Conducting the Banking Business: A Comparative Approach to the Authorization Procedures in Turkey and in Switzerland

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I. Introduction

Banks are special. They play a central role in our economies, and as much as their strength and soundness contributes to economic growth, the devastating effect of their failure is easily felt in all sectors of the economy. Banking is also a risky business. Typically, banks hold liquid liabilities in the form of bank deposits, whereas their assets are long-term assets which are often difficult to sell on short notice. Furthermore, banking is a public business. Banks offer services that are essential to the modern economy, such as process payments, accepting deposits, and extending credit. In this sense, banks are said to fulfill a public service. Lastly, banks are the central link between the banking system and the conduct of monetary policy. Because banks are special, they warrant special regulatory oversight.

One aspect of the prudential supervision of banks is that the operation of a bank is subject to an authorization procedure. This contribution will take a comparative approach on these procedures by analyzing the legal framework in both countries, i.e., the present draft of the Turkish Financial Services Act (FSA) and the Swiss Federal Banking Code of 1934 (SBC). It begins with a general overview of the major steps in the authorization procedure. In a second step, it will focus on the

specific authorization conditions regarding the personal qualifications of a bank’s executive officers.

II. Who needs a banking license?

When asking what entities need a banking license, the answer for both countries is obvious: banks. It is further obvious that, both countries being subject to the rule of law, the authorization is not at the discretion of the authority in charge. It must be granted if the authorization conditions are fulfilled. A closer look, however, reveals a number differences between Turkey and Switzerland. For instance, the Turkish draft of the FSA includes a licensing requirement for Contribution Banks. These institutions have developed out of a cultural and historical background that lacks a Swiss parallel. Generally speaking, however, the Swiss Banking Code operates on a more restrictive authorization regime than its Turkish counterpart.

1. Foreign controlled banks

Swiss law distinguishes between genuine Swiss banks and foreign controlled banks, submitting the latter to additional licensing requirements. The distinction operates on the basis of the control principle: a bank is considered foreign controlled if a foreigner with a qualified participation directly or indirectly holds more than 50 percent of the voting rights in the bank, or if he exercises a significant influence in another manner. Under the Code, a foreigner is any person who is neither a Swiss national nor a legal resident of Switzerland. If the shareholder is a legal entity, it will be deemed foreign if it is headquartered abroad; if its headquarters are in Switzerland, it will be deemed foreign if it is controlled by natural persons who are neither Swiss citizens nor legal residents of Switzerland.

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1 See message of the Swiss Federal Council to the Parliament to recommend the adoption of the Swiss Banking Code in 1934, Bundesblatt 1934 I 171.
3 English draft version of November 24, 2004.
The additional authorization requirements are two-fold. First, the foreign state must grant reciprocity to Swiss banks, thus allowing them to do business in that state. This provision has become irrelevant in view of Switzerland’s membership in the WTO/GATS, as Switzerland grants the most favored nation status to other WTO members. The second one is still of relevance: The corporate name must not suggest that the bank is genuinely Swiss. For instance, a foreign-controlled bank is not allowed to use the name “Swiss Commercial Bank Ltd.”. A Swiss bank who falls under foreign control will have to make the necessary adjustments to its corporate name.

Foreign-controlled banks are quite frequent. Presently, about 350 banks operate in Switzerland, out of which roughly one third are foreign controlled.

2. Branches of foreign banks and foreign controlled banks

Almost no bank operates from one single geographical location. Most of them maintain offices in other locations. If these offices are free to enter into transactions, if they maintain customer accounts or if their actions legally bind the bank in any other way, they are called branches. Many banks operate branches abroad. From the point of view of the foreign regulator, these are branches of a bank headquartered abroad (foreign bank).

Under the regime of the FSA, only the first branch of a foreign bank needs to undergo authorization procedure in Turkey. The Swiss Banking Code is more restrictive and requires a separate license for each Swiss branch of the foreign bank. The main focus of the procedure is to contact the foreign Bank Supervisor in view of possible objections to the establishment of additional branches in Switzerland, to receive confirmation that there is adequate consolidated supervision of the worldwide activities of the bank and, lastly, to receive assurance that the foreign Bank Supervisor will inform the Swiss Bank Supervisor of any problems that may jeopardize the interests of the bank’s creditors. Also, one branch has to be designated as the one responsible for all communication with the Swiss Federal Banking Commission (SFBC).

The licensing requirement for branches also applies to foreign controlled banks. In practice, however, the Banking Commission will simply examine whether the bank is appropriately organized and has sufficient funds to open up a branch.

At the present time, about 30 branches have been authorized to conduct business by the SFBC.

3. Agencies of foreign banks

Lastly, the two countries differ in their treatment regarding the establishment of agencies or representative offices by foreign banks. The Turkish Financial Services Act contains no provision in this respect. The Swiss Banking Code, however, submits this kind of activity to a licensing procedure.

Presently, about 50 licensed agencies of foreign banks operate in Switzerland. It has to be emphasized, however, that the licensing

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12 Art. 6 para. 1 (a) BOFB.
13 Art. 4 BOFB.
14 Art. 6 para. 1 (b) BOFB.
15 Authorized branches can be found under www.ebk.admin.ch, authorized institutions.
16 Under Swiss law, an agency/representative office is an entity whose services do not amount to the activity of a branch. Most importantly, the agency is not authorized to conclude contracts with the clients. Its activities are limited to the forwarding of the client’s orders and to engage in representative functions. Art. 2 para. 2 (b) BOFB.

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requirement only applies if the foreign banks employ persons who operate within Switzerland. Purely cross-banking activities are exempt from the licensing procedure, as long as the foreign bank does not undertake its major banking activities in Switzerland.

III. The authorization procedure

Concerning the authorization procedure, there is a formal difference between the two legal regimes. This formal difference is reduced when looking at the practice of the Swiss authorization procedure.

The Turkish FSA follows a two-step approach: First, the entity applies for an establishment permission17 and in a second step it will be granted the operation permission18. This is a common approach practiced in many countries, including the United States. Under the Swiss Banking Code, only one permission is granted: the authorization to conduct banking business in Switzerland19. Materially speaking, however, it is also a two steps procedure, as the authorization approval is a contingent decision. Once the bank has received the authorization to conduct the banking business by the SFBC, it has to go back to its general assembly, have it formally approve the articles of incorporation, have the executive board formally approve the internal bylaws, and – most importantly – obtain the confirmation of the bank’s audit company that the bank is effectively operative. Only at this point will the SFBC approve the registration of the bank’s bylaws with the Commercial Register. And only upon the registration with the Commercial Register will the bank formally exist as a legal entity.

IV. The authorization requirements in general

So far, the focus has been on the procedure to obtain the authorization to conduct the banking business. Both legal regimes contain various conditions which have to be fulfilled for the application process to be successful.

1. Initial capital

The Turkish FSA requires an initial capital of 30 million (new) Turkish Lira, which is about 23 million US dollars. This is substantially more than the amount required by Swiss Banking Code, where only 10 million Swiss francs (about 8.5 million US dollars) are needed. In fact, Switzerland did not have an initial capital rule until 1972, when the legislator set it at 2 million Swiss francs. It was raised to 10 million Swiss francs in 1995. It has to be noted that in the authorization practice, this is handled as a minimum amount. The effective initial capital is set in view of the bank’s planned operations.

It might be surprising that the Swiss legislator did not consider it necessary to establish a minimum capital rule as an authorization condition. One has to take into account, however, that the initial capital is of very little practical relevance. It’s only purpose is to serve as a market entrance barrier to micro entities which may formally fulfill all other authorization conditions, but which would not be viable in the banking market. Once the bank effectively starts its operations, it will be submitted to the overall capital requirements for banks. The capital regime is a completely different regime which implements the international standards established by the Basel Committee on Bank Supervision (Basel Capital Accord I and II).

2. Legal form

Turkish banks must be organized as a Joint stock company (corporation) with shares registered to the name, issued in return for cash20. The Swiss Banking Code is more liberal. Generally speaking, the bank may take all legal forms foreseen by the

17 Art. 6 FSA.
18 Art. 7 FSA.
19 Art. 3 SBC.
20 Art. 7 para. 1 (a), (b) FSA.
4. Relation to corporate law

Pursuant to the FSA, the articles of association of a bank must not conflict with the provisions of said law. This reflects the general principle of the derogatory force of the banking law with regard to corporate law. Where the banking law modifies corporate law, the bank is bound by the provisions in the banking law. In the absence of supervisory law, banks are subject to company law and related laws. The derogatory force of (public) banking law with regard to (private) corporate law may be called into question when, in the course of time, corporate law is revised and sets stricter standards than the banking law. Switzerland has experienced such an asynchronous legislative development when the corporate regime was thoroughly revised in 1991.

The derogatory force of banking law also raises a practical question: How can one ensure that the corporate structure is in line with the regulatory framework? One way that both countries have chosen is to install a checkpoint before the articles of association, which are essentially private law arrangements, can be filed with the competent Authority (Register of Commerce) and thus become binding.

There is, however, a difference between the FSA and the Banking Code: In Switzerland, not only the articles of association, but also the bylaws, i.e., the internal rules and regulations of the bank, are subject to approval. Thus, the Swiss Banking Regulator has a broader power than its Turkish counterpart, and it is making much use of it. For instance, the authority requires that the articles of association and the bylaws as a whole are a clear reflection of the organization of the bank, its internal procedures, its rules regarding investment strategies, its checks and balances and the question of responsibility ("who does what"). This, in turn, motivates the bank to reflect upon its organization and especially upon the tasks and responsibilities on various levels.

Furthermore, the SFBC requires the banks to include certain information in their articles of association. For instance, the bank must include a detailed description of its business activities and their geographical scope. For prudential purposes, such a detailed description is necessary because it is the basis upon which the SFBC determines the adequacy of the organizational structure and the financial resources of the bank.

It remains to be seen what kind of regulatory approach the Turkish Banking Regulation and Supervision Board (BRSB) will take with regard to corporate law issues. On the one hand, the BRSB’s power is limited to the approval of the articles of association. On the other hand, Turkish banks have to publish their articles of association on their websites. In view of the Turkish regulatory regime, there might be some discussion between the banks and the BRSB about the minimal content of the articles of association. In other words: What needs to be regulated in the (published and approved) articles of association, and what can be regulated in the (unpublished and unapproved) bylaws? If one looks at corporate law to decide the question, the articles of incorporation will be short. Therefore, it is likely that the BRSB will look for ways to include the bylaws in its examination and approval process.

V. The requirements regarding executive officers

From a methodological perspective, it is interesting to compare the different legislative approach taken by Turkey and Switzerland with regard to the requirements that have to be fulfilled by the bank’s executive officers.

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21. Art. 7 para. 1 (g) FSA.
22. Art. 16 para. 2 FSA.
1. Requirement catalogue vs. general clause

When comparing the two laws, the different legislative approach of the two countries is evident: The Swiss Banking Code contains a general provision which reads as follows: “The persons in charge with the administration or the management shall have a good reputation and shall ensure the proper conduct of the business operation”\(^23\). This is commonly referred to as the “fit and proper test”. It stands for a material regulatory approach. In contrast, the Turkish FSA rules by an extensive requirement catalogue, thereby choosing a formal regulatory approach. In the FSA, one can distinguish three sorts of requirements for the bank’s executive officers: Educational background, criminal background, and financial acumen.

First, there are rules on the educational background of the executive officers\(^24\). For instance, general directors must at least have undergraduate degrees in certain disciplines, and they must have at least ten years of professional experience in the field of banking or business administration. Furthermore, two thirds of the deputy directors must have a four year university degree or master’s degree and have at least seven years of pertinent professional experience. Secondly, there are rules on the criminal background of the bank’s executive officers. Persons who have received imprisonment sentences or heavy fines for violations of the FSA are barred from taking important functions in the bank \(^25\). Other offenses will have the same effect. Among these are offenses for embezzlement, bribery, theft, smuggling, and money laundering \(^26\). Thirdly, there are rules on the financial acumen of the bank’s executive officers. They must not have suffered personal bankruptcy, they must not have held privileged shares in banks who have lost their banking license or banks who have been subject to forced liquidation \(^27\). Lastly, the FSA contains a general “fall back” provision, stating that the bank’s executive officers shall "have the honesty and competence required by the works"\(^28\), thereby including a fit and proper provision in the legislative framework.

It remains to be seen what role this last requirement will play in the framework of the Turkish supervisory activity. Will it play a marginal role or will it become the central instrument for the Supervising Board (BRSB)? A few examples shall illustrate the point: Assuming that a bank's executive officer has not been convicted of any offence listed in the FSA. Said officer has, however, been convicted of dealing with child pornography. Will such a person be allowed to play a leading role in one of the country’s banks? Or will the BRSB revert to the fit and proper clause and rule that this officer lacks the honesty required by the works? Assuming that a person is engaged in dubious business? This is generally known. However, the person has never been convicted by a criminal court. Will the BRSB point to the fit and proper clause and rule that this person lacks the honesty required by the works? Assuming, lastly, that a person has the necessary university degrees and has worked ten years in a bank, but never in a high management position? Can such a person become the General Director of a big bank? Or will the BRSB rule that this person lacks the competence required by the works?

2. The Swiss experience

In this context, it may be interesting to examine what role the fit and proper test has played in the regulatory activities of the Swiss Bank Regulator. The answer to this question is quite clear: The fit and proper test has been, from its beginning, a pivotal regulatory instrument for the SFBC \(^29\).

\(^{23}\) Art. 3 par. 2 (c) SBC.
\(^{24}\) Art. 23, 25 FSA.
\(^{25}\) Art. 26 FSA.
\(^{26}\) Art. 26 FSA in connection with Art. 8 (d) FSA.
\(^{27}\) Art. 26 FSA in connection with Art. 8 (a), (b), (c) FSA.
\(^{28}\) Art. 26 FSA in connection with Art. 8 lit. f FSA.
\(^{29}\) For a detailed discussion of the fit and proper clause see Marcel Livio Aellen, Die Gewähr für eine einwandfreie Geschäftstätigkeit gemäss Art. 3 Abs. 2 lit. c des Bankengesetzes, Diss. Bern 1990.
a) Informal regulatory activity

There are several reasons for the regulatory impact of the fit and proper test. One reason is that it has been used as a tool of informal regulatory activity by the SFBC. In practice, it will suffice for the regulators to raise their eyebrows with regard to the doings of an executive officer for the bank to consider letting that person go. As a practical consequence, an individual may become an undesirable executive in the Swiss banking scene without ever having been through a formal proceeding where an eventual wrongdoing has been identified and proven.

A second reason lies in the design of the fit and proper test. It is the bank which is responsible that its executive officers meet the regulatory standard. In fact, the SFBC has no direct power over the individual executives. Thus, the fit and proper test has become the legal basis for interventions when the SFBC detects organizational failures or weaknesses in the control mechanisms of the bank. An example shall illustrate this point: When the major Swiss bank UBS failed to detect that it had a 60 million dollar account which was to be attributed to the environment of the Nigerian dictator Sani Abacha, the SFBC started a fit and proper procedure. However, it was clear from the beginning that this was not the individual failure of one executive officer, but rather that it was an organizational problem which, if at all, would have to be attributed to the executive board as a whole. Still, the intervention tool was the fit and proper provision of the Banking Law. And in its reports, the SFBC notes that the bank failed the fit and proper standard, without even mentioning its executive officers.

b) Self-Regulation

Apart from serving as a basis for the standard violations of the provisions of the Swiss Banking Code\textsuperscript{31}, the fit and proper procedure has been the link by which the body of self-regulation has entered into the realm of supervisory activity.

In Switzerland, as in Turkey, the banks have a professional organization, the Banking Association. In Turkey, membership is mandatory. In Switzerland, it is not, but there are only one or two banks which are not members. In both countries, the Association is the standard-setting body for the professional principles. Formally speaking, the principles and guidelines of these professional associations are private law agreements on proper business conduct. In Switzerland, however, the fit and proper provision of the Banking Code has operated as a gate opener for these private rules to enter the realm of public law. If an officer of a bank has been found in violation of the conduct rules of the Swiss Banking Association, he will be in serious trouble when it comes to the requirement of the fit and proper test. In this sense, by way of the general clause in the Banking Code, private rule making becomes relevant for the application of public law. In fact, the bank’s audit company, which is in charge of submitting the annual audit report on the bank to the SFBC, has to certify that it has not found the bank to be in violation of the important rules of self-regulation.

\textsuperscript{31} Examples include: (1) Violation of the capital requirement rules, see Bulletin of the Swiss Federal Banking Commission 1992, 12 \textit{et seq.}; Bulletin of the Swiss Federal Banking Commission 1997, 26 \textit{et seq.} (2) Loan given to the bank’s executive officers under conditions which violated the standards set by the Banking Law, see Annual Report of the Federal Banking Commission 1993, 22 \textit{et seq.}

\textsuperscript{32} Art. 84 FSA.
c) Relation between the bank and its clients

Furthermore, the fit and proper test forms a link between supervisory law and contract law, namely, the contractual relations of the bank with its clients. Generally speaking, the relation between the bank and its client is a matter of private law, whereas the relation between the Bank Supervisor and the bank is a matter of public law. The objective of the public law is to protect the rights of the savers by preventing the banks to fail. The objective of private law is to establish a framework by which contracting parties can enforce the promises made at a level playing field. The consequence of this dichotomy is that the Bank Supervisor is not competent to regulate the private law relation between the bank and its client.34

However, the Swiss Federal Court has made it clear that a irregularities by a bank in its dealings with clients will entail supervisory activity by way of the fit and proper test. Examples include the following: The placement of client money with an associated foreign bank which is battling financial problems35, high risk investments of client money in a vehicle in which the bank has an own interest36, investment of client money in illiquid titles in violation of the provisions of the asset management contract37. Even if the irregularities committed by the bank’s executive officer are related to activities outside the bank, they can be relevant for the fit and proper test, as it was the case for a major shareholder of a bank who was also a board member of a company which had been under criminal investigation for defrauding clients38.

34 See the express rule in Art. 84 FSA. It is the task of the Banks Association, and not the task of the BRSB, to set up a board of arbitrators in view of settling disputes between the banks and its clients.
38 Decision of the Swiss Federal Court, BGE 108 I b 196.

d) Good reputation

Lastly, one can note by looking at provision of the Banking Code, the members of the executive board, the management and the shareholders have to have a good reputation. This, the requirement of the fit and proper test can be denied even though the person in question has never been formally convicted of any wrongdoing. This gives SFBC broad powers. From the point of view of the authority and from the point of view of ensuring a sound banking industry, this is a positive state of affairs. It also shows what trust the legislator places in the judgment of the regulatory authority.

Judging by the rule of law and its principle that all state action interfering with individual rights must have a basis in the law, this does raise some questions. In the legal doctrine, the provision has been criticized for its indeterminacy39. Certainly, the balance between the rule of law and the prudential objective of ensuring a sound banking system with competent and morally sound executive members of the bank is a delicate one. So far, the facts have favored the SFBC. In a recent case, for instance, the SFBC used the fit and proper test to deny the application of an individual who, as a majority shareholder, wanted to operate a bank. The person had not been convicted of any criminal offense. The SFBC refused the authorization on the grounds that the financial structure of his business operation was not transparent. Shortly thereafter, this person was arrested and charged for fraud. The investigation had not yet been concluded. However, one can say with a reasonable amount of certainty that his person, judging by the facts known at the present time, would not meet the fit and proper test.

VI. Summary

Banks are special. Not only in Switzerland and not only in Turkey, but everywhere in the world. The global recognition of their distinctive and central functions in the economy has lead to their general prudential supervision on a national and international scale. The authorization procedure forms a central part of the regulatory framework. The comparative analysis of the Turkish and the Swiss authorization procedure has shown many similarities and some differences in the regulatory approach. One difference concerns the supervisory benchmark for the bank’s executive officers. The Swiss Banking Code contains a general fit and proper clause, whereas the Turkish FSA opts for a detailed catalogue with a fit and proper test as a “fall back” clause. It remains to be seen whether this “fall back” clause will follow the path of its Swiss counterpart in becoming the pivotal instrument of bank regulation.

Appendix

Comparative Table of the Authorization Requirements

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<th>Who Needs a Banking License?</th>
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<td>Switzerland</td>
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<td>Banks (Art. 3 SBC 46), (additional requirements for foreign-controlled banks, Art. 3bis SBC).</td>
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<td>First Turkey branch of a credit institution established abroad (Art. 6 I, 9 FSA).</td>
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<td></td>
<td>Branches of foreign-controlled banks (Art. 3, 3bis SBC).</td>
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<td>Representative offices (agencies) of foreign banks (Art. 3bis SBC, Art. 21b BOFB).</td>
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Type of Authorization

<table>
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<tr>
<th>Turkey</th>
<th>Switzerland</th>
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<tr>
<td>Authorization must be granted upon fulfillment of authorization conditions (Art. 7 I FSA).</td>
<td>Authorization must be granted upon fulfillment of authorization conditions (Art. 3 I SBC).</td>
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Authorization Procedure

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<th>Turkey</th>
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<td>Two-step procedure: establishment permission, operating permission (Art. 6, 10 FSA)</td>
<td>Formally: single procedure (Art. 3 SBC). Materially: two-step procedure.</td>
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45 Financial Services Draft Law of Turkey.
46 Swiss Federal Banking Code (SBC).
47 Swiss Banking Ordinance on Foreign Banks (BOFB).
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<th><strong>Authorization Conditions</strong></th>
<th>Turkey</th>
<th>Switzerland</th>
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<tr>
<td><strong>Initial capital:</strong></td>
<td>30 Mio NTL (≈ 23 Mio USD) (Art. 7 I f FSA)</td>
<td>10 Mio SFR (≈ 8.5 Mio USD) (Art. 4 SBC, Art. 4 BO)</td>
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<tr>
<td><strong>Legal form:</strong></td>
<td>Joint stock company, shares registered to the name, issued in return for cash (Art. 7 I a/b FSA)</td>
<td>All forms allowed by the Code of Obligations (SCO).</td>
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<tr>
<td><strong>Monistic system with restrictions:</strong></td>
<td>general manager and chairman of the executive board shall not be the same person (Art. 23 I FSA)</td>
<td>Dualist system: personal and structural separation of the executive board and the management (Art. 3 II a SBC)</td>
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<td><strong>Articles of association must not conflict with FSA:</strong></td>
<td>(Art. 7 I g FSA)</td>
<td>General principle of the derogatory force of banking law.</td>
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<td><strong>Amendments of the articles of association may not be filed with the Commercial Registry Gazette without prior approval by the Agency:</strong></td>
<td>(Art. 16 FSA)</td>
<td>Articles of association and bylaws require approval by the FBC. Amendments of the articles of association may not be filed with the Register of Commerce without approval by the FBC (Art. 3 III SBC)</td>
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<tr>
<td><strong>Transparent/open partnership structure and organizational chart that will allow efficient audit of the institution:</strong></td>
<td>(Art. 7 I h FSA)</td>
<td>No specific audit provision.</td>
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<td><strong>Sound relation between organizational structure and financial resources and fields of activity:</strong></td>
<td>(Art. 7 I e FSA)</td>
<td>Sound relation between organizational structure and fields of activity (Art. 3 II a SBC)</td>
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<tr>
<td>Requirement</td>
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<td>No element to hamper consolidated audit (Art. 7.1 i FSA)</td>
<td>Consolidated supervision of the group is requirement for authorization. [Specific provision only for foreign-controlled and foreign banks, regulatory practice extends it to Swiss banks]. (Art. 3bis 1bis SBC).</td>
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<tr>
<td>Qualification requirement for founders (Art. 7.1 c, 8 FSA), [same for qualified shareholders, Art. 18 V FSA]</td>
<td>No specific provision for founders. Qualification requirement for qualified shareholders Art. 3 II e bis SBC.</td>
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<tr>
<td>Qualification requirement for members of the executive board (Art. 7 I d FSA, Art. 22, 23 FSA.)</td>
<td>Qualification requirement for members of the executive board (Art. 3 II c SBC).</td>
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<td>Qualification requirement for the general director and the deputy general directors (Art. 25, 26 FSA)</td>
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<td></td>
<td>Domicile requirement for members of the management (Art. 3 II d SBC) Domicile requirement for members of the executive board (Art. 708 I SCO)</td>
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**Authorization Conditions: Main Legal Provisions**

**Art. 6 FSA**
The establishment of a bank in Turkey or the opening up of the first Turkey branch of a credit institution established abroad shall be permitted via affirmative votes of at least five members of the Board on the condition that the establishment conditions laid down in this Law are fulfilled.

**Art. 7 FSA**
Banks to be established in Turkey shall be given establishment permission provided that they fulfill the following requirements:
(a) They should be established as joint stock companies;
(b) Their shares should be issued in return for cash and should be registered to name;
(c) The founders should meet the criteria indicated therein for founders;
(d) The members of the executive board shall bear the qualifications set out in the institutional management provisions and shall have the professional experience required for carrying out the planned activity;
(e) Their envisaged field of activity shall be in harmony with the planned financial, managerial and organisational structure.
(f) The paid-up capital, consisting of cash and free of all kinds of fictitious transactions, should not be less than 30 Million New Turkish Liras;
(g) Their articles of association shall not be in conflict with the provisions of this law;
(h) There should be a transparent and open partnership structure and organisational chart that will not constitute an obstacle for the efficient audit of the institution;
(i) There should be no element that hampers consolidated audit.

The principles and procedures applicable to the enforcement of this article shall be set by the Board.

**Art. 3 SBC**
1 Banks are required to obtain a licence from the Banking Commission prior to engaging in business operations; they may not register with the Register of Commerce before such licence has been granted.
A licence will be granted if:
(a) The articles of associations, bylaws, company contracts and business rules of the bank provide for a clear definition of the scope of business and establish an adequate organisation corresponding to the proposed business activities; where the scope or the importance of the business activities is significant, the bank must create separate bodies for the management on the one hand and for the direction, supervision and control on the other. The authorities of these bodies must be segregated in a manner so as to ensure the effective supervision of the bank's management;
(b) The bank discloses the minimum fully paid-in share capital as determined by the Federal Council.
(c) The persons in charge with the administration or the management shall have a good reputation and shall ensure the proper conduct of the business operation.
3 (c) Natural person or legal entities, which directly or indirectly participate in at least 10 percent of the capital or voting rights of a bank or otherwise whose business activities are such that they may influence the bank in a significant manner (qualified participation) guarantee that their influence will not have a negative impact on a prudent and solid business activity.
(d) The persons entrusted with the management of the bank have their domicile in a place where they may exercise the management in a facultative and responsible manner.

The bank shall file its articles of incorporation, bylaws, company contracts and internal regulations with the Banking Commission and notify that body of all subsequent amendments concerning the business purpose, the scope of business, the capital or the internal organisation of the bank. Such amendments may not be registered with the Register of Commerce unless they have been approved by the Banking Commission.

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TASLAĞININ İÇRA VE İFLAŞ HUKUKU AÇISINDAN
DEĞERLENDİRILMESİ

Prof. Dr. Hakan PEKCANITEZ

1. Genel Olarak

Son olarak 24.11.2004 tarihinde goûteden geçirilen Finansal Hizmetler Kanunu Tasarı Taslağı'nda, Bankalar Kanunu'nndan farklı olarak, farklı konuların aynı madde içinde, yoğun biçiminde yer alacak şekilde düzenlemesine terk edilmiş, daha kullanılam ve kanun yapma tekişine uygundur bir metin oluşturulmaya çalışılmıştır. Bankalar Kanunu'nndaki sayfalarca devam eden Maddeler, bu Maddelerin altında fikra mı, yoksa bent mi olduğu anlaşılması numaralandırma ve ayrıca bir makale gibi a, b (gibi alt ayımlar kanun yapma tekişine uygundur düşmemekte idi. Fıkraların bazlarının numaralandırılması Taslağın bazı Maddelerinde de devam edilmiş (Örneğin, m.118, 121).


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