulf A. Kaal, "Blockchain-Based Corporate Governance", *Stanford Journal of Blockchain Law & Policy, Y.2021 V.4 N.1 p.(1-44)* , https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441904 , 6, (accessed at 04.02.2023).

[496] Yermack, 8-9.

[497]Hans-Georg Fill and Andreas Meier, Blockchain-Voting für My Politics und Our Politics, *Blockchain* Wiesbaden: Springer Fachmedien Wiesbaden, 2020,, https://doi.org/10.1007/978-3-658-28006-2 , 337 (accessed at 04.02.2023).

Although blockchain is often linked with transparency, decentralization, and anonymity, applications utilizing blockchain technology primarily involve the collection and storage of individual[498] data. In contrast to the prevalent central data storage model, blockchain operates on a decentralized system, introducing a new paradigm for data protection[499] worldwide.

In this context, deletion, destruction and anonymization of personal data are different in blockchain systems from traditional systems.[500] Since, data in these blockchains are stored in multiple units[501] on a distributed system unlike central systems, it is impossible to delete the data by deleting or destructing it in one unit because each unit optionally accesses data on the entire blockchain and can keep a copy of itself.[502]

Although it is commonly believed that data[503] stored on a blockchain is immutable, this is not entirely accurate. On the contrary, if participants in the network reach a consensus and agree to make changes, or if they follow consensus protocols allowing for modifications, data on a blockchain can indeed be replaced.[504]

However, it is generally more difficult to alter or delete data on a blockchain compared to centralized networks.[505] Consequently, the difficulty in deleting or replacing data on the blockchain system may lead to discussions about potential administrative fines

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[498]See at https://www.reedsmith.com/en/perspectives/2022/11/blockchain-and-data-protection--an-faq-guide , (accessed at 09.10.2023).

[499]Michele Finck, "Blockchains and Data Protection in the European Union", *Max Planck Institute for Innovation & Competition Research Paper Y.2017 N.18-01 p.(1-31),* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080322,1, (accessed at 09.10.2023).

[500] Osman Gazi Güçlütürk, "Blokzincir Üzerinde Depolanan Verilerin Kişisel Veri Niteliği ve Silinemezlik, Yok Edilemezlik Sorunu", *Kişisel Verileri Koruma Dergisi Y. 2019, V. 1 N. 2, p. (30 – 40),* , https://dergipark.org.tr/tr/pub/kvkd/issue/50609/638359 , 1, (accessed at 09.10.2023),

[501] Güçlütürk, "Kişisel Veri", 37.

[502] Güçlütürk, "Kişisel Veri", 37.

[503] Güçlütürk, "Kişisel Veri", 37.

[504] Güçlütürk, "Kişisel Veri", 37

[505] Michèle Finck, *Blockchain and the General Data Protection Regulation Can distributed ledgers be squared with European data protection law?,* Brussels: European Parliament, 2019, 1-102.

imposed by both the Personal Data Protection Committee (PDPC) in Turkey and the General Data Protection Regulation (GDPR) in the European Union for companies.

The adoption of blockchain technology in enterprises may pose challenges in complying with both the PDPC and the GDPR. As a result, organizations utilizing blockchain technology may face regulatory penalties, and the directors of such companies may be held legally accountable for these fines.

The usage of blockchain technology, without considering the regulations of PDPC Turkey and GDPR, may be seen as a breach of directors' duty of care. Hence, it is crucial for company directors to assess the PDPC and the GDPR before to implementing blockchain technology in their organizations.

2.7. Evaluation of Blockchain Technology Regarding the Duty of Care of Directors

As stated in the initial chapter of this thesis, both directors and BoD are required to exercise duty of care when performing their duties, as outlined in Article 369 of the TCC. If both directors and BoD fail to fulfill the duty of care outlined in Article 369 of TCC, then the legal responsibility of both parties can be examined.

As outlined in the initial chapter, directors or members of BoD can absolve themselves of culpability if they can manifest that they have exercised the utmost diligence and prudence in carrying out their corporate duties. However, given the inherent uncertainties and risks in business operations, directors can still be held accountable for any financial harm inflicted upon the company, regardless of the cause. Thus, if directors fail to implement a blockchain-based system for maintaining share ledger records, financial records, or during the Annual General Meeting (AGM), it may be argued that they are not fulfilling their duty of care.

Transparency is influential for investors and creditors to ensure the integrity of market processes. By storing share ledger records in a blockchain system, companies can greatly enhance transparency and security. Additionally, blockchain technology can be leveraged to maintain financial records, enabling shareholders and other stakeholders to access encrypted financial data within specified parameters. This facilitates the detection of anomalies and inaccuracies in financial reporting. Moreover, blockchain has the potential to revolutionize AGMs and board meetings, as discussed earlier.

Given its transparency, as mentioned earlier, blockchain technology has the potential to enhance the efficiency of AGMs and board meetings, while eliminating unequal access to information and manipulation by the majority. Hence, it would be advantageous to implement blockchain technology in companies.

Nevertheless, it may be argued that the application of blockchain technology in enterprises can be assessed under the framework of the business judgment rule in the contemporary world. Currently, the use of blockchain technology is limited and might be financially burdensome for companies. If the adoption of blockchain technology grows in firms in the future, the directors' duty of care may need to be examined.

2.7.1. Evaluation of Blockchain Technology in Terms of the Business Judgment Rule

As explained earlier, the directors of company cannot be held responsible for decisions which are made in accordance with business judgment rule.[506] However, various requirements must be fulfilled.

As explained earlier, according to these conditions, relevant decisions must not be contrary to imperative legal regulations, be in line with the company’s objective and interests, be made in a meeting that is realized in line with the law, and be defensible

[506] Pulaşlı, *Şirketler Hukuku C. II.*, 1577; Akdağ Güney, *Yönetim Kurulu*, 190.

in terms of content.[507] In addition, meeting attendees are required to maintain independence and impartiality.[508]

In the current legal landscape, there are no regulations mandating the use of blockchain technology in company operations.[509] Nonetheless, the adoption of blockchain is steadily growing, particularly among companies with significant capital and those involved in cryptocurrency transactions. Consequently, the failure to implement a blockchain system in such companies may be deemed a breach of the directors' duty of care.

The decision not to use a blockchain system may conflict with the company's objectives and interests in today's world, where blockchain technology offers various benefits. Nonetheless, for companies without significant capital or involvement in cryptocurrencies, implementing blockchain could pose financial challenges. Consequently, in such cases, the decision not to adopt blockchain might be seen as a breach of the directors' duty of care.

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[507] For detailed information please see at first chapter of the thesis.

[508] Akdağ Güney, *Yönetim Kurulu*, 190.

[509] See at https://technologymagazine.com/top10/top-10-companies-using-blockchain-technology (accessed at 04.02.2023).

THIRD CHAPTER

THE IMPACT OF SUSTAINABILITY ISSUES TO THE DUTY OF CARE OF DIRECTORS

1. CONCEPTS OF ESG, CORPORATE SOCIAL RESPONSIBILITY(CSR) AND SUSTAINABILITY

1.1. General Overview

With the advancement of technology, society has encountered both new opportunities[510] and challenges. Instances such as the emergence of COVID-19, the locust infestation in Africa[511], and the fraud-related delisting[512] of companies like Luckin Coffee have highlighted ESG issues on a global[513] scale.

Consequently, the pursuit of sustainable and holistic development has gained significant attention in recent years. In response to these challenges, various stakeholders including governments, international organizations, and financial markets have initiated efforts to develop frameworks such as ESG to promote sustainable development worldwide.[514]

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[510] Ting-Ting Li, Kai Wang, Toshiyuki Sueyoshi and Derek D., “ESG: Research Progress and Future Prospects”, *Sustainability Y.2021 N.13, p.(1-28)* https://www.mdpi.com/2071-1050/13/21/11663, 1, (accessed at 12.09.2023).

[511] Desert locusts developed seriously and made an outbreak in East Africa, the Arabian Peninsula and the Indian subcontinent between june 2019 and February 2022; they have also threatened food supplies.It was the worst outbreak that hit Kenya in 70 years, Ethiopia, Somaila and India in 25 years.

[512] A Chinese coffee retail chain Luckin Coffee has been delisted from Nasdaq in 2020 in the wake of accepting falsifying 310 million USD in sales; See at https://asia.nikkei.com/Business/Companies/Luckin-Coffee-to-delist-from-Nasdaq, (accessed at 05.02.2024).

[513] Ting Li, Wang, Sueyoshi and D.,”ESG”, 1.

[514] Ting Li, Wang, Sueyoshi and D.,“ESG” 1.

Due to the plans and actions explained above, the speed change in the meaning of "sustainable management", "sustainability", and "social responsibility" has provided many transformations, especially in terms of raising the awareness of public authorities, businesses, consumers, and other economic actors.[515]

In sustainable management, it could be mentioned that the value of the company is increasing in the fields which are economic, social, and environmental in long term. In other words, managing any company in accordance with these aspects emerges a sustainable business environment that causes sustainable growth in the long term, rather than profit maximization in the short term.[516] Besides, the perspective regarding the management of the companies also needs to be changed in accordance with ESG issues. Therefore, this part of the thesis will explore how ESG issues will impact the directors' duty of care within the scope of existing laws.

1.2. Concept of ESG

In advance of discussing the effect of sustainability issues to the duty of care of the directors in the company, it is crucial to grasp the definition and history of the concept of ESG, sustainability and corporate social responsibility (CSR). The concept of ESG

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[515] Marta Szczepańczyk, Paweł Nowodziński and Adam Sikorski, "ESG Strategy and Financial Aspects Using the Example of an Oil and Gas Midstream Company: The UNIMOT Group", *Sustainability Y.2023, V.15 N.18 p.(1-24)* , https://www.mdpi.com/2071-1050/15/18/13396 ,3, (accessed at 12.09.2023),

[516] Szczepańczyk, Nowodziński and Sikorski, ""ESG Strategy and Financial Aspects", 3.

has emerged from a 2004 report commissioned by 20 financial institutions[517] in response to a call from Kofi Annan, Secretary-General of the United Nations.[518]

ESG may be defined as a framework encompassing environmental (E), social (S), and governance (G) issues; it is derived from responsible investment.[519] ‘’*Responsible investment is defined as "Responsible investment including environmental, social and governance (ESG) issues when making investment decisions and influencing companies or assets*" by scholars.[520] For this reason, ESG could be defined as a standard and strategy that is taken into consideration by investors to examine corporate behavior and the future financial performance of any company.[521]

In this context, in case any investor wants to invest in a company and wants to evaluate sustainable development of the company has to take care relevant factors of ESG. In addition, ESG factors help to evaluate the sustainability and social impact of business activities of any enterprise.[522] In this context it could be summarized that, the concept of ESG refers to how companies or other investors integrate environmental (E), social (S), and governance (G) issues to their business models.[523]

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517 ABN Amro, Aviva, AXA Group, Banco do Brasil, Bank Sarasin, BNP Paribas, Calvert Group, CNP Assurances, Credit Suisse Group, Deutsche Bank, Goldman Sachs, Henderson Global Investors, HSBC, Innovest, ISIS Asset Management, KLP Insurance, Morgan Stanley, RCM (a member of Allianz Dresdner Asset Management), UBS and Westpac.

518 Stuart L. Gillan, Andrew Koch and Laura T. Starks, "Firms and Social Responsibility: A Review of ESG and CSR Research in Corporate Finance", *University of Pittsburgh Y.2020 p. (1-45)*, https://sites.pitt.edu/~awkoch/CSR%20review%20JCF.pdf , 2, (accessed at 17.09.2023).

519 Ting Li, Wang, Sueyoshi and D.,"ESG", 1.

520 See at https://www.unpri.org/introductory-guides-to-responsible-investment/what-is-responsible-investment/4780.Article , (accessed at 14.09.2023).

521 Ting Li, Wang, Sueyoshi and D., "ESG",1.

522 See at https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Consultations/2021/Consultation%20on%20draft%20ITS%20on%20Pillar%20disclosures%20on%20ESG%20risk/963626/Factsheet%20-%20ESG%20disclosures.pdf , (accessed at 14.09.2023).

523 Gillan, Koch and Starks, "Firms and Social Responsibility", 2.

1.3. Concept of CSR

The discussion concerning CSR and sustainability has evolved over the past fifty years.[524] The literature regarding CSR has primarily developed in Europe, North America and UK with roots traced back to the concept of corporate philanthropy that gained popularity in the 1950s.[525]

CSR is one of the most controversial concepts in this age. The most difficult thing regarding this concept is there is no accepted definition by the scholars.[526] However, even though there is still no universally accepted definition of CSR, the aforementioned concept is becoming increasingly popular day by day.[527]

Actually, relevant concept CSR appears as an umbrella concept that provides a fertile discussion ground for the relationship between society and companies, where all questions related to and arising from this relationship will be included, and can be used in every field where the company and society intersect.[528]

As we mentioned above there is no accepted definition of CSR, and defining CSR would exceed the scope of this dissertation.[529] In this context, it could be stipulated that there are two different perspectives of CSR[530]which are broad and narrow.

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[524] C.V. Baxi and Rupamanjari Sinha Ray, *Corporate Social Responsibility A Study of CSR Practices in Indian Industry*,,New Delhi: Vikas Publishing House Pvt Ltd, 2012, 2.

[525] Baxi and Ray, *Corporate Social Responsibility*, 2.

[526] Deniz Okuyucu, “Anonim Şirketin Sosyal Sorumluluğu”, Yayınlanmış Doktora Tezi, İstanbul Üniversitesi, 2022, 6.

[527] Okuyucu, Sosyal Sorumluluk, 6.

[528] Okuyucu, Sosyal Sorumluluk, 6.

[529] Okuyucu, Sosyal Sorumluluk, 9.

[530] Theodore Levitt. "The Dangers of Social Responsibility." *Harvard Business Review Y.1958 N.36, p. (41-50),* https://www.scirp.org/reference/referencespapers?referenceid=1209105, 41-50, (accessed at 11.03.2022); Milton Friedman. "The Social Responsibility of Business Is to Increase Its Profits." *The New York Times Magazine, Y.1970 p.(1-7).* http://websites.umich.edu/~thecore/doc/Friedman.pdf, ,.2; (accessed at 11.03.2024), Okuyucu. Sosyal Sorumluluk, 9.

Inasmuch as, according to a narrow viewpoint, the sole responsibility of companies[531] is profit maximization; hence, they believe that CSR activities are only necessary and important if they contribute to the company's profit maximization.

In other words, they argue that if the aforementioned social responsibility activities do not contribute to profit maximization, companies should not engage in them. In fact, scholars who support this narrow opinion consider behaviors that align with social responsibility to be irresponsible.[532]

Furthermore, this viewpoint maintains that shareholders appoint directors[533] to maximize the company's profits, and therefore, actions taken by directors in relation to social responsibility are seen as a violation of their duty of care. Consequently, according to this narrow viewpoint, CSR activities represent a departure from the company's purpose and should be undertaken by NGOs or the government.[534]

According to proponents of the broad approach, the belief that companies solely pursue profits is considered unrealistic.[535] Aristotle advocated for considering oneself as part of a larger community and striving to contribute to the collective welfare of both oneself and humanity.[536] The idea that companies should embrace social responsibilities aligns with this fundamental philosophy.[537]

Besides, proponents of the broad approach argue that due to the significant influence companies wield in society, they should shoulder responsibilities that extend beyond

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[531] Levitt , "The Dangers of Social Responsibility"; 41-50; Friedman, "Social Responsibility", 2.

[532] Levitt , "The Dangers of Social Responsibility"; 41-50; Friedman, "Social Responsibility", .2.

[533] Levitt , "The Dangers of Social Responsibility"; 41-50.

[534] Dennis Massaka, "Why Enforcing Corporate Social Responsibility (CSR) is Morally Questionable",*EJBO Electronic Journal of Business Ethics and Organization Studies Y. 2008 V.13, N.1p.(13-21)*, http://ejbo.jyu.fi/pdf/ejbo_vol13_no1_pages_13-21.pdf, 13-21, (accessed at 18.09.2023); Okuyucu, Sosyal Sorumluluk, 10.

[535]Paul Hohnen and Jason Potts, *Corporate Social Responsibility An Implementation Guide for Business*, Canada: International Institute for Sustainable Development, 2007, 1-2; Okuyucu, Sosyal Sorumluluk, p.14.

[536] Hohnen and Potts, 1-2; Okuyucu, Sosyal Sorumluluk, 14.

[537] Hohnen and Potts, 1-2; Okuyucu, Sosyal Sorumluluk, 14.

a profit[538] generation. The considerable social power held by companies justifies societal expectations for them to contribute to the welfare of communities.

Under this approach, CSR encompasses decisions and actions taken to benefit society, even if they are not directly tied to the company's profitability but exceed its economic objectives.[539] Consequently, it is no longer acceptable to view a company's sole obligation as profit maximization. We all share the same world and bear responsibilities for our environment, and companies are no exception. Given their substantial impact on both people and the environment, companies must take responsibility for social issues, with their obligations extending beyond mere profit maximization.

1.4. Concept of Sustainability and Sustainable Development

Approximately 7 billion people live in the planet at present, but several billion people also will join us until the end of this century.[540] Current estimates show that the population of the planet will reach at about 9 billion people until the middle of this century. Therefore, feeding, clothing, and housing all of these people will be a big challenge with today's resources. Insomuch as, it is obvious that as humans we are interacting at local, regional, and global scales with the natural systems to sustain our lives.[541]

Since many multinational corporations in this era have the potential to inflict significant damage on the world and the environment through their operations, examples like the Exxon Valdez and BP Deepwater oil spills serve as stark reminders

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[538] Hohnen and Potts, 1-2; Okuyucu, Sosyal Sorumluluk, 14.

[539] Archie B. Carroll, A History of Corporate Social Responsibility: Concepts and Practises, *The Oxford Handbook of Corporate Social Responsibility*, Oxford: Oxford University Press, 2008, 19-20.

[540] David S Ginley and David Cahen, *Fundamentals of Materials for Energy and Environmental Sustainability*, Cambridge: Cambridge University Press 2012, 38.

[541] Ginley and Cahen, *Energy and Environmental Sustainability*, 38.

of this reality.[542] However, companies still continue to impact the environment in their pursuit of business interests. [543]

In this context, irreversible climate change, resource depletion, accumulation of nonbiodegradable waste, and loss of biodiversity will threaten the future of human beings.[544] In order to prevent this situation, applying the necessities of environmental sustainability is necessary.

Within the scope of environmental sustainability, firstly, renewable resources should not be consumed in quantities greater than necessary; secondly, pollution should not exceed the environment[545]'s capacity; and thirdly, renewable alternatives to nonrenewable resources should be developed[546]. Accordingly, we must redesign our way of life to align with environmental sustainability principles to safeguard the well-being of future generations.[547]

1.4.1. Corporate Governance and Sustainability

Corporate governance could be defined as rules and organizational structures that constitute fundamental principles for the proper operation of businesses.[548] In other

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[542]Beate Sjafjell and Benjamin j. Richardson, *Company Law and Sustainability Legal Barriers and Opportunuties*, Cambridge: Cambridge Press, 2015, p.35.

[543] Sjafjell and Richardson, *Company Law and Sustainability*, 35.

[544] Sjafjell and Richardson, *Company Law and Sustainability*, 35.

[545] See e.g. Millennium Ecosystem Assessment (MEA), Living Beyond Our Means: Natural Assets and Human Well-Being, Statement from the Board (MEA, 2005); United Nations Environment Programme (UNEP), Global Environment Outlook GEO-5 (UNEP, 2012); Sjafjell and Richardson, Company Law and Sustainability, 35.

[546] Sjafjell and Richardson, *Company Law and Sustainability*, 35.

[547] World Commission on Environment and Development, *Our Common Future*, Oxford: Oxford University Press, 1987.

[548] Valeria Naciti,, Fabrizio Cesaroni, and Luisa Pulejo. "Corporate governance and sustainability: a review of the existing literature." *Journal of Management and Governance Y.2021 V.26, N. 1 p.(1-20)*

words, corporate governance can be described as a set of rules and activities aimed at guiding companies to adhere to specific codes in their operational processes.[549] This encompasses both the legal requirements of the country where the company operates and internal company procedures. Additionally, it serves as a roadmap for companies to achieve their goals.[550]

Traditionally, the primary objective of corporate governance was to protect shareholder investments from opportunistic directors within the companies.[551] As explained earlier, corporate governance principles, including 'transparency', 'fairness', 'accountability', and 'responsibility',[552] are detailed in the preceding section and will not be reiterated here to avoid repetition.[553]

The principle of responsibility entails that companies consider all stakeholders throughout their operational processes.[554] In this context, it can be argued that companies are accountable to both stakeholders and society in their operations. According to the philosophy of corporate governance, when a company and its management act responsibly towards society and stakeholders, the company's performance tends to improve simultaneously.[555]

In recent years, companies have increasingly prioritized sustainability alongside profit maximization. Indeed, sustainability issues have become integral and decisive

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https://www.researchgate.net/publication/348178644_Corporate_governance_and_sustainability_a_review_of_the_existing_literature, 2, (accessed at 11.03.2024);, Jean Jacques du Plessis, Anil Hargovan, and Jason Harris, *Principles of Contemporary Corporate Governance* Cambridgre: Cambridge University Press, 2018, 4.

[549] Naciti, Cesaroni and Pulejo, 2.

[550] Naciti, Cesaroni and Pulejo, 2.

[551] Donald John Roberts and Eric Van den Steen, “Shareholder Interests, Human Capital Investment and Corporate Governance”, *Stanford GSB Working Paper Y.2000 N.1631 p.(1-27),* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=230019 , 2, (accessed at 05.02.2023).

[552] Paslı, *Corporate Governance*, 5-13; Eminoğlu, *Kurumsal Yönetim*, 14.

[553] Please see at heading 1.4 of second chapter for the principles of corporate governance.

[554] Paslı, *Corporate Governance*, 78; Eminoğlu, *Kurumsal Yönetim*, 23.

[555] Eminoğlu, *Kurumsal Yönetim*, 23.

components of the strategies adopted by many firms.[556] Furthermore, the concept of sustainability itself has evolved over time. Whereas corporate sustainability was once viewed merely as a legal obligation or an ethical and moral practice for companies, it has now transformed into a fundamental aspect of their business models.[557]

It can be argued that companies adapting their business models to align with sustainability issues stand to benefit in several ways. Notably, such changes can lead to improvements in product quality, reductions in operational costs, and enhancements in the reputation of these companies among consumers.

In conclusion, sustainability has emerged as a crucial concern for both the present and future of corporate governance. By embracing sustainability, companies can enhance product quality, lower expenditure, and bolster their reputation among consumers, as outlined above.

1.4.2. The UN Sustainable Development Goals

In September 2015, the UN General Assembly adopted the 17 Sustainable Development Goals (SDGs) after three years of negotiations involving stakeholders and intergovernmental organizations.[558] These goals replaced the Millennium Development Goals[559] set by the UN.[560] Unlike the Millennium Development Goals,

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[556] Naciti, Cesaroni and Pulejo, 2.

[557] Naciti, Cesaroni and Pulejo, 2.

[558] Magdalena Bexell and Kristina Jönsson, "Responsibility and the United Nations' Sustainable Development Goals", *Forum for Development Studies Y. 2017 V.44, N.1, p.(13–29),* https://www.tandfonline.com/doi/epdf/10.1080/08039410.2016.1252424?needAccess=true ,13, (accessed at 06.02.2024).

[559] For detailed information regarding Millennium Development Goals of the UN see at https://www.un.org/millenniumgoals/ , (accessed at 06.02.2024).

[560] Bexell and Jönsson, 13.

which primarily targeted poverty and hunger, the SDGs[561] comprise 17 agendas and 169 targets, making them applicable to all countries.[562]

The SDGs represent a significant shift as they place sustainability at the forefront of global development efforts. They cover a wide range of categories,[563] with a strong emphasis on economic security and environmental sustainability. This comprehensive approach reflects a broader vision for global progress and addresses interconnected challenges faced by societies worldwide.

As previously outlined, the UN Sustainable Development Goals consist of 17 agendas and 169 targets, covering a wide range of critical areas such as poverty eradication, hunger alleviation, health, education, gender equality, clean water, and sustainable cities, among others. These goals are outlined in the preamble as an action plan for people, planet, and prosperity, aiming to foster universal peace and freedom.[564]

Eradicating poverty is recognized as a crucial step toward achieving sustainable development worldwide. Additionally, sustainable environmental practices, justice, strong institutions, responsible consumption, and innovation play essential roles in advancing these goals.[565] Collaboration among countries is imperative for realizing these objectives, as they are fundamental to creating a livable environment for all inhabitants of the world.[566]

Despite progress made by some countries like Sweden, Denmark, and Finland, which have achieved three-quarters of these goals, many OECD countries, including top performers, still need to improve their efforts, particularly in areas such as climate change mitigation and sustainable consumption. Collaboration among nations is

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[561] Naveem Kumar Arora and Isha Mishra, "United Nations Sustainable Development Goals 2030 and environmental sustainability: race against time", *Environmental Sustainability Y. 2019 N. 2 p.(339–342),* https://link.springer.com/article/10.1007/s42398-019-00092-y , 339, (accessed at 06.02.2024).

[562] Arora and Mishra, 339.

[563]Arora and Mishra, 339.

[564]See at https://sdgs.un.org/goals , (accessed at 07.02.2024).

[565] See at https://sdgs.un.org/2030agenda , (accessed at 07.02.2024).

[566] See at https://sdgs.un.org/2030agenda , (accessed at 07.02.2024).

essential to ensure the successful implementation of these goals and create a more sustainable[567] future for all.

Additionally, Türkiye has its own development plans, such as the 12th[568] Development Plan, which aims to foster a stable and robust economy, enhance competitiveness in production and productivity through green and digital transformation, promote skilled human resources and societal strength, create resilient and sustainable cities, and uphold the rule of law, democratization, and good governance.[569] These development goals are designed to align Turkey's objectives with the UN Sustainable Development Goals.

Consequently, companies operating in Türkiye have a significant role to play in achieving these goals. They must integrate these objectives into their operations to contribute effectively to their realization. As highlighted earlier, companies face numerous sustainability-related risks arising from their activities. Therefore, the subsequent sections of the dissertation will scrutinize the relationship between sustainability and company law.

1.4.3. Sustainable Development Plans of Türkiye

As it is known, the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement are the main international treaties concerning climate change. Türkiye signed the Paris Agreement on April 22, 2016, and ratified it on October 7, 2021. The mentioned agreement entered into force in Türkiye on November 10, 2021. Türkiye has declared that it will implement the Agreement as a developing country

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[567] Arora and Mishra, 339.

[568] See at https://www.bertelsmann-stiftung.de/en/topics/latest-news/2019/june/long-in-words-but-short-on-action-un-sustainability-goals-are-threatened-to-fail/ , (accessed at 07.02.2024).

[569]Türkiye has have 12 development plans since 1963 for five years period. 12th development plan consists of 2024-2028. These development plans are very important for Turkey to comply with sustainability development goals.

based on the principles of "equity, common but differentiated responsibilities, and respective capabilities[570]."

In addition, Türkiye has begun working towards achieving a net-zero carbon target by 2053[571]. It is understood that the aim of the UNFCCC is the implementation[572] of the Paris Agreement and the goal of keeping global warming to no more than 1.5°C[573]. In this context, Türkiye is playing its role in combating climate change and reducing greenhouse gas emissions.[574]

The EU declared its European Green Deal on December 11, 2019. With this initiative, the EU aims to become the first climate-neutral continent by 2050 and to transform its economy through green technology.[575] As part of this effort, the Commission proposed the Carbon Border Adjustment Mechanism (CBAM) to help achieve climate targets[576], addressing the risk of "carbon leakage[577]." The CBAM aims to ensure compliance with the EU Emissions Trading Scheme (ETS) for relevant products such as iron and steel, cement, fertilizer, aluminum, hydrogen, and electricity.

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[570]See at https://www.sbb.gov.tr/wp-content/uploads/2023/12/On-Ikinci-Kalkinma-Plani_2024-2028_11122023.pdf , (accessed at 07.02.2024).

[571] See at https://trade.gov.tr/exports/green-action-plan , (accessed at 13.02.2024).

[572] See at https://trade.gov.tr/exports/green-action-plan , (accessed at 13.02.2024).

[573] See at https://trade.gov.tr/exports/green-action-plan , (accessed at 13.02.2024)

[574] See at https://trade.gov.tr/exports/green-action-plan , (accessed at 13.02.2024).

[575]"Communication on The European Green Deal", https://commission.europa.eu/publications/communication-european-green-deal_en, (accessed at 16.02.2024); Filiz Yılmaz, "Enerji Yönetimi ve Türkiye: Avrupa Yeşil mutabakatı Çerçevesinde Bir Değerlendirme", *Akademia Doğa ve İnsan Bilimleri Dergisi Y.2022 V.8 N.1 p (19-37),* https://dergipark.org.tr/en/download/article-file/2105703 , 21, (accessed at 16.02.2024).

[576]"Communication on The European Green Deal", https://commission.europa.eu/publications/communication-european-green-deal_en , accessed at 16.02.2024); Füsun Özerdem, "İklim Krizinin Gölgesi Altında Avrupa Yeşil Mutabakatı ve Türkiye'yi Bekleyen Zorluklar", *Akademi Sosyal Bilimler Dergisi Y.2024 V.11 N.31, p.(51-65),* https://dergipark.org.tr/en/download/article-file/3314025 , 59, (accessed at 13.02.2024); Yılmaz, 21-22.

[577] See at https://trade.gov.tr/exports/green-action-plan , (accessed at 13.02.2024).

In the implementation of the mechanism, it imposes obligations on companies to pay for the emissions embedded in certain carbon-intensive products[578] imported into the European Union (EU) through the purchase of CBAM certificates[579]. The relevant system started on October 1, 2023, and is stipulated to continue until January 1, 2026[580].

The EU represents a significant market for Türkiye. The implementation of CBAM will impact a substantial share of Türkiye's exports to the European Union.[581] Turkish products may become less competitive due to the financial and administrative burdens imposed by CBAM.[582] However, Türkiye is committed to sustainability and closely follows initiatives by UNFCCC, the EU, and other organizations in this regard.

In alignment with the European Green Deal[583], Türkiye published "The Green Deal Action Plan of Türkiye" in the Official Gazette on July 16, 2021, through Presidential Circular No. 2021/15.

This plan aims to align with global climate change policies and promote green transformation. The coordination of the Green Deal Action Plan of Türkiye is overseen by the General Directorate of International Agreements and the European Union within the Ministry of Trade.[584]

Furthermore, according to the mentioned plan, a "Green Deal Working Group" consisting of nineteen "Specialized Working Groups" at a technical level has been

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[578] Özerdem, 59.

[579] ‘’Communication on The European Green Deal”, https://commission.europa.eu/publications/communication-european-green-deal_en, accessed at 16.02.2024); See at https://trade.gov.tr/exports/green-action-plan , (accessed at 13.02.2024).

[580] Özerdem, p.59.

[581] See at https://trade.gov.tr/exports/green-action-plan , (accessed at 13.02.2024).

[582] See at https://trade.gov.tr/exports/green-action-plan , (accessed at 13.02.2024).

[583] See at https://trade.gov.tr/exports/green-action-plan , (accessed at 13.02.2024).

[584] See at https://trade.gov.tr/exports/green-action-plan , (accessed at 13.02.2024).

established.[585] The aim of these groups is to establish a national carbon pricing system, such as ETS, in coordination with the Ministry of Trade.

The plan encompasses various headings, including carbon regulations at the border, a green and circular economy, green financing, clean, affordable, and safe energy supply, sustainable agriculture, sustainable smart transportation, climate change combating, diplomacy, and information and awareness activities[586]. Additionally, the plan includes 81 subheadings.

Therefore, it can be inferred that Türkiye has been actively implementing policies to comply with sustainability issues. Furthermore, as elucidated earlier, sustainability issues are a core element in Türkiye's five-year development plans.[587]

2. THE IMPACT OF SUSTAINABLITY ISSUES TO THE DUTY OF CARE OF THE DIRECTORS

2.1. The Relation Between Sustainability, Sustainable Development and Company Law

As explained earlier, the predominant objective for most companies globally is to establish a framework that facilitates profit maximization.[588] Nonetheless, in the

[585] See at https://trade.gov.tr/exports/green-action-plan , (accessed at 13.02.2024).

[586] Özerdem, p.60; Yılmaz, p. 25.

[587]See at https://www.sbb.gov.tr/wp-content/uploads/2023/12/On-Ikinci-Kalkinma-Plani_2024-2028_11122023.pdf , (accessed at 07.02.2024).

[588]Charlotte Villiers, "Sustainable Companies: Barriers and Possibilities in UK Company Law", *International and Comparative Corporate Law Journal, Y.2015 V.11 N1 p.(105-173)* https://deliverypdf.ssrn.com/delivery.php?ID=769100067111073024002088026009091101005063061035027036094120126100090080095071005078024006023047020040034099077097108090004096008086008054041107123065082121002078030068062031023104004092001100012013020071112 08

contemporary landscape, there is a dearth of legal frameworks concerning the correlation between sustainability matters and corporate practices.

Particularly in Turkey, there lacks legal mandates compelling companies to integrate sustainability considerations into their operations. Nonetheless, as previously discussed, there exist numerous risks associated with corporate activities concerning sustainability issues. In essence, if companies persist in their current operational approaches, we may confront a perilous scenario, potentially leading to the endangerment of humanity.

Upon examination of Turkish law, pursuant to Article 331 of the TCC, joint-stock companies may be formed for any economic purpose or subject matter not explicitly prohibited by law. Consequently, in accordance with this provision, a company is a legal entity established for the purpose of conducting commercial activities and other profit-oriented endeavors[589]. Additionally, as stipulated by the regulation, joint-stock companies are exclusively permitted for economic purposes and cannot be established for non-economic objectives.[590]

For example, it is not possible to establish a joint stock company to provide financial support to political parties, to allocate all its income to a sports club, or to help those in need[591]. Economic purpose is defined as "*a company's aim to provide an economic benefit in the form of benefiting from monetary value in favor of its shareholders*" and it is stated that the economic purpose is an activity aimed at generating profit.[592]

50240281030260270890980000220690871071061112&EXT=pdf&INDEX=TRUE ,105, (accessed at 23.09.2023),

[589] Okuyucu, Sosyal Sorumluluk, .276.

[590] Okuyucu, Sosyal Sorumluluk, .276.

[591] Mustafa Yavuz, "Anonim ve Limited Şirketlerin Kanunen Yasaklanmamış Her Turlu Ekonomik Amaç ve Konu İçin Kurulabilmesi", *Lebib Yalkın Mevzuat Dergisi, Y.2014, N. 125.*

[592] Hasan Pulaşlı, "Turk, İsviçre ve Alman Hukukuna Göre "İktisadi Amaç" Kavramının Şirket ve Dernekler Bakımından Değerlendirilmesi", *BATİDER, Y.2016 V. 22 N. 2, p. 21-72,* p.23; Okuyucu, Sosyal Sorumluluk, 277.

Furthermore, while Article 331 of the TCC can be viewed as a reflection of the shareholder primacy theory in Turkish law, the provision stipulating that a company can only be established and operate for economic purposes does not absolve companies from considering sustainability issues in their operations.

While every company aims to maximize profit, this should not preclude them from adopting a socially responsible approach to environmental concerns. Given that the continuation of current corporate practices may lead to the extinction of humanity, prioritizing profit maximization becomes meaningless.

Therefore, despite the absence of specific regulations governing the relationship between sustainability issues and company activities, it is imperative that companies integrate sustainability considerations into their operations. Failure to do so will undoubtedly result in dire consequences.

There is also a legally binding international treaty on climate change known as the Paris Agreement, which was accepted and ratified by 196 Parties at the UN Climate Change Conference (COP21) in Paris[593]. The agreement was signed on 12 December 2015 and entered into force on 4 November 2016.[594] The aforementioned agreement includes commitments for countries to reduce emissions and collaborate on mitigating the impacts of climate change. Additionally, the agreement urges companies to enhance their commitments regarding climate change.[595] The Paris Agreement was ratified in Turkey on 7 October 2021.[596]

It could be stipulated that the Paris Agreement does not compel private companies to reduce their emissions; however, it encourages and facilitates them to undertake

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[593] See at https://unfccc.int/process-and-meetings/the-paris-agreement , (accessed at 25.09.2023).

[594] See at https://unfccc.int/process-and-meetings/the-paris-agreement , (accessed at 25.09.2023).

[595]See at https://www.un.org/en/climatechange/paris-agreement , (accessed at 25.09.2023).

[596]See at https://www.mfa.gov.tr/paris-anlasmasi.tr.mfa#:~:text=Dışişleri%20Bakanlığı&text=2020%20sonrası%20iklim%20değişikliği%20rejiminin,gazı%20emisyon%20azaltımı%20taahhüdünde%20bulunmuşlardır., (accessed at 25.09.2023).

necessary actions concerning sustainability issues[597]. Consequently, given that countries are obliged to take necessary actions in accordance with the Paris Agreement, companies also have an obligation to assist states in complying with the regulations of the Paris Agreement.

There have been numerous reforms in EU company law aimed at making companies more sustainable in alignment with the Paris Agreement and UN Sustainable Development Goals.[598] Within this context, the EU legislator initiated a reform program in 2018 with the objective of establishing a connection between the financial industry and sustainable development.[599]

As part of this initiative, firstly, in February 2020, the Commission published the "Study on due diligence requirements through the supply chain," prepared by the British Institute of International and Comparative Law (BIICL) in partnership with Civic Consulting and LSE Consulting. Subsequently, thirdly, in July 2020, the Commission's DG Justice and Consumers published "the Study on directors' duties and sustainable corporate governance," which was prepared by EY as a short-term plan.[600]

The aim of the relevant plan is to assess the current relationship between market practices and regulations and identify steps to contribute to sustainable developments for companies in alignment with the Paris Agreement and UN Sustainable Development Goals in the short term.[601] Additionally, on 23 February 2022, the Commission accepted and published a Proposal for a Directive on Corporate

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[597]See at https://www.lexology.com/library/detail.aspx?g=5a96e682-b82c-42e1-b0b1-10f1c0057462, (accessed at 25.09.2023).

[598] For detailed informaiton please see at heading 1.4.2. of this chapter; Guido Ferrarini, Michele Siri and Shanshan Zhu, "The EU's Proposed Reform of Directors' Duties and the Missing Link to Soft Law", *European Business Organization Law Review Y.2023 p.(1-25),* https://link.springer.com/Article/10.1007/s40804-023-00290-6 ,2, (accessed at 26.09.2023).

[599] Ferrarini, Siri and Zhu, "Directors' Duties", 2.

[600]Ferrarini, Siri and Zhu, "Directors' Duties", 2-3.

[601] See at https://www2.deloitte.com/uk/en/blog/emea-centre-for-regulatory-strategy/2023/what-is-the-european-corporate-sustainability-due-diligence-directive.html, (accessed at 16.02.2023); Ferrarini, Siri and Zhu, "Directors' Duties", 2-3.

Sustainability Due Diligence ("CSDD"), which aims to promote a sustainable and responsible business approach across global value chains.[602]

In the following section, the CSDD directive will be evaluated to discuss directors' duty of care in accordance with the aforementioned proposal.

2.2. Evalution of a Proposal for a Directive on Corporate Sustainability Due Diligence Within the Scope of Duty of care of the Directors

As previously mentioned, directors are obliged to exercise due diligence in fulfilling their responsibilities. Therefore, in line with this duty, directors must prioritize the best interests of the company when carrying out their duties. However, with the introduction of the Corporate Sustainability Due Diligence (CSDD) directive and other sustainability requirements, it has been emphasized that firms must also take into account sustainability issues.

In light of this perspective, questions arise regarding the potential conflicts between the interests of the corporation and sustainability concerns. This section of the chapter will analyze Article 25 of the CSDD regulation, which addresses the directors' duty of care concerning conflicts between the interests of corporations and sustainability concerns.

Firstly, it is crucial to establish and clarify the objective of the Corporate Sustainability Due Diligence (CSDD) directive. If the CSDD directive is implemented, it will establish criteria for companies to identify and address the current and potential

[602] See at https://www2.deloitte.com/uk/en/blog/emea-centre-for-regulatory-strategy/2023/what-is-the-european-corporate-sustainability-due-diligence-directive.html, (accessed at 16.02.2023); Ferrarini, Siri and Zhu, “Directors’ Duties”, 3.

negative impacts of their operations on the environment and human rights violations[603].

Furthermore, this proposal not only requires the aforementioned companies to exercise due diligence in their operations but also mandates them to ensure compliance with the directive by their subsidiaries and partners.[604] In this regard, relevant companies need to develop plans and obtain contractual commitments from their partners in accordance with the CSDD in order to adhere to its requirements.

Furthermore, directors' liability and duty of care play a significant role in compelling companies to comply with the CSDD. In this context, pursuant to Article 25 of the CSDD directive, member states are required to ensure that directors of companies defined in Article 2(1) of the proposal are held accountable for failing to consider the consequences of their decisions on sustainability matters, human rights, climate change, and environmental impacts, both in the short, medium and long term.[605]

However, it should be noted that Article 25 of the CSDD directive does not apply to all companies universally. It is applicable only to companies specified in Article 2(1) of the CSDD directive. Firstly, if relevant companies have more than 500 employees and a net worldwide turnover exceeding EUR 150 million, they will be subject to this provision. Secondly, if a company does not meet the conditions[606] of having 500

603‘’The EU’s Corporate Sustainability Due Diligence Directive Human Rights and the Environment”, https://kpmg.com/xx/en/home/insights/2023/02/the-eu-corporate-sustainability-due-diligence-directive.html,, (accessed at 28.09.2023).

604 “The EU’s Corporate Sustainability Due Diligence Directive Human Rights and the Environment”, https://kpmg.com/xx/en/home/insights/2023/02/the-eu-corporate-sustainability-due-diligence-directive.html , (accessed at 28.09.2023).

605 “Proposal for a Directive on corporate sustainability due diligence and annex (CSDD)” 23 February 2022, https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en , (accessed at 28.09.2023).

606Proposal for a Directive on corporate sustainability due diligence and annex (CSDD)” 23 February 2022, https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en , (accessed at 28.09.2023).

employees and a turnover of 150 million EUR, it may still be subject to this provision if it meets the following conditions.

They must have more than 250 employees on average and have a net worldwide turnover of more than EUR 150 million. Additionally, they must derive at least 50% of their turnover from sectors such as the manufacture of textiles, agriculture, forestry, fisheries, and the extraction of mineral resources[607]. However, it should be clarified that other companies that do not meet the aforementioned conditions will not be subject to this discussion and proposal.

With the introduction of Article 25 of the Corporate Sustainability Due Diligence (CSDD) Directive, a new debate has emerged in EU corporate law. In this context, it appears that the duty of care of directors will undergo changes in EU countries in accordance with Article 25 of the CSDD.

According to the Commission, enhancing companies' social performance through better specification of directors' duties and modifying the legal framework in EU company law to align with this objective is essential for achieving a more sustainable world and living environment in the future. Article 25 of the CSDD specifies that directors' duties not only entail considering the best interests of the company but also encompass evaluating environmental, societal, and human rights concerns, as mentioned earlier.[608]

Furthermore, there is significant shareholder demand for large companies to align their investments with ESG issues. For instance, a diverse coalition of institutional

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[607]Proposal for a Directive on corporate sustainability due diligence and annex (CSDD)" 23 February 2022, https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en , (accessed at 28.09.2023).

[608] Ferrarini, Siri and Zhu, "Directors' Duties", 10.

investors, including Amundi, Legal & General, and others, recently compelled banks to cease investing in carbon-intensive projects.[609]

In light of this, in the preparatory discussions of the commission, it has been emphasized that companies and directors should heed the aforementioned shareholder demands, which extend beyond the current regulations in EU company law concerning directors' obligations.[610]

Therefore, as a result of the EU Commission's viewpoint, it could be argued that EU company law will undergo revisions with mandatory rules that compel companies and directors to consider sustainability and other ESG issues[611]. However, several scholars do not concur with this view[612]. According to *Ferrarini, Siri,* and *Zhu,* there is no necessity for EU company law to enact mandatory rules forcing companies to integrate sustainability[613] and ESG issues into their operations.

They also contend that it remains uncertain whether imposing requirements via directive would truly enhance corporate sustainability. They argue that if mandatory rules are enforced by the EU on this matter, companies may solely focus on satisfying core stakeholders without exerting additional efforts to become socially responsible corporations.

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[609] Wolf-Georg Ringe, "Investor-led Sustainability in Corporate Governance", *Law Working Paper Y.2021 N.615 p.(1-43)* ,https://deliverypdf.ssrn.com/delivery.php?ID=940123101123003108070108081082095110050080061059011018113095070111000031125031086090041007038028040060043013121071085100085099001072063049059096089014088107120068021058079030120002024026085103120091003106027021117027117109087021103097067013119069070&EXT=pdf&INDEX=TRUE ,6-7, (accessed at 30.09.2023).

[610]Ferrarini, Siri and Zhu, "Directors' Duties", 10-11.

[611]Meltem Karatepe Kaya, "Impacts of Emerging Technologies on Multinational Enterprises: Legal Challenges and Opportunities*", Sakarya Üniversitesi Hukuk Fakültesi Dergisi Y.2023 V.11, N..2, p.(1458-1501),* https://dergipark.org.tr/en/download/article-file/3530643 , 1474, (accessed at 16.02.2024).

[612] Ferrarini, Siri and Zhu, "Directors' Duties", 10-11.

[613] Ferrarini, Siri and Zhu, "Directors' Duties", 11.

Moreover, they suggest that, based on some empirical research on ESG, being socially responsible either improves a company's financial performance or at least does not negatively impact it. Therefore, they advocate for companies to voluntarily strive towards creating socially responsible corporations committed to sustainability[614].

Moreover, *Ferrarini, Siri,* and *Zhu* propose that if legislation is to be enacted on this issue, it would be preferable to do so at the member state level rather than through EU company law[615]. They suggest two potential reasons for legislating the obligation of directors and sustainability.

Firstly, it could protect directors from both company and shareholders when they prioritize sustainability over profit maximization[616]. Secondly, it could serve an educational function for both companies and directors on sustainability issues[617]. However, it should be noted that this view is not acceptable in today's world. Because due to the importance of the sustainability issue, a global regulation is a necessity on a larger scale.

Given the circumstances, it is imperative to enact legislation regarding the duty of care of directors and sustainability. Today, we face significant threats stemming from

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[614] Alexander Dyck, Karl V. Lins, and Hannes F. Wagner, "Do institutional investors drive corporate social responsibility? International evidence*",* *Journal of Financial Economics* *Y.2019 V.131 N.3, p.(693-714),*
https://www.sciencedirect.com/science/Article/pii/S0304405X18302381 , 694, (accessed at 01.10.2023),

[615] Ferrarini, Siri and Zhu, "Directors' Duties", 11.

[616] Ferrarini, Siri and Zhu, "Directors' Duties", 11.

[617] Ferrarini, Siri and Zhu, "Directors' Duties", 11.

sustainability issues, as previously outlined.[618] If we do not take essential measures to address this issue, we risk extinction.[619]

Therefore, it can be argued that this matter should not solely rely on the discretion of directors and member states. The European Union should establish a comprehensive legislative framework. In essence, if we leave it to companies and directors to address this issue, most companies will prioritize profit maximization, leading to adverse effects on the environment and our future.

This is deemed unacceptable both in the present era and for the future well-being of our descendants. Hence, considering that directors wield the highest level of authority and decision-making power within companies, it is crucial to mandate them to prioritize sustainability concerns.[620]

Furthermore, individuals who fail to adhere to relevant obligations should be held accountable for their actions. Consequently, it is impossible to agree with the viewpoint of *Ferrarini*, *Siri,* and *Zhu*.

2.3. Evalution of Shell vs. Clientearth Case in Terms of Duty of Care of The Directors as a Case Study

In terms of the duty of care of directors, the Shell vs. Clientearth case serves as an insightful case study. Shell was confronted with two cases brought forth by Clientearth, alleging that the directors breached their duty of care by failing to adopt

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[618]Hatice Kübra Kandemir, "Sürdürülebilir Şirketler ve Hukuki Çerçevesi", *İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi Y.2021 V.20 N.41 p. (853-876),* https://dergipark.org.tr/tr/download/article-file/1813142, 857, (accessed at 13.02.2024).

[619]See e.g. Millennium Ecosystem Assessment (MEA), Living Beyond Our Means: Natural Assets and Human Well-Being, Statement from the Board (MEA, 2005); United Nations Environment Programme (UNEP), Global Environment Outlook GEO-5 (UNEP, 2012); Sjafjell and Richardson, Company Law and Sustainability, p.35; Kandemir, "Sürdürülebilir Şirketler", 857.

[620] Sjafjell and Richardson, *Company Law and Sustainability*, 35; Kandemir, "Sürdürülebilir Şirketler", p. 857.

adequate climate change risk management strategies.[621] Clientearth, an NGO, with a mere 27 shares in Shell[622], pursued injunctive relief in English courts to compel Shell's directors to change their company policy regarding sustainability issues, particularly reducing gas emissions.[623]

However, the case filed in English courts seeking permission for Shell's directors to take derivative action for climate change issues[624] was ultimately rejected by the court. The rejection was based on the application of the business judgment rule. The court held that Clientearth's claim sought to impose its own strategy on Shell[625] rather than compelling Shell to create its own policy regarding sustainability issue.[626]

Thus, according to the court, Clientearth's claim was not justified under the circumstances. However, in the case conducted in Dutch courts, Shell was ordered to reduce its CO2 emissions into the atmosphere by 45%[627]. This decision was based on soft law principles, relying on reports from the IPCC (Intergovernmental Panel on Climate Change), a UN body.[628]

Thus, it can be inferred that despite the absence of specific sustainability regulations in Dutch law, the courts in the Netherlands have the authority to rule in favor of sustainability matters. This decision aligns with the viewpoint of *Ferrarini, Siri, and Zhu*. Despite the presence of regulations in England, the court dismissed the

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[621] Paul Davies, "Shell: A Tale of Two Courts", *University of Oxford Law Faculty Website Y.2023,* https://blogs.law.ox.ac.uk/oblb/blog-post/2023/10/shell-tale-two-courts, (accessed at 10.10.2023); Hans De Wulf, " The Failed Derivative Action By Clienearth Against Shell's Directors: Minority Shareholders Should Not Try To Determine A Corporation's Climate Change Strategy Through The Courts", *European Company Case Law (ECCL) Y.2023 V.1 N.2 p.(1-18)* , https://financiallawinstitute.ugent.be/wp-content/uploads/2023/07/2023-10.pdf, 4 , (accessed at 10.10.2023).

[622] De Wulf, "The Failed Derivative Action", 4.

[623] De Wulf, "The Failed Derivative Action", 4.

[624] Davies, "Shell: A Tale of Two Courts".

[625] De Wulf, "The Failed Derivative Action", 4; Davies, "Shell: A Tale of Two Courts".

[626] De Wulf, "The Failed Derivative Action", 4; Davies, "Shell: A Tale of Two Courts".

[627] Davies, "Shell: A Tale of Two Courts".

[628] Davies, "Shell: A Tale of Two Courts".

accusations made by Clientearth. Nevertheless, in light of the court ruling in the Netherlands, directors should be compelled to prioritize sustainability concerns.

2.4. Evaluation of Article 369 of TCC In Accordance With Sustainability Issues

In Turkish law, there is currently no specific legal regulation that governs the actions of directors[629] concerning sustainability issues. However, there are various recommendations for integrating sustainability considerations into Turkish company law. Among these recommendations, the most significant regulation should focus on enhancing the duty of care and loyalty of directors in relation to sustainability matters.

Pursuant to the current regulations of the TCC, it is stipulated that members of BoD and third parties involved in company management must act as diligent directors in the best interests of the company and shareholders. Therefore, under today's regulations, if members of BoD and other directors prioritize sustainability issues over the interests of shareholders, they could be held liable in accordance with Article 553 of the TCC.[630] Because of this, Turkish law should include legal regulations mandating that directors and third parties consider ESG issues in the course of performing their duties.

However, it is also crucial to determine the approach taken when establishing legal regulations. In this regard, clarification is needed regarding whether the concept of CSR will be construed as a discretionary right or recognized as a mandatory obligation.[631] If the law permits directors to make decisions on behalf of their

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[629] Marleen A. O'Connor, "Restructuring the Corporation's Nexus of Contracts: Recognizing A Fiduciary Duty to Protect Displaced Workers", *North Carolina Law Review, Y. 1991 V. 69 N..4 p. (1189-1260)*, https://scholarship.law.unc.edu/cgi/viewcontent.cgi?Article=3355&context=nclr, 1196-1260 (accessed at 01.10.2023); Okuyucu, Sosyal Sorumluluk, 318.

[630] Okuyucu, Sosyal Sorumluluk, 319.

[631] Okuyucu, Sosyal Sorumluluk, 319.

companies that prioritize the interests of stakeholders, then CSR becomes a directorial right, allowing companies to serve stakeholders at their discretion.

In this scenario, sustainability issues will be assessed within the framework of the business judgment rule. Conversely, if the law mandates directors to conduct their management activities in a socially responsible manner or to safeguard the interests of stakeholders on behalf of the company, then CSR becomes an obligation that compels them to serve stakeholders.[632]

As mentioned earlier, the first approach explicitly imposes obligations on directors to consider the interests of stakeholders and ESG issues. This approach, known as '*Multi-Constituency Duties'* in legal doctrine[633], advocates for directors to have responsibilities not only towards the company and shareholders but also towards stakeholders and ESG issues[634]. Conversely, the second approach suggests that instead of mandating such obligations, it would be preferable to enact legal regulations that encourage directors to consider the interests of stakeholders[635] voluntarily. *Ferrarini, Siri, and Zhu* align with the second approach[636], as discussed previously.

It can be argued that relying solely on the second method may prove insufficient, as it places the entire responsibility for ESG concerns on directors who primarily represent the shareholders. As previously emphasized, our society faces significant risks associated with sustainability issues. Failing to take decisive action in this regard could

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[632] Okuyucu, Sosyal Sorumluluk, 319.

[633] Stephen M. Bainbridge, "In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green", *Washington and Lee Law Review, Y. 1993 V. 50., N.4, p.(1423-1448)* http://heinonline.org/HOL/Page?handle=hein.journals/waslee50&div=84 , 1423-1448, (accessed at 01.10.2023); Michael E. DeBow, Dwight R. Lee, "Shareholders, Nonshareholders and Corporate Law:Communitarianism and Resource Allocation", *Delaware Journal of Corporate Law, Y.1993 V.18 N.2 p. (393-424)* http://heinonline.org/HOL/Page?handle=hein.journals/decor18&div=14, 418, (accessed at 01.10.2023), ; Okuyucu, Sosyal Sorumluluk, 320.

[634]Okuyucu, Sosyal Sorumluluk, 320.

[635] Okuyucu, Sosyal Sorumluluk, 320

[636] Ferrarini, Siri and Zhu, "Directors' Duties", 10-11.

lead to severe consequences. It is imperative that such consequences are not left solely to the discretion of company directors.

Therefore, in my view, it is essential to advocate for the alignment of the legal framework with the initial approach. Article 25 of the Corporate Sustainability Due Diligence (CSDD) Directive should be taken into account during the revision of existing regulations, as it clearly mandates directors to prioritize ESG issues in their duties.

However, if no regulation is established in Article 369 of TCC, there are alternative avenues to integrate sustainability policies into company practices in accordance with current law. Firstly, the implementation of sustainability policies within the company can be assessed under the business judgment rule, which will be elaborated upon later.

Secondly, joint stock companies have an Early Detection of Risk and Risk Management Committee, as stipulated in Article 378 of TCC. This committee is tasked with identifying potential threats to the company's existence, development, and continuity, implementing necessary precautions and remedies, and managing risks.

It is mandatory for companies whose shares are traded on the stock exchange, while for other companies, the committee is established based on a written notification[637] from the auditor. The BoD forms this committee from members who lack executive authority and independent experts[638]. As previously mentioned, companies and their operations have inflicted significant damage on the world and the environment.

These damages will inevitably impact the long-term profitability of companies. In today’s world, an increasing number of consumers and investors prioritize sustainability issues, and this trend is expected to continue growing in the future. Therefore, the Early Detection of Risk and Risk Management Committee must identify these risks, and based on their reports, the company should implement a sustainability

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[637]Pulaşlı, *Şirketler Hukuku C. II.*, 1190-1191; Pulaşlı, *Genel Esaslar*, 399-400; Bilgili, and Demirkapı, 288; Akdağ Güney, *Yönetim Kurulu*, 133-134.

[638]Pulaşlı, *Şirketler Hukuku C. II.*, 1190-1191; Pulaşlı, *Genel Esaslar*, 399-400; Bilgili, and Demirkapı, 288; Akdağ Güney, *Yönetim Kurulu*, 133-134.

policy. Failure to implement such a policy despite these risk reports could be interpreted as a breach of duty of care by the members of BoD.

Moreover, shareholders in companies have the right to access information and conduct inspections under Article 437 of the TCC. This right is applicable to every shareholder in joint stock companies.[639] In exercising this right, shareholders are entitled to various documents, including financial statements, consolidated financial statements, the annual activity report of the board, audit reports, and the profit distribution proposal of the board, all of which must be made available[640] to shareholders at least 15 days prior to the AGMs.[641]

Sustainability reports of the company can be assessed within the scope of these documents, as they are typically included in the annual activity report of the board. Given the numerous benefits of sustainability policies to the company, the failure of the BoD to adequately address sustainability issues in these reports could be considered a breach of their duty of care, in my opinion.

2.5. Evaluation of the Business Judgment Rule in Terms of Sustainability Issues

As previously discussed, the business judgment rule shields directors from liability for decisions made within its confines.[642] Conversely, certain conditions must be met for this protection to apply. These conditions dictate that such decisions must align with imperative legal regulations, serve the company's objectives and interests, be made during a meeting conducted in accordance with the law, and be defensible in terms of

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[639]Tekinalp, *Sermaye Ortaklıkları*, 377.

[640] Tekinalp, *Sermaye Ortaklıkları*, 377.

[641]Oğuz Atalay, "Anonim Şirketlerde Bilgi Alma ve İnceleme Haklarının Mahkeme Aracılığıyla Kullanılması", *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, Y.2015 V. 16 p. (53-76)*, https://hukuk.deu.edu.tr/wp-content/uploads/2015/09/O%C4%9EUZ-ATALAY.pdf , 54-55, (accessed at 11.02.2024)

[642] Pulaşlı, *Şirketler Hukuku C. II.,* 1577; Akdağ Güney, *Yönetim Kurulu*, 190.

their substance.[643] Additionally, it is essential that the members participating in the decision-making process maintain independence and impartiality.[644]

In accordance with current regulations, if members of BoD and other directors of the companies prioritize stakeholders' interests over shareholders' interests exclusively, they could be held liable under Article 553 of the TCC. However, in my opinion, if the company's management emphasizes sustainability issues without adversely affecting its profitability, then such actions could be assessed within the framework of the business judgment rule. In this context, decisions concerning sustainability must comply with imperative legal regulations and align with the company's objectives and interests.

For instance, the BoD could argue that a focus on sustainability will attract increased investments to the company.[645] Moreover, if companies adjust their business models to address sustainability issues, they can enhance the quality of their products, reduce costs, and improve their reputation among consumers.

Therefore, in my opinion, decisions made by companies concerning sustainability issues could be assessed under the business judgment rule if they adhere to imperative legal regulations and align with the company’s objectives and interests.

However, I believe there should still be a legal regulation mandating companies to prioritize sustainability issues, as it should not solely rely on the discretion of the company. As discussed earlier, such regulations can take two forms: one grants the BoD the authority to address sustainability issues, while the other imposes an obligation on the Board or other directors regarding sustainability matters. The former, granting authorization to the Board, would fall under the purview of the business judgment rule.

[643] For detailed information please see at first chapter of the thesis.

[644] Akdağ Güney, *Yönetim Kurulu*, 190

[645] Naciti, Cesaroni and Pulejo, 2.

CONCLUSION

In conclusion, according to Article 365 of the TCC, joint stock companies are directed and represented by a BoD, with few exceptions defined by law. Whether managed by shareholders or third parties, these directors are tasked with performing their duties diligently.

As a consequence, Article 369 of the TCC regulates the duty of care of directors to impose obligations on them. Scholars hold varying opinions regarding the legal nature of this duty, with many asserting it as a side obligation. Side obligations are ancillary to main performance obligations and cannot be pursued independently. Given that neither the company nor its stakeholders can directly sue directors for breaching the duty of care in joint stock companies, it is consistent with this viewpoint. In essence, we align with this perspective . Because as explained above neither the company nor its stakeholders can directly sue directors and company solely based on breaching the duty of care.

The duty of care holds immense significance for joint stock companies as it serves both social and economic functions. Moreover, objective criteria play a pivotal role in defining the duty of care of directors. By means of establishing transparent criteria, the objective duty of care ensures transparency for members of BoD and other directors, guiding them in fulfilling their duties effectively and responsibly.

Furthermore, in addition to members of BoD, third parties involved in management are also held accountable to the duty of care. However, as the specific inclusion of third parties in management is not directly outlined in Article 369 of the TCC, reference is made to Article 553, which addresses the legal liability of directors in such cases. Within legal doctrine, it is acknowledged that the term "third party in management" mentioned in Article 369 of the TCC and the term "director" specified in Article 553 of the TCC refer to the same entity.

The rights and obligations of members of BoD commence upon acquiring the right to membership in the BoD as outlined in Articles 359 and 363 of the TCC. Similarly, the obligations of care, as per Article 369 of the TCC, are incumbent upon them. Likewise, their rights and obligations cease upon the termination of their tenure. These same principles apply to third parties involved in management.

Moreover, there are legal repercussions for members of BoD or directors found to have breached the duty of care outlined in Article 369 of the TCC. One of the most significant consequences is the initiation of legal proceedings based on liability. In such cases, shareholders, creditors, and other affected stakeholders have the right to seek compensation for any losses incurred due to the actions of the directors.

They may do so under Article 553 of the TCC, as well as Articles 549–552 and 193 of the same code. The prerequisites for establishing this legal liability typically include proof of fault, resulting damage, violation of laws or the articles of association, and a causal connection between the breach and the harm suffered. Furthermore, a breach of the duty of care may lead to the dismissal of directors and members of BoD, as well as the dissolution of the company.

The thesis also delves into the concept of the business judgment rule. According to this principle, directors of companies are shielded from liability for decisions made in good faith, with sufficient information, and without conflicts of interest with the company, utilizing their discretion. However, Turkish law lacks specific regulations concerning the business judgment rule, and there are no direct rulings from the Court of Cassation addressing it. Instead, the Court of Cassation tends to scrutinize decisions based on their economic viability. Nonetheless, the doctrine generally advocates for the incorporation of the business judgment rule into Turkish law.

In my view, while the broad application of the business judgment rule may not be feasible due to Articles 369 and 553 of the TCC, it could be utilized in cases where decisions align with legal provisions and the company's core agreement, are in the company's best interests, and are made by independent and impartial directors.

Alongside the evolving landscape, contemporary discussions surrounding the duty of care of directors have been spurred by technological advancements, particularly in the realms of artificial intelligence (AI) and blockchain technology. Hence, these innovations have introduced significant changes to corporate governance practices. While the integration of AI into corporate boardrooms and the adoption of blockchain technology for financial records and governance processes are still in their nascent stages, they have prompted inquiries into how directors' obligations may be impacted.

In my view, considering the current constrained implementation of AI and blockchain within corporate environments, it would be premature to categorize their underutilization as a violation of directors' fiduciary responsibilities.

Nevertheless, for companies with substantial capital and resources, the failure to leverage these technologies may indeed be viewed as a violation of the duty of care, particularly if competitors are embracing them to gain a competitive edge. Besides, should any harm arise from the activities of these technologies, directors could be held accountable.

In the future, with the increasing prevalence of AI and blockchain, directors might encounter greater pressure to integrate these technologies into their company's operations. Failure to do so could increasingly be seen as a breach of their duty of care. Consequently, I believe there is a pressing need for legal regulations governing the use of AI and blockchain in corporate environments to provide clarity and guidance to directors as these technologies continue to proliferate.

Finally, the matter of sustainability carries immense significance in the contemporary world. The myriad environmental challenges faced globally, including critical issues such as climate change and global warming, are largely traceable to corporate activities. These environmental concerns pose risks to humanity, highlighting the urgent need for proactive measures.

In this context, the Paris Agreement represents a seminal global endeavor, having garnered acceptance and ratification by 196 parties at the UN Climate Change Conference (COP21) in Paris. In accordance with the Paris Agreement, a "*Proposal for a Directive on Corporate Sustainability Due Diligence*" was submitted to the EU. This proposal aims to regulate the obligations of directors within the realm of sustainability issues.

It mandates that directors must consider sustainability issues while performing their duties. However, some scholars criticize this regulation. They argue against mandating companies and directors to act on sustainability issues, believing that since addressing these issues is more profitable in the long term, companies will naturally take action. I dissent from this viewpoint due to the profound implications of sustainability challenges, which render them too consequential to be entrusted solely to the discretion of directors.

In addition, Turkish law lacks specific regulations addressing this matter. According to the prevailing provisions of the TCC, it is mandated that both the BoD and third-party entities involved in company management exercise their responsibilities as judicious overseers, aiming to serve the best interests of both the company and its shareholders.

Hence, as per current regulations, should members of BoD and other directors of companies place greater emphasis on sustainability matters at the expense of shareholder interests, they may face liability under Article 553 of the TCC. In my view, Turkish legislation should incorporate legal provisions mandating directors' obligations concerning sustainability issues.

If such legislation is not promulgated, however, alternative avenues exist within the extant legal framework for the adoption of sustainability policies. Firstly, the implementation of sustainability policies within the company could be adjudicated within the purview of the business judgment rule.

Secondly, such policies could be instituted based on risk assessments provided by the Early Detection of Risk and Risk Management Committee. Moreover, sustainability reports issued by the company could be scrutinized within the parameters delineated in Article 437/1 of the TCC, enabling shareholders to prompt members of BoD to address sustainability concerns.

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