

INTERMEDIATION ACTIVITIES IN THE CAPITAL MARKET AND INTERMEDIATION FRAMEWORK AGREEMENTS

ATIVIDADES DE INTERMEDIÇÃO NO MERCADO DE CAPITAIS E ACORDOS-QUADRO DE INTERMEDIÇÃO

IMMET KOÇ

Faculty of Law, Necmettin Erbakan
University, Konya, Turkey
drhimmetkoc@gmail.com

Received: 15 Sep 2022

Accepted: 15 Jan 2023

Published: 30 Jan 2023

Corresponding author:

drhimmetkoc@gmail.com



Abstract: Intermediary institutions are institutions operating in the field of capital markets. Intermediary institutions act as intermediaries in bringing the funds to the economy. During the execution of intermediary activities, a contract is concluded between the intermediary institutions and their customers. This contract is a brokerage framework contract. At the conclusion of the brokerage framework agreement, some protection mechanisms were introduced to protect customers in a weak situation. Protection mechanisms are particularly important when customers are consumers. However, the protection of customers does not depend on their consumer status. In other words, customers should be protected under the framework agreement, even if they are not consumers. These mechanisms take place within the framework of the capital market law, The Code of the Protection of the Consumer and the Turkish Code of Obligations.

Keywords: Intermediary institution. Intermediary. Framework contract. Audit. Protection.

Resumo: As instituições intermediárias são instituições que operam no campo do mercado de capitais. As instituições intermediárias atuam como intermediárias para trazer os fundos para a economia. Durante a execução das atividades intermediárias, é celebrado um contrato entre as instituições intermediárias e seus clientes. Este contrato é um contrato estrutural de corretagem. Na conclusão do contrato estrutural de corretagem, alguns mecanismos de proteção foram introduzidos para proteger os clientes em uma situação de fraqueza. Os mecanismos de proteção são particularmente importantes quando os clientes são consumidores. No entanto, a proteção dos clientes não depende de seu status de consumidor. Em outras palavras, os clientes devem ser protegidos nos termos do acordo-quadro, mesmo que não sejam consumidores. Esses mecanismos ocorrem no âmbito da lei do mercado de capitais, do Código de Proteção do Consumidor e do Código Turco de Obrigações.

Palavras-chave: Instituição intermediária. Intermediário. Contrato-quadro. Auditoria. Proteção.

INTRODUCTION

Intermediary institutions are institutions authorized by the Capital Markets Board to act as an exclusive intermediary. There are various brokerage agreements concluded by brokerage houses. Brokerage houses are obliged to first conclude a framework agreement with their customers regarding the trading intermediation transaction. The legal basis of this obligation will be explained in the study. After a framework agreement is concluded and an account is opened in the name of the customer with the brokerage house, individual trading agreements can be concluded between the customer and the brokerage house. In the study, only the framework agreement on trading intermediation will be emphasized.

In the study, in order to better understand the subject, firstly, general information about intermediary institutions will be given in the first part. While giving this general information, the regulations of the old Capital Market Law will be mentioned from time to time.

Although not all of the framework contracts for the purchase and sale of derivative instruments, the majority of these framework contracts are concluded by presenting them to the customer as general transaction conditions in practice. For this reason, brief information about the general transaction conditions, which have a wide place in practice and are frequently applied, will be included in the second part of the study.

In the third part of the study, it will be tried to focus on the concept of derivative instruments. After trying to explain the concept of derivative instrument, the four types of derivative instruments, which are the most traded in practice, will be tried to be explained in terms of their general nature.

In the fourth part, the trading activities of these derivative instruments and the concept of the framework contract to be concluded between the brokerage houses and their customers will be discussed.

In the fifth part, which is the last chapter, the main purpose of the subject, which is the control of the framework agreements concluded within the scope of the activity of intermediation in the purchase and sale of derivative instruments, will be tried to be explained. In this section, the capital market legislation, which includes special regulations regarding the supervision of framework agreements, the provisions of the Law on the Protection of the Consumer (TKHK) numbered 6502 and the Turkish Code of Obligations (TBK) numbered 6098, and the legal regulations referenced in the section.

I. INTERMEDIATE INSTITUTIONS

A. DEFINITION

Intermediary institutions can be defined as “institutions that mediate certain transactions in the capital market” (Kara, 2006: 94). Intermediary Institutions operate exclusively in capital markets (Ünal, 1997: 68).

Code of Capital Markets No. 2499, which is abolished m. In 30/2, “capital market instruments are issued by authorized institutions on their own behalf and on their own account within the framework of Article 31; on behalf of another person; It was defined as “purchasing and selling on one's own behalf, on behalf of someone else”. In the last sentence of the first paragraph of the 31st article, it is stated that “30. It was stated that the capital market activities listed in subparagraphs a and b of paragraph 1 of the article would be carried out exclusively by intermediary institutions.

In the new Capital Markets Law No. 6362 (SPKn), intermediary institutions in subparagraph a of paragraph 1 of article 3, “37. organizations that carry out the activities in clauses a, b, c, e and f of the article. In addition, the necessary conditions for the Capital Markets Board to grant an operating license to the Intermediary Institutions are listed in the SPKn article 43 et seq.

It is seen that the intermediary institutions could not be defined in the real sense in both legal arrangements. In the CMB system, unlike the old law, the concepts of intermediary institutions and intermediary services were abandoned; Instead, the concepts of investment services and investment institutions were preferred (Memiş and Turan, 2016: 153). However, in the study, the concept of intermediary institution and intermediary services will be preferred.

B. LEGAL CHARACTERISTICS OF INTERMEDIATIONAL INSTITUTIONS AND INTERMEDIATION ACTIVITIES

The determination of the legal nature is very important as it serves to determine the rules of law to be applied. However, both laws and capital market communiqués in the field of capital markets; It is not sufficient to determine the legal qualifications of neither intermediary institutions nor their intermediary activities.

Intermediary institutions, first of all, are partnerships organized as a joint stock company (SPKn art. 43/1, a). It has a unique legal character, different from the institutions such as brokerage, whistleblower and agency regulated in the Turkish Code of Obligations and the Turkish Commercial Code. However, it has not been regulated in any legislation. From this point of view, it can be said that intermediary institutions have their own legal structures (Ünal, 1997: 72).

The scope of intermediary activities includes many different activities. Trading, custody, consulting are just a few of them. Here, the legal nature of intermediary activities varies according to the legal nature of the intermediary activity (Ünal, 1997: 70). In other words, the legal nature of the activity for which the intermediary activity is carried out becomes the legal nature of the intermediary activity.

C. ACTIVITIES OF INTERMEDIATE INSTITUTIONS

Intermediary Institutions were regulated by the Communiqué Serial: V, No: 46 issued by the Capital Markets Board¹. Within the scope of this communiqué, almost every situation regarding intermediary institutions was regulated. The principles regarding intermediary institutions are regulated in Communiqué Serial: III, No: 37.1² and Communiqué Serial: III, No: 39.1³, which are still in effect.

Intermediary institutions also found their place in Article 3 of the Code of Capital Market by referring to Article 37. In Article 37 titled “Investment Services and Activities”, investment activities within the scope of the SPKn are specified. In Article 3, it is stated that the activities specified in clauses a, b, c, e and f of Article 37 are intermediary activities⁴.

The common point of all these fields of activity is that capital market instruments lie on the basis of transactions (Kara, 2006: 99). Capital market instruments are also subject

¹ This Communiqué has been repealed.

² RG: 28704 S. ve 11.07.2013 T.

³ RG: 28854 S. ve 17.12.2013 T.

⁴ According to the said article 37, the following activities are intermediary activities:

- “1) Receiving and transmitting orders regarding capital market instruments,
- 2) Execution of orders related to capital market instruments in the name and account of the customer or in his own name and account of the customer,
- 3) Purchase and sale of capital market instruments from its own account,
- 4) Intermediation in the sale of capital market instruments by underwriting,
- 5) Intermediation in the public offering of capital market instruments without underwriting.”

to SPK'n paragraph of 3/1, "Refers to other capital market instruments determined by the Board to be within this scope, including securities and derivative instruments and investment contracts." has been defined. According to the relevant paragraph, capital market instruments;

-"Securities,

-Derivative Instruments

-Investment Contracts

-Other Capital Market Instruments. Checks, bills and policies known as bills of exchange do not have the quality of securities (Sumer, 1999: 34-35; Memiş and Turan, 2006: 56).

If we talk about them briefly;

First of all, the prevailing opinion is that the definition of securities in Turkish law is not clear enough (Akbulak and Akbulak, 2004: 20.; Memiş and Turan, 2016: 56). Securities represent a portion of the capital or receivable divided into equal shares (Sumer, 1999: 10 et al.). Securities provide partnership or receivable rights to their owners (Günel, 1986: 108 et al.). At the same time, they are documents that have features such as representing a certain amount, being used as an investment tool in the medium and long term, bringing periodic income, being doubled, being issued in large numbers and in series (Günel, 1986: 108). Securities have the quality of valuable papers (Tekinalp, 1982: 13). Documents such as stocks, bonds, participation certificates, profit and loss sharing certificates are securities.

Derivative instruments, as the name suggests, are instruments derived from another capital market instrument. Instruments that are intended to generate income based on the return from another asset are defined as derivative instruments. In other words, the value of derivative instruments is directly dependent on the value of another financial instrument or commodity. Other assets on which derivative instruments are based are generally; may be commodities, securities, currency types, interest rates, precious metals or other derivative instruments.

Investment contracts, on the other hand, do not have any definition in the legislation. Contracts made as a result of a call made to a company to create financial resources, and if it provides a financial resource to the company, that contract can be qualified as an investment contract in terms of capital market law. Investment contracts are

contracts that document investment in a venture. With the investment contract, the investor seeks to earn an income in the medium or long term.

In addition, there are some transactions that can be concluded by authorizing the Intermediary Institutions exclusively, and in brief, these are as follows: Intermediation in public offering, brokerage in trading, investment consultancy and management contract.

II. DERIVATIVE INSTRUMENTS

Derivative instruments are not defined in the legislation. It has found a place for itself in the doctrine, albeit a little. Derivative instruments obtain their value depending on the value of another asset (Kara, 2006: 194; Keskin, 2007: 26; Penezoğlu, 2004: 5; Köroğlu, 2013: 6). This is the reason why they are named as derivative instruments. For example, stocks are securities. It gives the owner the right of partnership in the company. In the event that the option right is granted on the stock, the option transaction is a derivative instrument (Keskin, 2007: 24).

In Article 53 of the repealed Communiqué Serial: V, No: 46, the activity of intermediation in the purchase and sale of derivative instruments was defined. In the relevant article, it was stated that "intermediary activity in the purchase and sale of derivative instruments refers to the trading of all kinds of derivative instruments, including futures and option contracts based on economic and financial indicators, capital market instruments, commodities, precious metals and foreign currency, as an intermediary and for commercial purposes".

The value of derivative instruments depends on interest, money market instruments, securities; it may even depend on another derivative vehicle (Köroğlu, 2013: 7). Depending on the value of another economic element, numerous derivative instruments can be issued (Kara, 2006: 195; Köroğlu, 2013: 8). However, there are four different types of derivative instruments that stand out in practice. These are swap contracts, option contracts, forward contracts and future contracts (Kurar, 2010: 23).

III. INTERMEDIATION FOR TRADING OF DERIVATIVE INSTRUMENTS AND FRAMEWORK AGREEMENT

Trading intermediation is one of the fields of activity of intermediary institutions. Only brokerage firms authorized by the CMB can mediate the buying and selling of derivative instruments (Kara, 2006: 95; Köroğlu, 2013: 61; Penezoğlu, 2004: 98).

In Article 54 of the Capital Markets Board Communiqué Serial: V, No: 46, which is out of force, the activity of intermediation in the purchase and sale of derivative instruments was defined: “Accepting orders from customers regarding derivative instruments directly or in a representative capacity, directing these orders to other persons or institutions, for this purpose. Opening a business, concluding a contract, acting as an intermediary in the conclusion of a contract, or making collections or payments regarding the transactions made are considered as intermediation in the purchase and sale of derivative instruments.

What should be understood from the trading intermediation activity is explained in Article 10 of the Communiqué Serial: III, No: 37.1. According to this article, the activity of intermediation in trading. They are the activities in clauses a, b and c regulated in Article 37/1 of SPKn. Relevant activities are as follows:

“a) Receiving and transmitting orders related to capital market instruments (Intermediation for Order Transmission)

b) Execution of orders regarding capital market instruments in the name and account of the customer or in his own name and account of the customer (Transaction Intermediation)

c) Purchase and sale of capital market instruments from own account (Portfolio Brokerage)”

In the Communiqué Series: III, No: 37.1, and in the Communiqué, Serial: III, No: 39.1, a derivative instrument trading intermediary activity is not defined. Accordingly, the provisions of these two current communiqués on trading intermediation activities should also be applied to the trading of derivative instruments.

Forward contracts and swap contracts, which are derivative instruments, are not traded in organized exchanges due to their nature. They are traded on the over-the-counter market. Therefore, at first glance, it can be concluded that there is no need for intermediary institutions to act in the signing of these two contract types. However, it should be stated that, as per the clear provision in Article 25 of the Communiqué Serial: III, No: 37.1, it is possible for intermediary institutions to act as intermediaries in the buying and selling of forward contracts and swap contracts. In the provision of the article, it is clearly stated that

the buying and selling of derivative instruments other than leveraged transactions can be carried out in exchanges, other organized market places or over-the-counter markets depending on the nature of the intermediary activities. Leveraged transactions are also a derivative instrument, unlike the four derivative instruments examined in the study (Article of SPK n 3/1,u) (Aydın and Ayyıldırım, 2015: 27-33). In other words, swap, option, future and forward contracts, which are the subject of the study, are excluded from leveraged transactions. Since swap and forward contracts are also traded in over-the-counter markets, they should be evaluated within the scope of this article. In conclusion; Intermediary institutions may also be involved in the purchase and sale of forward contracts and swap contracts, and a framework contract may be concluded between the customer and the intermediary institution regarding these two contracts.

A framework contract is concluded if the persons who aim to make more than one contract of the same type in the future mutually agree that certain conditions will be partially or completely included in this contract in order to avoid the need to re-determine the issues related to the contracts they will establish in the future (Barlas, 2008: 90). et al; Penezoglu, 2004: 98). In terms of their legal nature, intermediary framework contracts are sui generis contracts (Köroğlu, 2013: 78; Penezoglu, 2004: 101).

The customer who wants to trade derivative instruments is obliged to conclude a framework agreement with the brokerage house that is a member of the stock exchange (Kara, 2006: 232; Kırca, 2000: 85; Köroğlu, 2004: 72; Penezoglu, 2004: 98 et al; Memiş and Turan, 2016: 158).).). This obligation is from subparagraph b of paragraph 1 of article 14 of the Communiqué Serial: III, No: 37.1; From subparagraph a of paragraph 1 of article 19; It can be clearly understood from subparagraph a of paragraph 1 of Article 24. In addition, in Article 26 of the Communiqué Serial: III, No: 39.1, the obligation to sign a framework contract is clearly stated.

After the conclusion of the framework agreement, an account is opened in the name of the client within the brokerage house. The customer can only notify the brokerage house of his orders regarding trading activities after this account is opened (Kırca, 2000: 85).

After the framework agreement is concluded and an account is opened on behalf of the customer in the brokerage house, individual agreements are signed between the customer and the brokerage house. The content of these individual contracts may include elements such as the quality, amount and time of purchase and sale (Köroğlu, 2013: 70-72).

IV. AUDIT OF FRAMEWORK AGREEMENTS INTERMEDIATE TRADING OF DERIVATIVE INSTRUMENTS

A. AUDIT WITHIN THE FRAMEWORK IN TERMS OF CAPITAL MARKET'S LEGISLATION

Audit within the scope of capital market legislation; It is carried out in the form of regulating the mandatory provisions regarding the framework agreements to be concluded by the intermediary institutions in accordance to the the 5th paragraph of the 26th article of the Communiqué Serial: III, No: 39.1 provision of the relevant paragraph, the following provisions cannot be included in the framework agreements to be concluded by the intermediary institutions:

- “Provisions contrary to the capital market legislation,
- Provisions that seriously harm the rights of customers,
- Provisions providing unilateral extraordinary rights in favor of intermediary institutions, and
- Provisions regarding the burden of proof of orders to the customer” (İnceoğlu, 2004: 71).

The provision of article 26/5 of the relevant communiqué is abolished in the article of the Communiqué Serial: V, No: 46. It is the arrangement of the 13/4 provision in the new communiqué ((İnceoğlu, 2004: 70 et al.). When the two provisions are compared, it will be seen that they contain the same expressions. It has the ability to be applied to all framework contracts.

In the above-mentioned provision, the provisions that will not be included in the framework agreements are regulated in an imperative manner. However, the sanction of violating this imperative provision was not included in the Communiqué Series: III, No: 39.1, just like in the old communiqué. Since there will be a violation of the legal regulation here, the provisions of the framework agreement that do not comply with the relevant provision should be subject to invalidity sanction (TBK art. 27).

If there is a provision in the framework agreement that is contrary to the mandatory provisions of the relevant communiqué, only those provisions should be null and void (Kara, 2006: 239). In this case, a partial invalidation sanction should be applied. Other provisions must continue to be valid (TBK art. 27/2, c. 1). However, in the framework agreement, article 26/5 of the Communiqué Serial: III, No: 39.1. Even if it is

clearly understood that the contract will not be concluded in the event that the provisions contrary to the imperative provision are deemed null and void, the entire framework contract must be absolutely null and void (TCO art. 27/2, c. 2).

The judge is the person who will decide whether there is a violation of the article 26/5 of the relevant communiqué in the provisions of the framework contract (Sirmen, 2011: 112). While forming this opinion, the judge has made content control based on the authority granted to him within the framework of the general transaction conditions (Kara, 2006: 239; Kırca, 2000: 92).

Moreover, at its meeting dated 2001 and numbered 45, the Capital Markets Board also regulated some issues to be considered in the framework agreements that intermediary institutions will conclude with their customers. These matters are as follows:

- Provisions that seriously harm the customer's rights and that provide unilateral extraordinary rights in favor of the intermediary institution should not be introduced.
- Records that impose the burden of proof on the customer should not be included.
- A clear and understandable language should be used, characters and font sizes that would make it difficult or prevent the customer from reading should not be used.
- The rights and obligations of the customers and the intermediary institution should be determined in a mutual and balanced manner.

B. AUDIT WITHIN THE FRAMEWORK IN TERMS OF THE CODE OF PROTECTION THE CONSUMER

Some definitions have been made in article 3. No. 6502 Code of the Protection of Consumers (TKHK). The definition of the concept of service is also included in this article. According to sub-paragraph d, service means *“the subject of any consumer transaction other than the supply of goods made or promised to be performed in return for a fee or benefit”*. In other words, the intermediary activities offered by the intermediary institutions to their customers are a service provision activity. Therefore, there will be no problem in accepting any brokerage framework agreement as service provision and applying the provisions of the TKHK.

However, in order to apply the provisions of the TKHK to an intermediation framework agreement, it is not sufficient for that activity to be service provision alone. At

the same time, the customer who receives service should not be a trader, that is, he should be a consumer. In the art. of 3/1, k TKHK, the consumer is defined as a “*real or legal person acting for non-commercial or non-professional purposes*”. From this point of view, it can be said that; If the party to which the brokerage firm provides services in any derivative instrument trading framework agreement is not a trader and has the title of consumer; If the framework contract has not been concluded for any professional or commercial purpose, the provisions of the TKHK may be applied to that framework contract. Therefore, that framework contract can also benefit from the supervision of the provisions of the TKHK. Because the provisions of the TKHK aim to protect the consumer who makes transactions by acting with the aim of meeting their unlimited and various needs (Deryal, 2014: 59; Şahin and Kizir, 2014: 69). However, if the customer who is a party to the contract with the brokerage house in the said framework agreement is a trader, then the provisions of the TKHK cannot be applied. For consumers, in cases where there is no provision in the TKHK, the provisions of the TBK, which is the general law, will be applied.

After determining in which cases the provisions of the TKHK can be applied to the framework agreements for the purchase and sale of derivative instruments, it is necessary to evaluate the provisions within the scope of the TKHK audit. For the supervision of framework agreements for the purchase and sale of derivative instruments within the scope of TKHK, TKHK art. 5 clauses need to be examined. In the relevant article, regulations have been made about unfair terms in consumer contracts. These regulations need to be applied to the framework agreement for the purchase and sale of derivative instruments, one of which is the consumer. If there is a trader in the position of customers of intermediary institutions, the said trader, TKHK art. 5 will not benefit from the protection of the provision.

The issues related to the control of unfair conditions, which can also be applied to the framework agreements for the purchase and sale of derivative instruments, are regulated in Article 8 of the regulation. According to the first paragraph of this article, the Ministry of Trade should take the necessary measures to remove or prevent the use of unfair terms in the framework contracts from the contract texts. This issue is already in the TKHK art. 5/8, it was included provision of the regulation. According to the art. 8/2 clause, if any unfair terms are detected in the framework agreements for the purchase and sale of derivative instruments, the Ministry gives the intermediary institution a period of thirty days to remove these terms from the framework contract. The Ministry may extend

this period up to ninety days if it deems necessary. In case the unfair terms provisions are not removed from the framework contract until the end of the relevant period, TKHK art. It is regulated in the 4th paragraph of the 8th article that he will be punished with an administrative fine within the scope of art. 77.

According to paragraph 3 of Article 8, if the intermediary institution notifies the customer in a clear and understandable way, in writing or electronically, that the contract terms determined as unfair terms are absolutely invalid for the customer in any derivative instrument trading framework agreement, from the date of determination. It will be accepted that these terms have been removed from the contract texts that were previously established with the consumers and are still valid.

C. AUDIT UNDER THE TURKISH CODE OF OBLIGATIONS

Intermediation framework agreements for the purchase and sale of derivative instruments are concluded between the brokerage houses and their customers. It should be noted that not every framework contract can be signed under general transaction conditions. In practice, intermediary framework agreements for the purchase and sale of derivative instruments are usually prepared unilaterally by the intermediary institutions in advance and presented to the customer (Kırca, 2000: 89). Although this is mostly the case in practice, there is no legal obligation to conclude every framework agreement as a general transaction condition. If a framework contract is presented to the customer as a general transaction condition, it will be able to benefit from the audit provisions regarding the general transaction conditions in the Turkish Code of Obligations (TBK) (Kara, 2013: 727; Altop, 2011: 35).

However, if a derivative instrument trading framework agreement is not presented to the customer as a general transaction condition and is put into effect by negotiating with the customer, it will not be able to benefit from the audit provisions established on the general transaction conditions regulated in the TBK system. In other words, in order for a derivative instrument trading framework contract to benefit from the audit provisions on the general transaction conditions within the scope of the TBK, that framework contract must be presented to the customer as a general transaction condition and be put into effect without being negotiated between the parties (Altop, 2011: 35).

Between art. 20-25 of TBK, general trading conditions are regulated. In these articles, the general transaction conditions are defined and the foreseen control mechanism is regulated. General trading conditions protect the weak side against the strong side that regulates the general trading conditions. In order to provide this protection, the existence of some control mechanisms is required. In these inspection systems, no distinction is made between merchants and consumers. Types of audits regulated in the TBK; enforcement, comment, and content control.

In the TBK system, first, the enforcement control was organized (Altop, 2011: 40). The purpose of enforcement is to resolve the issue of whether the relevant provisions will be included in the contract. In this context, the sanction of not being written has been taken into consideration in article 21 (Arkan, 2011: 72.). Accordingly, the validity of provisions contrary to the customer's interest in a derivatives brokerage framework agreement depends on the fulfillment of certain conditions. These conditions are:

- While concluding the framework contract, the intermediary institution,
- It must clearly inform the customer about the existence of these conditions.
 - The intermediary institution should allow the customer to learn about them.
 - The customer must accept these conditions.

If these conditions are not found together, the clauses in the derivative instrument trading framework agreement contrary to customer interests will be deemed invalid (Engin, 2010: 79-80; Atamer, 2011: 28). The customer's declaration of acceptance may be in an explicit or implicit form. Proof of the negotiation will also be in the intermediary institutions.

Article 21/2 of the TBK also regulates another state of being unwritten. Accordingly, provisions that are unfamiliar to the nature of the derivative instrument trading framework agreement and the nature of the business will also be deemed unwritten (Deryal, 2014: 59; Altop, 2011: 40; Atamer, 2011: 31; Sirmen, 2011: 116). These provisions are described in the doctrine as surprising records or unusual records.

Article 22 of the TBK regulates the effect of being considered unwritten on the contract. Accordingly, the framework agreement for the purchase and sale of derivative instruments should be kept alive, with provisions other than those deemed unwritten (Altop, 2011: 41; Arkan, 2011: 72). According to the second paragraph, the brokerage house will not be able to demand the nullification of the entire framework agreement,

claiming that it would not have re-established the agreement if there were no provisions deemed unwritten (Şahin and Kizir, 2014: 72; Sirmen, 2011: 117).

In Article 23 of the TBK, the principles of auditing by interpretation are regulated. In the scope of audit by interpretation, how to interpret the provisions that are not clear and intelligible is regulated. Based on Article 23, it can be said that; If a provision in a derivative instrument trading framework agreement is not clear and understandable or has more than one meaning, it will be interpreted against the brokerage house and in favor of the customer (İnal, 2014: 54; Şahin and Kizir, 2014: 72; Altop, 2011: 42). ; Arıkan, 2011: 73; Engin, 2010: 81; Atamer, 2011: 35). There is no purpose here to make comments in favor of the customer. What should be emphasized here is the fact that it is not the customer but the intermediary institution that must endure a judgment that is not clear or understandable enough (Aydoğdu, 2011: 121).

In the Turkish Code of Obligations system, the party using the general transaction conditions has an obligation to bear the negative consequences of this. The counterparty has no influence on the preparation of the general terms of the transaction and cannot be expected to suffer the negative consequences of uncertainty. Those who use these conditions are expected to use a clear and understandable language in their writing (Atamer, 2011: 35; Aydoğdu, 2011: 116). The measure to be used in making the rule clear or comprehensible should be based on the knowledge of the customer who is honest and has an average intelligence (Aydoğdu, 2011: 117).

The content control of the framework agreements for the purchase and sale of derivative instruments within the scope of the TBK is the article 24 and 25 of the TBK and It is regulated in provision. Content control aims to examine the provisions of the contract that are contrary to the rules of honesty. The purpose of content control in the TBK system is to protect the party, which is generally considered to be a weak party, without being able to negotiate the contracts presented to him in the form of general transaction conditions (Aydoğdu, 2011: 131; Sirmen, 2011: 121).

CONCLUSION

Intermediation framework agreements for the purchase and sale of derivative instruments are the types of contracts concluded between intermediary institutions and their customers. These contracts, which are regulated as general transaction conditions in

practice, are prepared in advance by intermediary institutions. The participating party will also be in need of protection in contracts that are prepared in advance and in which the customers participate only by signature.

Within the Turkish legal system, various provisions have been regulated for the purpose of auditing these contracts. Thanks to these regulations, the supervision of the framework agreements for the purchase and sale of derivative instruments is effectively ensured. In this study, these control mechanisms were tried to be examined.

First of all, the audit provisions regulated within the scope of capital market legislation are mentioned. Regulations such as meeting documents, communiqués, and the Code of Capital Markets announced by the Capital Markets Board contain the said audit provisions. It is among these regulations that what matters should be included in the framework agreements.

Another control mechanism of the framework agreements for the purchase and sale of derivative instruments is regulated within the scope of TKHK. However, in order to benefit from the audit provisions within the scope of the TKHK, the party of any derivative instrument trading framework agreement must have the title of consumer. The definition of the title of consumer was also made within the scope of TKHK. To see how the framework agreement for derivative instrument trading will be audited under the art. of 5 of TKHK clause should be examined. In this provision, it is regulated how the provisions that are added as unfair terms in the framework agreement for brokerage trading in any derivative instrument will be controlled.

Finally, the control of general transaction conditions was tried to be examined in the study. The control of general transaction conditions is regulated in the TBK. Enforcement control, comment control and content control are regulated in the relevant provisions of the TBK, respectively. These provisions will be applied in all derivative instrument purchase and sale intermediation framework agreements concluded as general transaction terms, without making any distinction between merchants and consumers.

REFERENCES

- Akbulak, S.; Akbulak Y. (2004), *Capital Market Instruments and Public Joint Stock Companies in Turkey*, Istanbul: Beta Publications.
- Altop A. (2011), “General Transaction Conditions”, *Turkish Code of Obligations Symposium Articles-Communiqués*, (Edited by M. Murat İNCEOĞLU), Istanbul: Oniki Levha Publications, p. 27-44.
- Arıkan M. (2011), “General Transaction Conditions in the Turkish Code of Obligations No. 6098”, *Marmara University Law Faculty Legal Studies Journal Private Law Symposium Special Issue (Grant to Prof. Dr. Cevdet YAVUZ)*, p. 69-74.
- Atamer Y. (2011) “Audit of General Transaction Conditions According to the New Turkish Code of Obligations”, *General Transaction Conditions in Turkish Law Symposium*, 7-73.
- Aydin E.; Ayyıldırım K. (2015), “Leveraged Transactions And Taxation (Forex Trading And Taxation)”, *Journal of Economic and Social Research*, Vol 11, Year 11, Issue 1, p. 23-41.
- Aydoğdu M. (2011), “The Application Area of the General Transaction Conditions Regulated in the Turkish Code of Obligations No. 6098 in terms of Subject”, *Dokuz Eylül University Faculty of Law Journal*, Vol: 13, No: 2, pp.1-50.
- Barlas N. (2008), “The Concept of Framework Contracts and Features of Framework Contracts”, *My Articles*, C. I, Istanbul: Vedat Publications.
- Çakar A. (2009), “Derivatives and Futures Markets”, *Ankara University Social Sciences Institute Graduation Project*, Ankara (Project Advisor: Assoc. Dr. Kadir GÜRDAL).
- Deryal Y. (2014), “Examples of Unfair Conditions in Consumer Loans and Evaluation of New Arrangements Introduced by Law No. 6502”, *Terazi Law Journal*, Vol: 9, No: 89, January, p. 59-67.
- Engin B. I. (2010), “Protection of Consumers Against General Transaction Conditions in Turkish Law”, *Banking and Consumer Law Problems Symposium*, Istanbul: Oniki Levha Publications, p. 75-100.
- Gunal V. (1986), *Capital Markets Law*, Ankara: Capital Markets Board Publications.
- İnal T. (2014), “Unfair Terms in Consumer Contracts”, *Terazi Law Journal*, Vol: 9, No: 89, January, p. 32-57.
- İnceoğlu M. M. (2014), *Legal Responsibility of Intermediary Institutions in the Capital Market*, Ankara: Seçkin Publications.
- Kara M. S. (2013), “Unfair Competition Provisions Regarding General Transaction Conditions”, *Journal of Gazi University Faculty of Law*, Vol: XVII, No: 1-2, p. 723-742.
- Kara M. S. (2006), “Investor Protection in Capital Market Intermediation Activities”, *Ankara University Social Sciences Institute PhD Thesis*, Ankara (Thesis Advisor: Prof. Dr. Asuman TURANBOY).

Keskin A. D. (2007), "Swap Process and Its Legal Characteristics", *Ankara University Social Sciences Institute PhD Thesis*, Ankara (Thesis Advisor: Prof. Dr. Mehmet ÜNAL).

Kirca I. (2000), *Bank Option Agreements in Legal Aspect*, Ankara: BTHAE Publications.

Köroğlu B. (2013), "Intermediation Agreements for the Purchase and Sale of Derivative Instruments", *Gazi University Institute of Social Sciences Graduate Thesis*, Ankara (Thesis Advisor: Assoc. Dr. Mehmet ÖZDAMAR).

Kurar İ. (2010), "Application of Risk Management of Derivative Instruments in Futures and Options Exchange in Turkey", *Dumlupınar University Social Sciences Institute Master's Thesis*, Kütahya (Thesis Advisor: Assoc. Dr. Rasim YILMAZ).

Memis T.; Turan G. (2016), *Capital Market Law*, 2nd Edition, Ankara: Seçkin Publications.

Penezoğlu Y. G. (2004), *Futures Contracts in Legal Aspects*, Istanbul: Kazancı Publications.

Saltoğlu B. (2014), "Derivatives-Markets and Risk Management", *Licensing Exams Workbooks*, October 2014.

Capital Markets Tools I (2015), *Licensing Exams Workbooks*, SPL Registry and Training Institution, August 2015.

Sirmen L. (2011) "Audit of General Transaction Conditions in Consumer Contracts", *General Transaction Conditions in Turkish Law Symposium*, Ankara, p. 109-134.

Sumer A. (1999), *Turkish Capital Market Law and Selected Legislation*, 2nd Edition, Istanbul: Alfa Publications.

Sahin T.; Kizir M. (2014), "Innovations and Changes in General Principles, Unfair Conditions and Defective Goods and Services of Law No. 6502 on the Protection of Consumers", *Libra Law Journal*, Vol: 9, No: 89, January, p. 68-78.

Şen İ. (2010), "Analysis and Evaluation of Derivative Products Swap, Forward, Futures, Option Transactions and Taxation in Turkey", *Gazi University Institute of Social Sciences Graduate Thesis*, Ankara (Thesis Advisor: Prof. Dr. Fevzi Rifat ORTAÇ).

Tekinalp U. (1982), *Principles of Capital Market Law*, Istanbul: Economic and Social Publications.

Tütüncübaşı C. (2006), "Transactions Related to Derivative Instruments and Legal Characteristics of These Transactions", *Marmara University Banking and Insurance Institute Master's Thesis*, Istanbul (Thesis Advisor: Assistant Prof. Dr. Birgül SOPACI).

Unal O. K. (1997), *Intermediary Institutions*, Ankara: Approach Publications.