

Senay ÖZTRAK
Banking Regulation and Supervision Agency
Head of the Department of Legal Affairs

BANKRUPTCY OF BANKS AND SPECIAL FINANCE INSTITUTIONS *

1- INTRODUCTION

The subject title I have been informed concerning this meeting was “the bankruptcy of banks and other financial institutions”. However, from banks to capital markets institutions, from factoring institutions to leasing institutions and asset management companies, this represents a large scope. When the difference of the concepts and rules brought by the regulatory framework to which each of the mentioned depend considered, for me to go beyond the field in which I am specialized would be necessary due not only to the institutions to be analyzed but also to the problem to be analyzed. Therefore, I have deemed appropriate to contend with dealing with the bankruptcy of banks and other institutions which depend on the Banks Act, which is the field on which I am specialized directly. I believe that giving you more detailed information with a high certitude will thus be possible.

The bankruptcy of joint stock corporations is one of the most important points of intersection of the bankruptcy law and the commercial law. When “bankruptcy of banks” added to this, a triple intersection, which also includes the banks act, arises. The fact that each of these law fields has their own concepts and rules engenders some problems. As a matter of fact, when a regulation on banking is not considered, it will be said that the bankruptcy of a bank will always be possible. However, when the regulations of the Banks Act come into play, it will be understood that making this judgment is not as easy as it appears.

The purpose of this presentation is to show how hard bankruptcy is for banks in one hand and inform you on the special bankruptcy procedure brought by the Banks Act Nr. 4389 on the other.

2- BANKRUPTCY IN TURKISH LAW

Provisions regulating the bankruptcy procedure in Turkish Law were regulated within the Act Nr. 2004 on Execution and Bankruptcy (hereinafter referred to as EBA). When the profile of the present audience is taken into account, I believe it will be beneficial to give you

* This study does not reflect the point of view of the Banking Regulation and Supervision Agency, the responsibility belongs to the writer.

some basic information on the bankruptcy procedure regulated by the Act on Execution and Bankruptcy.

Pursuant to our legal system, only merchants are subject to bankruptcy. (EBA Article 43, Turkish Commercial Code (hereinafter referred to as TCC) Article 20) The determination of whether or not a person is a merchant is made pursuant to the provisions of the Commercial Code. The Turkish Commercial Code has set up the criteria for natural persons to managing a commercial enterprise even partly under his own name, however, it determines one by one the legal entities considered as merchants. Accordingly, (TCC Article 18) commercial firms are considered as merchants. Consequently, collective companies, commandit companies, joint stock corporations, commandit companies whose capitals are divided into shares and limited liability companies are merchants and therefore they are subject to bankruptcy.

If we leave aside the details, the general bankruptcy reason foreseen through the Act on Execution and Bankruptcy is the failure of the debtor to pay its debt due despite the lawsuit on bankruptcy. Even if, according to our legal system, the fact that the liabilities of the debtor exceed its assets is not considered as a reason for bankruptcy, Article 179 of the Act on Execution and Bankruptcy considers the liability excess in respect of assets of capital institutions (joint stock corporations and limited partnership companies and cooperatives) as a separate reason for bankruptcy.

The bankruptcy of a merchant or persons considered as merchants, due to its monetary debts, can be requested. Bankruptcy does not apply for non-monetary receivables. There exist no differences between unsecured claims and commercial claims in being subject to bankruptcy. Furthermore, there also exist no difference between public receivables and receivables engendering from private laws. The only limitation on this issue is the receivable to be taken under guarantee through pledge. For requesting the bankruptcy in case of failure on the payment of such a receivable, first of all a follow-up through transformation of pledge to money is required as a rule.

3- BANKRUPTCY OF BANKS

Banks incorporated or to be incorporated in Turkey and branches in Turkey of the banks incorporated or to be incorporated abroad shall operate within the framework of the provisions of the Banks Act Nr. 4389.

Besides, according to the sub-paragraph (a), paragraph 2 of Article 7 of the Banks Act Nr. 4389, a bank to be incorporated in Turkey shall be a joint stock corporation. Accordingly, a bank to be incorporated in Turkey will also be subject to the provisions of the Turkish Commercial Code which concern joint stock corporations. As joint stock corporations bear the merchant nature pursuant to the above-mentioned Article 18 of the Turkish Commercial Code, it is possible to say that the bankruptcy of banks incorporated in Turkey is realized according to the provisions of the Act Nr. 2004 on Execution and Bankruptcy.

Branches opened or to be opened in Turkey by a bank incorporated abroad will, together with the Banks Act, be subject to all regulatory provisions in Turkey, as other Turkish banks. However, it shall be stated that the status of branches of foreign banks in Turkey, as subject to this presentation, differ. For this reason, the status of branches of foreign banks in Turkey will be analyzed under a different section. Unless I specially mention, I will use “bank” word for deposit collecting banks incorporated in Turkey.

It will be beneficial to mention a second difference concerning the above-mentioned legal framework. The Banks Act Nr. 4389 separates banks as deposit accepting banks and non depository banks such as investment banks. As banks will be incorporated as joint stock corporations under any condition it is not possible to mention an important difference on the bankruptcy procedure but only banks collecting deposits will be subject to the bankruptcy procedure foreseen in the Banks Act. Because the application of Article 16 of the Banks Act provisioning the bankruptcy procedure, to investment banks is not possible.

Reminding once again the main rule that banks bankrupt accordingly with the provisions Act on Execution and Bankruptcy as they are considered as merchants, I will make the explanations on conditions under which banks go bankrupt. At the following section the only exception to this rule provisioned by the Banks Act nr. 4389 will be mentioned.

i. BANKRUPTCY BASED ON PROCEEDINGS

In bankruptcy based on proceedings, no difference exists between the bank which is a joint stock corporation and other persons subject to bankruptcy. The reason why bankruptcy is requested here is the failure of the payment of a due debt, which is the general bankruptcy reason in our Law.

However, bankruptcy based on proceedings is not much important for banks even though it does not seem so. Because the bank, when solvent, has no interest in un-paying its liability subject to proceeding, besides, by such a behavior, it will prepare its own legal and economic end. But if the reason why the bank fails to make the payment is generated from its poor financial condition, then it will be deemed unable to pay the liability, which will be subsequently explained. The creditors will prefer requesting the direct bankruptcy of the bank due to “suspension of payments”, which will be less costly for them and be concluded in a shorter period of time (as it will be explained hereafter, the suspension of payments will also constitute a reason for the takeover of the bank by the Fund). This, in fact, is the reason why this procedure is not commonly preferred in practice for the bankruptcy of joint stock corporations.

On the other hand, a bank’s failure in the payment of a due debt as a principle constitutes the state of “inability of fulfillment of the obligations as they fall due” stated in paragraph 3 Article 14 of the Banks Act. In this case, the takeover of the banks’ control and management by the Fund or revocation of its banking license will be in question. In case one of these eventuate, the bankruptcy of the bank will get difficult, the reasons thereof will be explained.

ii. DIRECT BANKRUPTCY

The direct bankruptcy is related to the current property status or specific behavior of the debtor (the bank).

Even though the related provisions remains unlimited, some of the conditions provisioned as direct bankruptcy conditions in Turkish bankruptcy Law are valid for natural persons by nature. Therefore, application thereof to banks is impossible. Some conditions have been regulated by only taking capital companies as basis. The conditions considered as direct bankruptcy reasons are as follows.

- 1- lack of a known residence
- 2- escapade of the debtor to evade its obligations (transfer of the headquarter abroad)
- 3- engagement or attempt in fraudulent proceedings infringing the rights of creditors
- 4- hiding properties in the prosecution by the way of attachment
- 5- suspension of payments
- 6- non-affirmation of the proposed composition or withdrawal of the composition delay or the annulment of the composition
- 7- non-payment of the debt based on judgment although it was demanded by an order of payment
- 8- inability of fulfillment of obligations as they fall due for joint stock company
- 9- being deep in debt

Even though the general reasons for bankruptcy of banks have been mentioned above, bankruptcy of a bank due to the above-mentioned reasons is theoretically possible but very uncommon in practice. I will, in a while, explain the causes in detail. However, as a general information on bankruptcy has previously been presented here by the Central Bank officials and as it excludes the field on which I am specialized, I will explain why the bankruptcy of a bank is not possible and consecrate the rest of my speech to show you how a bank is drawn out of the system by practical reasons. In our explanations we will make an evaluation on especially based on the provisions of the Banks Act Nr. 4389.

The most severe measures that can be taken on a bank according to the Banks Act Nr. 4389 are the transfer of its control and management to the SDIF and the revocation of its banking license. Legal results of these measures differ. The operation of this system where the Banking Regulation and Supervision Agency and the Savings Deposit and Insurance Fund share different authorities is as follows.

4- A BANK'S TRANSFER TO THE FUND AND THE REVOCATION OF ITS OPERATING LICENCE

Article 14 of the Banks Act Nr. 4389 regulates the measures to be taken concerning banks. Paragraph 3 of the mentioned Article states that;

“If the Agency in its sole discretion determines that,

a) a bank does not take the measures in part or in whole stated in paragraph (2) of this Article, the financial structure of the bank cannot be strengthened although the measures have been taken in part or in whole, or the financial structure has become so weak that it could not be strengthened even if those measures were taken, or,

b) a bank can not fulfill its obligations as they fall due or,

c) the value of the liabilities of the bank exceeds the value of the assets, in accordance with the valuation standards determined by the Board for the implementation of this Article or,

d) the continuation of its activities would threaten the rights of depositors and the security and the stability of the financial system,

The Board may transfer the management and control and rights of shareholders except dividends, of a bank to the Fund or revoke the license of the bank to perform banking operations and/or to accept deposits, with an affirmative vote of at least five members of it.”

At this point, I believe that a comparison must be made between the reasons that are considered as reasons for bankruptcy and the reasons that require the transfer of the control and management or the revocation of banking license of a bank. As this comparison is elementary in showing that bankruptcy of banks is extremely hard in practice.

Failure in the payment of a due debt which is a cause of bankruptcy based on proceedings is the case of failure of the bank to “fulfill its obligations as they fall due” stated in paragraph 3 of Article 14.

We have previously said that some direct bankruptcy reasons could only be applied on natural persons, in other words not applicable for banks. For example; lack of a known residence or escapade of the debtor to evade its obligations.

A similarity, even an overlap exists between the direct bankruptcy reasons and the conditions stated in paragraph 3 of Article 14. Causes tied to legal results are the reasons for which a legal result has been tied overlaps with a case concerning the debtor's property in both. This similarity arises also when reasons of bankruptcy are taken into account one by one. What is meant by the suspension of payments is the general and continuous failure of the payment of due debt implicitly or explicitly declared to creditors. This is again the failure of the bank to "fulfill its obligations as they fall due". Failure on the payment of a debt based on judgment should also be evaluated within the same scope. Non-affirmation of the proposed composition or withdrawal of the composition delay or the annulment of the composition, being deep in debt and inability of joint stock companies is the case where "the value of the liabilities of the bank exceeds the value of the assets".

Eventually, most of the conditions that require the takeover of a bank by the Fund or revocation of its banking license are causes of direct bankruptcy or bankruptcy based on proceedings. Therefore, it is possible to say that the initiation of the process of direct bankruptcy or bankruptcy based on proceedings shows the presence of the conditions requiring the takeover of a bank by the Fund or revocation of its banking license. In this case, for the Banking Regulation and Supervision Agency, which is responsible for ensuring the confidence and stability in the financial sector, to make a Board Resolution concerning the takeover of a bank by the Fund or revocation of its banking license will be a necessity. At this point, I should mention that the bank financial conditions are under the continuous and very close supervision of BRSA through sworn bank auditors. The financial condition of the bank and in case a financial problem with the bank whether it is serious or not is very well known by BRSA.

Hereafter, our explanations will be on the transfer of the bank's control and management to the Fund. As in case of revocation of banking license, a special bankruptcy is in question. That is the reason why adding a new section is necessary. However, before moving on, it will be beneficial to mention some of the authorities of the Fund for ensuring the better comprehension of our explanations.

i. AUTHORITIES OF THE FUND

After the takeover of the control, management and shareholders' rights except dividend rights by the Fund, the Fund Board decides on the registration of all the shares of the bank by taking over the losses corresponding to the capital of the bank not exceeding insured deposits pursuant to Article 15, paragraph 5, sub-paragraph (a) (aa) of the Banks Act. One of the most important difficulties experienced at this point is the transfer of the shares of small investors in joint stock corporation banks that are public limited. According to the mandatory provision of Banks Act, the shares are transferred to the Fund regardless of the identity of the owner or amount of the share.

The transfer of the shares constitutes a very important step as Banks Act mostly limits the authorities of the Fund with the transfer condition of the shares to the Fund.

After the takeover of the control and management of the bank by the Fund, the attitude of the later will determine the legal process.

According to the subparagraph (a) paragraph 5 of Article 14 the Fund is authorized to transfer assets that are deemed appropriate, organization, personnel who agrees, and insured saving deposits including interests that might not exceed the average interest rate applied by the five largest banks according to their saving deposits by the time of transfer date, and the reserves in liabilities, to a bank that will be founded or a current one that is volunteer and/or to request the revocation of license of the bank to accept deposits and to carry out banking operations from the Board for the banks which it takes over management and control and rights of shareholders except dividends based on provision of paragraph (3), by taking into consideration the balance sheet of bank as of date of transfer.

ii. IS THE BANKRUPTCY OF A BANK TAKEN OVER BY THE FUND POSSIBLE?

What we have here is a bank, control and management of which is taken over by the Fund due to its bad financial status. As the legal entity nature of the bank does not end by the takeover, its bankruptcy is theoretically possible. However, if we analyze this case according to the reasons of bankruptcy it will be seen that the case is not as easy as it appears.

First of all, expecting the creditor of a debt of such a bank taken over by the Fund to carry out a bankruptcy based on proceedings is not rational, as the bank has gained the support of the Fund. The Fund's support to the bank reveals in two ways.

1) In Turkey, debts of a bank, shares of which are taken over by the Fund are paid by the Fund. This approach is the result of a policy determined by the Prime Ministry and declared to the public. During an announcement made by the Prime Minister of the period Bülent Ecevit on December 6, 2000, it has been stated that credits extended in the banking sector were under the government's guarantee. Within the same announcement it has also been said that the mentioned guarantee would last until the reinstatement of confidence and strength in the banking sector. It has also been underlined that this guarantee would be provided by the Fund.

The necessity to determine the principles towards the application of this policy following its determination and announcement to the public required the Banking Regulation and Supervision Board to make the announcement dated January 18, 2001. The announcement of the Board states that "the utilization of the funds of all depositors and creditors in banks taken over by itself pursuant to the Banks Act will be ensured by the Fund without being subject to any limitation". According to this announcement, the guarantee will be in effect upon takeover of the shares by the Fund. Thus, the most important result of the transfer of bank shares to the Fund may be this afore-mentioned one. In this case, the creditor may not experience difficulties in recovering its receivable as the Fund mainly aims the reintroduction of the bank within the financial system.

- 2) - The liability of the Fund to pay the bank's debt is sometimes due to an obligation foreseen, not by the government policy but the Banks Act. For the banks which it holds their shares, the Fund is authorized in order to maintain confidence and stability in financial system and limited to the situations deemed appropriate by the Board, and in order to strengthen and restructure its financial structure;
- if necessary, to increase its capital,
 - to postpone or reduce the legal reserve requirements and to cancel the penalty interest that would be imposed upon prior consultation with the Central Bank ,
 - to purchase its subsidiaries, real estates and other assets or to provide advance in return to these assets or to make deposits
 - or take-over its receivables or its losses, or to sell these assets and shares to the third parties through discounting or similar means,
 - to guarantee obligations of the bank that resulted or will result from real transactions depending on the records of the bank

in accordance with Article 14 (6/b) of the Banks Act Nr. 4389. As it is seen, the Fund provides financial support, in the most general meaning, to the bank, which may be exposed to bankruptcy proceeding due to the fact that it has not paid its due debt. This support minimizes the bankruptcy risk. In the case that the Fund guarantees obligations resulted from real transactions, the receivables of the creditor will be guaranteed. However, the realization of these authorities depends on the condition that the shares of the bank have been taken over by the Fund. In practice, following the Board resolution regarding the transfer of the management and control of the bank, the Fund completes the transactions providing the transfer of shares.

Meanwhile I would like to determine that banks financial structure of which are strengthened through using the above-mentioned authorities are partially or totally sold by the Fund within the framework of the authority granted in accordance with sub-paragraph (a) of the same article. A special sales transaction, in other words a kind of balance-sheet sales, is realized here; the purchaser chooses the assets and liabilities they want and a separate balance-sheet (closing balance-sheet) is prepared for the transfer transaction. Up to now, many bank sales have been realized through this method and these banks have been kept active in the system. For example Sümerbank, having problem banks under its structure was sold to Oyak Group and Demirbank was sold to HSBC Group by the Fund. Process up to the sale of a bank taken over by the Fund through this method will be explained under a separate title.

It may be thought that this provision is not so meaningful when the guarantee granted by the Government is taken into consideration. Nevertheless, it must be bear in mind that the guarantee prescribed as a government policy has a temporary quality. After confidence and soundness have been ensured and the blanket guarantee is ended in the banking sector as a result of the policies practiced, creditors of banks will be able to have demands from the Fund for their receivables by the guarantee granted within the framework of the above-mentioned regulation.

- Finally, it is also possible for the Fund to strengthen the financial structure of a bank in a manner enabling the bank pay its debts with measures other than granting guarantee

within the scope of the above-mentioned article. In such a case, the bank has reached the financial capacity to pay its own debts itself.

Another parenthesis would be opened for the case that the proceeding for the bankruptcy of the bank had been initiated before the resolution of the transfer. In such a case, the financial structure of the bank necessitates the transfer of the bank to the Fund and after having such resolution the arising of bankruptcy result would be prevented due to the reasons such as the above-mentioned blanket guarantee, the fact that the Fund guarantees the debts and the bank's new position of being able to pay its debt with the resources transferred by the Fund. It is also possible for the Board to make a decision of the revocation of the banking license of the bank, not the transfer of its management and supervision. Accordingly, the execution and bankruptcy proceedings initiated will be suspended.

It is important to mention another probability when we take into consideration that there are basically two methods of bankruptcy in our law. This probability is whether or not direct bankruptcy of the bank taken over by the Fund can be demanded. We have stated above that many of the reasons requiring direct bankruptcy of a bank as a normal joint stock corporation are in fact caused the bank to be taken over by the Fund. Analytically, the opposite of this legal proposition is also correct. Namely, reasons requiring the bank to be taken over by the Fund may in fact be the situations in which direct bankruptcy of the bank could be demanded. As there will not be any change in the legal entity status of the bank as a result of the take over, it is said that theoretically bankruptcy of the bank could be asked. Although this idea may be opposed with a idea that the Banks Act Nr. 4389 aims the bank to stay within the financial system in the first stage following its transfer to the Fund, we will draw a framework through considering the ones in practice and the ones possible to happen in the future.

- The above-mentioned state guarantee (blanket guarantee) regarding the SDIF banks is the first obstacle for creditors to file a bankruptcy lawsuit with such a request. The obstacle is not used in the meaning of "legally impossible".

- Although this may be opposed with the fact that blanket guarantee is a provisional measure, no legal problem will exist in the case that the Fund takes necessary measures for the strengthening of the financial structure of the bank and meanwhile guarantees the debts of the bank in accordance with the above-mentioned article 14 (6).

- Furthermore, it must be borne in mind that the measures taken by the Fund in accordance with Article 14 (6) aim at strengthening the financial structure of the bank. For a bank, financial structure of which has been strengthened by the measures taken, nothing can be accepted as a reason for direct bankruptcy. As a result of these measures the bank will be rescued from cases such as bank failures, insolvency, suspension of the payments. As the realization of reasons (for instance, not having a clear address) for direct bankruptcy of the bank will not be in question, considering for the bankruptcy of the bank won't be a realistic approach.

- However, although it is said that there is a little possibility for demanding the direct bankruptcy of the bank, it cannot be ignored that another authority granted to the Fund by the

Banks Act Nr. 4389 may not prevent the bankruptcy but change the whole of the procedure to which the bankruptcy will be subject. In the case that condition for direct bankruptcy is realized, the Fund can provide the Banking Regulation and Supervision Board to make a resolution on the revocation of the operating license of the bank in accordance with Article 14 (5a)(aa) in case it is aware of the bankruptcy demand in question. We can say that the execution of this authority will be a necessity at that point. Because, the decision to be made as a result of the demand for direct bankruptcy leads the whole assets of the bank to be liquidated pursuant to the provisions of the Execution and Bankruptcy Law and legally dissolution of the bank pursuant to the provisions of Turkish Commercial Code. However, if the engender of this result is inevitable due to the financial situation of the bank, the most rational preference for the Fund is to form the process in question in a manner that it has the most possible authority. This can be possible by the revocation of the operating license of the bank in question in accordance with Article 14 (5a)(aa) of the Banks Act Nr. 4389. When the license of the bank is revoked by the Board upon the proposal of the Fund, all execution and bankruptcy proceedings (as well as the bankruptcy lawsuit leading the Fund to make such a decision) filed against that bank pursuant to Article 16 (2) will suspend and the authority to demand for the bankruptcy of the bank will belong solely to the Fund. Accordingly, the process details of which is explained below and in which the Fund will have major authority in the bankruptcy procedure will initiate.

As it is seen, execution of neither bankruptcy based on proceedings nor direct bankruptcy procedure for banks taken over by the Fund and then shares of which are transferred to the Fund seems possible.

iii. IMPROPER USAGE OF BANK'S RESOURCES (Article 14/4)

We have to mention about another point here. There are two provisions requiring take over of a bank by the Fund in the Banks act Nr. 4389. One of them is transfer pursuant to paragraph 3 which I have explained above. Another regulation which is namely transfer pursuant to paragraph 4 is executed in the case that majority shareholders have made use of the bank's resources in a manner jeopardizing a secure functioning of the bank.

For such banks, method to revoke the operating license of thereof cannot be carried out. Bankruptcy based on proceedings of such a bank cannot be in question due to reasons such as blanket guarantee, the fact that the Fund guarantees debts of the bank and the bank to be in a position of being able to pay its debts by resources transferred by the Fund. Direct bankruptcy of such a bank cannot occur due to the same reasons and especially due to the strengthening of its financial structure as the reasons for bankruptcy disappears. Nevertheless, transfer pursuant to only paragraph 4 has not been realized up to today, banks have been generally transferred to the Fund pursuant to both paragraph 3 and 4.

iv. POSITION OF NON-DEPOSITORY BANKS

In this phase, I would like to make a short explanation about non-depository banks, namely investment banks taking the separation made by the Banks Act Nr. 4389 into consideration.

Article 20(2) of the Banks Act has the provision of:

“... In case the Agency in its sole discretion determines that those banks fall under paragraph 3 of Article 14, their licenses shall be revoked with an affirmative vote of at least five members of the Board and they are liquidated in accordance with general provisions. ”. Due to the fact that the said banks do not accept deposits and thus they do not have any activity which can be insured by the SDIF, transfer of the management and control thereof to the SDIF have not been prescribed, and the revoking directly of their license to perform banking activities and accordingly the bank’s going under the process of liquidation have been provisioned. Again, as Article 20 has provisioned the fact that Article 16 of the Banks Act Nr. 4389 will not apply to these banks, the Fund will not have any authority also in the case that licenses thereof are revoked. Therefore, a non-depository bank license to perform banking activities of which has been revoked, will go under liquidation within the framework of the rules regarding joint stock corporations of the Turkish Law and meanwhile the bankruptcy thereof could also be demanded by creditors.

5- BANKRUPTCY PRESCRIBED IN THE BANKS ACT NR. 4389

Up to this section, we have explained that although the bankruptcy of a bank according to the provisions of Execution and Bankruptcy Law seems possible in theory, it cannot be demanded in practice due to the system brought by the Banks Act Nr. 4389. Nevertheless, the Banks Act Nr. 4389 has prescribed a bankruptcy reason and procedure different than the provisions of the Execution and Bankruptcy Law. On the other hand, the provisions regulating the bankruptcy in the Banks Act Nr. 4389 will only be applied for a bank “license to accept deposit and perform banking activities, of which has been **revoked**”.

Cases in which the bank’s license to accept deposits and perform banking operations shall be revoked are determined by the Banks Act Nr. 4389. Accordingly;

- In the case of existence of conditions stipulated in Article 14(3), the Banking Regulation and Supervision Board may decide the management and control of the bank not to be taken over by the Fund but its license to accept deposits and perform banking operations to be revoked.

- According to Article 14(5), the Fund may demand the revoke of license of the bank, the management and control (not the ownership of the shares) of which has been taken over by the Fund in accordance with 14(3), to perform banking operations from the Banking Regulation and Supervision Agency. Upon this demand, the Board can decide to revoke the bank’s license to perform banking activities.

- According to Article 14 (6b), the Fund can demand from the Board to revoke the bank's license to perform banking operations if there is no possibility for the bank to be kept active in the financial system after the shares of the said bank have been taken over by the Fund.

Furthermore, what kind of results can arise from the revoke of the bank's license to perform banking activities is regulated separately.

i. TRANSFER OF MANAGEMENT AND CONTROL TO THE SDIF

In Article 16(1) of the Banks Act, it is stipulated that in the event that license of a bank to perform banking operations and to accept deposits is revoked, its management and control shall be assumed by the Fund. Nevertheless, while the revoke of the license through using the authority stipulated in Article 14(5a) is executed, the management has been already taken over by the Fund. Therefore, it is possible to say that this article shall be applied in the case that the Board revokes directly the license of the bank to perform banking operations.

ii. SUSPENSION OF EXECUTION AND BANKRUPTCY PROCEEDINGS

As it has been mentioned before, according to Article 16 (2), any and all execution and bankruptcy proceedings against the bank, including preliminary injunctions ordered against it, shall be suspended as of the date on which the decision of the Board to revoke its license is published in the Official Gazette. Accordingly no new proceeding could be carried out and the proceedings already been initiated would be suspended. It aims at preventing the reduction of assets of the bankruptcy estate to be established by the bankruptcy decision to be made upon the application of Fund.

- After the bank's license to perform banking operations is revoked, the Fund has the authority and duty to take measures for the protection of the rights of depositors and other creditors of the bank. The scope of the said "measures" stipulated in paragraph 3 has a quality which may change according to the specifications of the case. The completion of the proceedings initiated which do not have results against the Bank or the continuation of the collection of loans or other receivables may be given as examples for such measures. Furthermore, the Fund may request the courts to issue a preliminary injunction and preliminary attachment on properties of executives and shareholders of the bank the personal bankruptcy of whom may be demanded under the Banks Act, without requiring a security deposit.

- Taking into consideration the previous problems experienced in the past regarding the revocation of the bank's license to perform banking activities, creditors of a bank have

been prohibited to assign their rights or take any action, which could lead, to assignment of their rights from the date of revocation of the bank's license to perform banking activities.

In the regulations explained up to this section, the basic function is to protect the assets of the bank as far as possible before the bankruptcy procedure to be initiated and executed by the Fund. Because, prescribing the bankruptcy, the lawmaker has adopted a cumulative solution including all creditors. Satisfaction of all creditors including the Fund is targeted as much as possible.

iii. THE FUND PAYS DEPOSITS UNDER THE SCOPE OF INSURANCE

In order to execute the bankruptcy procedure prescribed in Article 16 of the Banks Act Nr. 4389, the Fund has to pay the savings deposits, guarantee amount of which has been determined by the resolution of the Council of Ministers, directly or through another bank it may designate. This is a precondition for the execution of the bankruptcy procedure prescribed by the Act. The accounts that are opened in the local bank branches (these must be active in Turkey and authorized to accept deposits) by natural persons native and/or foreign, in form of Turkish Liras and, gold or foreign currency that possess saving deposits, are included in the Deposits Insurance System according to the decision of the Council of Ministers Nr. 2000/682 published in the repeated issue of the Official Gazette Nr. 24066, dated 01.06.2000. As the accounts that have been opened or renewed after January 01, 2001, amounting up to TL 50 billion are under the scope of the insurance according to the aforementioned resolution, it is possible to say that the amount of guarantee is limited to TL 50 billion for the present time. Deposit insurance system is planned to be removed gradually.

iv. THE FUND MAY DEMAND THE BANKRUPTCY OF THE BANK DIRECTLY IN THE NAME OF DEPOSITORS

In Article 16(3) it is stipulated that ;

“The Fund shall pay the insured deposits with the bank, the management and control of which has been taken over by it directly or through another bank it may designate and institute bankruptcy proceedings in the name of the depositors against the bank.”

Following the realization of the precondition, namely, after the insured deposits are paid, the Fund has to demand the bankruptcy of the bank. The Fund making payments to depositors demands the bankruptcy for its own receivables in deed, as it has become the successor of the rights of depositors pursuant to the principles of insurance law.

Although the Supreme Court of Appeals has decided the bank to be represented in the bankruptcy lawsuit by the board of directors in charge on the date of the revocation of its license, in the doctrine it is determined that a trustee should be appointed for the representation of the bank in the bankruptcy lawsuit.

Bankruptcy lawsuit to be filed by the Fund has a direct qualification. In other words, bankruptcy based on proceedings will not be executed; proceedings such as arrangement of payment order, adjudication of objections, giving depot order will not be carried out. In the period when the Act Nr. 3182 was in force, there occurred some problems in practice due to the fact that there were no clarity regarding the qualification of the bankruptcy lawsuit to be filed similar to the current one.

For instance, upon the demand of the bankruptcy of Impeksbank, license of which was revoked, the court decided that there is no need for delivering a court payment order, nevertheless, the same court has given a depot decision for the amount which the Fund demands and already has paid to depositors. The Supreme Court of Appeals has not adopted this procedure which is a mixture of bankruptcy base on proceedings and direct bankruptcy. When handled with the principles prescribed in the Act, the Supreme Court judged that the provision granting to the Fund the authority and duty of demanding bankruptcy is already a reason for direct bankruptcy and the practice has occurred in this direction. Regarding this issue, The Banks Act Nr 4389 stipulates that “The Fund demands the direct bankruptcy of the bank” and gives no place for the discussions. It also stipulated a procedure to be followed in bankruptcy procedure and that the Article 178 of the Execution and Bankruptcy Act regarding the announcement of bankruptcy request shall not enforce.

In the case the bank’s license to perform banking activities is revoked, the Fund, exclusively, can demand for the bankruptcy of the bank. This authority solely belongs to the Fund. It is not possible for the creditors other than the Fund to demand for the bankruptcy of the bank. It has been set forth that other creditors could also demand for the bankruptcy of the bank due to the facts that there was not any provision regarding the exclusivity of the said authority in the Act Nr. 3182 and the revoke of the license will suspend the bankruptcy proceedings. The Supreme Court has dissolved the judgment of a court approving the bankruptcy request accordingly by considering the purpose of the Act and decided that only the SDIF can request the bankruptcy procedure.

Two different legal outcomes may arise according to the judgment of the Court after the request of the SDIF. Thus the forthcoming procedure should be analyzed in two parts.

a) WHERE A BANKRUPTCY JUDGEMENT IS RENDERED

In Turkish Law, the bankruptcy procedure is filed and the bankruptcy estate is established with the bankruptcy judgment of the Court. In accordance with the Banks Act, the SDIF shall participate in any bankruptcy estate in its capacity as a privileged creditor for the amounts it paid to depositors. In other words, the SDIF has priority to receive its receivables after the liquidation of the banks’ assets.

In the event that a bankruptcy judgment is issued, the SDIF shall liquidate the bank under the provisions of the Execution and Bankruptcy Act Nr. 2004, having the duties and powers of the bankruptcy office and after the creditors' meeting the bankruptcy administration described in the said Act. The important point herein is the SDIF has all duties and powers of the said bankruptcy bodies set forth in the Execution and Bankruptcy Act Nr. 2004. Although the SDIF have these capacities, it is subject to the provisions of the Execution and Bankruptcy Act Nr. 2004 as regards its transactions and particularly it is subject to the supervision of the execution examination authority.

In accordance with the Turkish Law, placing list which sets out the ranking and share of the creditors shall be completed in order to move to the phase of distributing the money in bankruptcy. On the other hand, if there is cash available in the bankrupt bank's assets then its obligations to the Fund shall be paid without waiting for the completion of the placing list.

The Fund is not subject to provisions of the Enforcement and Bankruptcy Act Nr. 2004 which stipulates depositing of the money in state banks in respect of keeping and obtaining interest on money funds included in assets of a bankruptcy estate as well as money funds it has collected in its capacity as a bankruptcy office. The SDIF will be also not subject to the provisions of the Official Fees Act which stipulates that interests, bonus premiums and such benefits shall belong to the State where the amounts received by the execution and bankruptcy administrations are deposited in the bank.

In our legal system, the legal representative of the bankruptcy estate is the bankruptcy administration. The bankruptcy administration shall refer any dispute to arbitration or accept any amicable settlement provided that the creditors grant authority to it. However, in its capacity as bankruptcy administration and for the benefit of the bankruptcy estate, the Fund shall be authorized to refer any dispute to arbitration, to accept any amicable settlement, to acknowledge and to waive its rights in the context of any and all kinds of receivables in accordance with Article 16/9 of the Banks Act.

There is one more authority to be emphasized herein. In accordance with the Execution and Bankruptcy Act, bankruptcy administration can sell the movables and real estates of the bankrupt through the method stipulated in the Act. However, the Banks Act has also granted an authority to the SDIF and stipulated that the SDIF can sell the movables and real estates of the bankrupt without being subject to provisions of the Execution and Bankruptcy act and State's Tender Act.

b) WHERE A BANKRUPTCY JUDGMENT IS NOT RENDERED

Article 16/6 of the Banks Act sets forth that "in cases where the bank is not declared bankrupt, provisions of paragraph (2) of Article 18 hereof shall apply". Article 18/2 referred herein sets out the voluntary liquidation of a bank. With a view not to violate the integrity of the issue, we will not mention voluntary liquidation herein. However, the claim asserting that the reference to Article 18/2 is not a suitable way has been put forth in doctrine.

6- REMOVAL OF A SDIF BANK FROM THE SYSTEM

One of the main characteristics of liberal economies is the free-entry and free-exit in the market. However, as banks are not ordinary enterprises, their exit from the system has been tied up to specific regulations. Article 18/2 sets forth the provisions to be applied if a bank operating in Turkey wishes to terminate and liquidate its operations. However, we will study herein that how a bank the management and control of which have been taken over by the SDIF exits from the system. Let us examine this process step-by-step beginning from the date of take over by the SDIF. Following explanations are based on the assumption that the bank is taken over by the SDIF due to the deterioration in its financial structure, in other words pursuant to Article 14/3 of the Banks Act.

- The SDIF is authorized to transfer assets that are deemed appropriate, organization, personnel who agrees, and insured saving deposits including interests that might not exceed the average interest rate applied by the five largest banks according to their saving deposits by the time of transfer date, and the reserves in liabilities, to a bank that will be founded or a current one that is volunteered. Transferring the shares of the said bank to the SDIF is not required for the utilization of this authority. However, the said way is not being used in practice.

- Where the afore-mentioned procedure cannot be realized, the next step will be rehabilitation of bank by using the authorities granted to it by the Banks Act with the purpose of strengthening the bank's financial structure and restoring them to the system. The key point herein is the the transfer of the bank's shares to the SDIF. After the SDIF has the shares within the framework of the procedure set forth in the Banks Act, it can use the authorities set forth in page 8.

The SDIF is also authorized to take any necessary measures other than those stipulated by the Act. When the fact that banks form a complicated structure together with its subsidiaries under the context of consolidated budget is taken into account, the necessity to strengthen the financial structures of the subsidiaries also engenders. Strengthening the subsidiaries of the SDIF banks is also subject to a different BRSA Resolution.

- After the bank's financial structure is strengthened, the prospect of acquisition of the bank by another bank or merger with another will be assessed as a result of the afore-mentioned procedures. If all conditions for acquisition or merger of bank are met, the investors who have performed due diligence in the bank offer their bids. The sale procedure is realized through "balance sheet sale" which is a special method as mentioned above.

- Due to the fact that the sale of the bank is made as balance sheet sale, the assets and liabilities which are not deemed appropriate by the investors to be purchased remain under the SDIF. The SDIF can also transfer these assets and liabilities to another SDIF bank.

- If the acquisition or merger of the bank cannot be realized, The SDIF will try one of the following options;

- initiating the liquidation of the bank by revoking its license to perform banking activities, as explained before

or

- merger of the bank with a current SDIF bank.

There is a bridge bank used by the SDIF for the second option. Bayındırbank A.Ş., is not only a center for accumulating the non performing assets transferred by the SDIF with a view to strengthening the bank's financial structure but also merges the SDIF banks, which are not deemed possible to be sold, under its structure.

- As result of the procedures set forth so far, the following assets and liabilities remain under the SDIF:

- assets and liabilities taken over by the SDIF with a view to strengthening the bank's financial structure,
- assets and liabilities which were not deemed appropriate by the investors to purchase during the sale&transfer process of the bank.

Another function carried out by the SDIF pursuant to the Banks Act is the resolution of the assets acquired within the afore-mentioned process in a manner which ensures recycling of the public funds injected. Accordingly, the SDIF is operating like an asset management company (AMC) for the time being although it is not officially classified as an AMC.

The SDIF mainly acquires the following within the afore-mentioned process:

- non-performing receivables (loans) and movables,
- real estates and
- subsidiary shares

and SDIF's operational units have been formed by considering this differentiation. The Collection Department is involved with non-performing loans, Real Estates Department is involved with real estates and Subsidiaries Department is involved with acquired subsidiary shares.

The SDIF may liquidate the assets;

- on behalf and account of itself,
- through assigning banks or third parties within the framework of the agreements it makes

or

- through a company having a status of public legal entity, all shares of which belong to the SDIF.

The SDIF has managed the assets it acquired up to now. Besides, the SDIF also disposed the assets it acquired (particularly receivables) through transferring them to Bayındırbank. The real estates are being offered to sale by the SDIF within the context of a plan. Sales of the subsidiaries having an economic value are continuing. A new activity for the sale of the assets which have been acquired by the SDIF (especially for the receivables) have been initiated by the SDIF. The related departments of the SDIF try to finalize the resolution of these assets and liabilities.

Asset Management Company which was introduced with the last amendment made to the Banks Act is also another option for the management of the non-performing assets of the SDIF.

7- FOREIGN BANKS' BRANCHES IN TURKEY

We have mentioned that foreign banks' branches in Turkey shall ensure compliance with the national legislation. In Turkish Law, the bank itself is liable for the debts of its branches. In accordance with the Turkish Law, branches of the foreign banks are not considered as legal entities. Pursuant to Execution and Bankruptcy Act, as only merchants are subject to bankruptcy, bankruptcy of a foreign bank's branch operating in Turkey is not possible. Where a branch incurs a loss or cannot fulfill its obligations, the legal entity of the bank will be responsible and bankruptcy of the branch cannot be requested. However, bankruptcy of the bank can be requested from the court located in the branch's province. In that case, the bankruptcy judgment rendered will be settled in accordance with the provisions of the international private law as regards enforcement of the bankruptcy judgments.

Insolvency of a foreign bank and insolvency of a foreign bank's branch in Turkey should not be confused. Article 16/7 sets forth the situation of a foreign bank itself but not its branch. However, it's agreed that the license of the branch that cannot receive the support of the headquarters for strengthening its financial structure will be also revoked. Indeed, the Banking Regulation and Supervision Agency has revoked the license of a foreign bank's branch in Turkey to perform banking activities and collect deposits.

In accordance with Article 16/7 of the Banks Act, in the event that the license of a foreign bank with branches in Turkey to perform banking operations and to accept deposits is revoked for any reason whatsoever or that its activities are stopped or that a decision is made for its bankruptcy or liquidation or that it enter into a composition with its creditors, then, the provisions of paragraph (3) of Article 14 and Article 16 shall be applied to its branches in Turkey. It has been stipulated that the principles concerning the transfer of the assets and receivables of these branches abroad shall be determined by the Board.

As a result of the revocation of licenses to perform banking activities, management and control of the foreign banks' branches in Turkey will be taken over by the SDIF and provisions of Article 16 will enforce thereafter. However, as bankruptcy proceedings against the branch cannot be carried out, execution proceedings will be suspended and the SDIF will not request the bankruptcy of the bank for the insured deposits it paid. As no bankruptcy proceeding will be carried out, the authorities to be granted with respect to the bankruptcy judgment cannot be taken into consideration. However, in case the foreign bank bankrupts, the SDIF will acquire its receivables in its capacity as privileged creditor from the assets of the branch in Turkey.

It should be agreed that enforcement of the provisions of Article 16 for the branch of the foreign bank may lead to problems. As the legislation is recently issued and there is no practice regarding this paragraph, the information herein is provided theoretically. Estimation of the problems that may occur and providing solutions for them is not always possible. Although the Board may settle the possible problems within the framework of its authority for regulating the assets and receivables of foreign bank's branch, the Board's authority with respect to issues other than transfer of the assets and receivables will be in dispute.

8- SPECIAL FINANCE INSTITUTIONS

Special finance institutions have been seen in Turkey in the last 15-20 years. The evident feature of these institutions is that they perform their banking activities in a interest-free manner. Accordingly, they do not collect deposits but perform a fund collection activity such as participation in profit-loss or as current account. Many provisions of the Banks Act also apply to them. These institutions are established as joint-stock companies. Thus, they are subject to general provisions regarding the bankruptcy of joint-stock companies.

The Act has also stipulated that licenses of these institutions can be revoked pursuant to Article 14/3. Our assessment as regards banks is also valid herein. In other words, conditions requiring the bankruptcy of the special finance institution overlaps the conditions requiring the revocation of the license of this special finance institution.

Under Article 20 (6) (d) regarding a special finance institution license of which has been revoked, execution and bankruptcy proceedings are also suspended and creditors cannot convey their receivables. Management and control of the institution shall be taken over by the Board of Liquidation. The Board of Liquidation can not request the bankruptcy of the special finance institution and liquidates this institution in accordance with the provisions of Turkish Commercial Code as regards the liquidation of joint-stock companies. Thus, we can express herein that the bankruptcy of special finance institution is also quite difficult.

9- CONCLUSION

The essence of this study which takes basis the practical but not theoretical eventuation is explained below.

A bank can go bankrupt as it is a joint stock company and thus acts in capacity of a merchant. However, such a view remarkably does not take into consideration the banking regulations which have been in a different trend in Turkey since 1999. Since the presence of the conditions requiring bankruptcy of a bank also indicates that the conditions requiring the take over of the management and control of that bank by the SDIF and requiring the revocation of its license to perform banking activities have also arisen.

Regulations foreseen for the process after the take over of the management and control of a bank that can go bankrupt indicate that bankruptcy is quite difficult procedure or in other words is a difficult legal outcome to reach for the creditors other than the SDIF. Because there are two alternatives for the SDIF after management and control of a bank is taken over by it.

- Where the financial structure of the bank can be strengthened and the bank can be restored to the system, the necessary procedures for assignment of the bank's shares to the SDIF shall be completed and thus the SDIF becomes able to use the broad authorities set forth in Article 14/6. Within the framework of these authorities;

- a) The SDIF can collateralize the debts of the bank,
- b) The SDIF can ensure the bank to have an adequate financial power to meet its obligations through the measures it takes with a view to strengthening the bank's financial structure although it does not collateralize the debts of the bank,
- c) The conditions required for the enforcement of the insurance procedure foreseen and implemented by the Government as a policy has engendered. Thus, after the shares of the bank are assigned to the SDIF, the creditors can apply to the SDIF within the context of the measures required for strengthening the financial structure even the debts of the bank are no collateralized.

It can be also expressed that same outcomes can be reached where management and control of the bank are taken over by the SDIF due to illegal use of funds. After the procedure stipulated by the Banks Act for the assignment of shares is finalized, realization of the bankruptcy is not possible due to the government insurance, insurance of the SDIF pursuant to the Banks Act and strengthened financial structure of the bank.

- Where restoring the bank to the system is not deemed possible (whether before or after the assignment of shares), the license of the bank to perform banking activities will be revoked. In that case, no creditors other than the SDIF will be able to request the bankruptcy of the bank. The bank will go bankrupt only if the SDIF requests the bankruptcy. Accordingly, the SDIF is the sole authority in carrying out the bankruptcy procedure.

As it can be seen, the situation as regards the deposit-taking banks is much more complicated that it seems. However, the problem regarding the non-deposit-taking banks will

be settled by taking into account the general regulations. In other words, bankruptcy procedures against these banks can be filed in accordance with the provisions of the Execution and Bankruptcy Act.

In Turkish Law, filing bankruptcy proceedings against the special finance institutions which have been subjected to the Banks Act is also difficult. Since, the conditions requiring the bankruptcy of these institutions also require the revocation of their licenses. With the revocation of license, the bankruptcy proceedings shall not be carried out and the institution shall be liquidated by the Liquidation Fund in accordance with the provisions of Turkish Commercial Code.