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Committee Opinion

on the Bill of Legislation amending Act No. 161/2002, on Financial Undertakings, as subsequently amended.

From the Economic and Trade Committee

The Committee has discussed this issue and has met with Arnar Þór Sæþórsson and Jóhannes Karl Sveinsson of the Financial Supervisory Authority, Eva Margrét Ævarsdóttir of the Icelandic Bar Association, Jóna Björk Guðnadóttir of the Icelandic Financial Services Association, Erla S. Árnadóttir and Steinunn Guðbjartsdóttir from Glitnir's Resolution Committee, Steinar Þór Guðgeirsson from Kaupthing's Resolution Committee, Einar Jónsson and Lárentsínus Kristjánsson from Landsbanki's Resolution Committee and Áslaug Árnadóttir and Jónína S. Lárusdóttir from the Ministry of Economic Affairs. The Committee also received opinions from the Institute of State Authorised Public Accountants, the Financial Supervisory Authority, British and Dutch creditors of Landsbanki, the Icelandic Bar Association, procedural committee, the Icelandic Financial Services Association, Glitnir's Resolution Committee, the Central Bank of Iceland and the Consumers' spokesperson.

General

The Bill proposes amendments to Chapter XII of the Act on Financial Undertakings, which concerns the financial restructuring of financial undertakings, their winding-up and merger with other financial undertakings. Directive 2001/24/EC, on the reorganisation and winding up of credit institutions, was transposed into Icelandic law with Act No. 130/2004, which made two very significant changes to arrangements provided for in Chapter XII of Act No. 161/2002. In the first place, it introduced the principle that the authorities in the home Member State of a financial undertaking should alone take decisions on the financial restructuring and winding-up of a financial undertaking and its branches in other states of the European Economic Area. Secondly, the principle was introduced that a decision on the financial restructuring and winding-up of a financial undertaking and its branches in another state of the European Economic Area must comply with the law of that state where the financial undertaking has its headquarters (the home Member State). There are several exceptions to this rule. The Directive was intended to establish harmonised rules on the financial restructuring and winding-up of financial undertakings in the European Economic Area.

In the autumn of 2008, the Boards of Directors of the three largest banks in Iceland requested that the Financial Supervisory Authority take measures to take over the banks. Such circumstances were completely unforeseeable when the rules of Chapter XII of the Act on Financial Undertakings were adopted; they were extraordinary in that the entire financial system could be said to have collapsed with the failure of the three banks, while provisions of the Act assumed rather that one financial undertaking or part of the financial system might collapse, but that the situation in financial system would, however, be relatively normal.

Adoption of Act No. 125/2008, the so-called “emergency legislation”, made various

changes to provisions of the Act on Financial Undertakings. The Financial Supervisory Authority, for instance, was granted extensive authority to take over management of a financial undertaking under certain circumstances. The Authority was authorised to appoint five-person Resolution Committees, which were intended to exercise all the authorisations of the Boards of Directors of the financial undertakings taken over pursuant to the Public Limited Companies Act. According to the Act, the Resolution Committees were to deal with all matters of the financial undertaking, including supervising handling of its assets and its other operations. In addition, the Authority was authorised to take any other measures deemed necessary. According to the Act, the Financial Supervisory Authority was authorised, for instance, to limit or prohibit the disposition of an undertaking's funds and assets, as well as to take into its custody assets which should be used to meet the undertaking's obligations. The Financial Supervisory Authority was also granted authorisation to void sales of assets which had taken place one month before the Financial Supervisory Authority took action.

Further amendments were made to the Act on Financial Undertakings by Act No. 129/2008 (the November legislation), which provided authorisation for the administrator of a financial undertaking's insolvent estate to carry on provisionally certain activities subject to license, despite revocation of its operating license. Art. 2 of the Act provided for a financial undertaking to be able to be in moratorium for up to 24 months. The Article also provided for the Appointee in moratorium not to be liable for damages in connection with his/her decisions and actions as Appointee unless this concerned a violation committed deliberately or through gross negligence. Furthermore, Art. 2 prohibited the bringing of court actions against a financial undertaking in moratorium except in specified instances. In addition, a Temporary Provision authorised postponing court actions even though a moratorium had been granted prior to the entry into force of the Act. This Bill proposes to repeal most of the provisions of the November legislation.

The Bill is the result of an overall review of Chapter XII of the Act on Financial Undertakings and at the same time a response to the situation which has developed in Iceland. In drafting the Bill, emphasis has been placed, in particular, on ensuring equal treatment of creditors and that rules on restructuring and winding-up accord with comparable rules on other undertakings and individuals.

Principal points of the Bill

Art. 3 proposes amendments to Art. 98 of the Act. It is proposed that special rules on the length of a financial undertaking's moratorium be cancelled and the arrangement whereby the Appointee in moratorium is not liable for damages resulting from his/her actions unless the violation was committed deliberately or through negligence removed in accordance with provisions of the Act on Bankruptcy etc., No. 21/1991. It is also proposed that provisions prohibiting bringing suit against a financial undertaking during its moratorium be removed from the Act.

Art. 5, which has the heading “Delivery of a financial undertaking to a provisional Board of Directors”, proposes that a financial undertaking itself may take the initiative in requesting that the Financial Supervisory Authority take over control of the undertaking. The mandate of the undertaking's Board of Directors then becomes invalid and a provisional Board of Directors takes over which is intended to operate generally for three months or longer in certain instances. Temporary Provision IV provides for the Financial Supervisory Authority also to take the initiative in taking over control of a financial undertaking; it contains most of the authorisations introduced in Art. 100 a with the adoption of the emergency legislation but the provision is expected to be valid temporarily.

It is proposed that a financial undertaking be wound-up according to specific rules, although various provisions of the Act on Bankruptcy etc. will be applied to the winding-up

proceedings. According to the fourth paragraph of Art. 6, a Winding-up Board shall be appointed, which in most respects has the same authority as the administrator of an insolvent estate. The Winding-up Board's objective shall be to maximise a financial undertaking's assets, including by waiting if necessary for its outstanding claims to mature rather than realising them sooner. This does not apply, however, if the interests of creditors and, as the case may be, shareholders or guarantee capital owners, are better served by disposing of such rights sooner in order to conclude the winding-up proceedings.

Art. 7 has the heading "Handling of claims etc." The first paragraph states that the same rules shall apply to the winding-up of a financial undertaking as apply generally to bankruptcy proceedings, with the exception that a court order for its winding-up shall not automatically result in claims against it falling due. The second paragraph of Art. 7 assumes that an invitation will be issued to lodge claims, giving creditors the opportunity to lodge their claims with the Winding-up Board, and that decisions will be taken regarding them, if necessary through court resolution. According to the Bill, creditors can safeguard their interests in the winding-up proceedings and have the option of referring to the courts disputes on the legitimacy of their claims and on decisions and measures taken by the Winding-up Board. The Committee received suggestions that provisions of the Bill did not comply with provisions of the Act on the Security of Payment Instructions in Payment Systems and the Act on Financial Collateral Arrangements, where the insolvency of financial undertakings is referred to. In this connection the Committee wishes to point out a provision in the first paragraph of Art. 102, cf. Art. 7 of this Act, which states that the same rules shall apply to the winding-up of a financial undertaking as apply generally in liquidation concerning reciprocal contractual rights and claims against it, with the exception that a court order for its winding-up shall not automatically result in claims against it falling due.

In Art. 9 proposals are made to enable winding-up proceedings to conclude in such a manner that financial undertakings have the option, with the approval of the Financial Supervisory Authority, of recommencing activities or of their owners receiving payment of their holdings in the undertaking after claims lodged against it have been paid. Provision is also made for the Winding-up Board to seek composition with creditors and implement this, whereafter the financial undertaking can either recommence its activities, with the approval of the Financial Supervisory Authority, or make payment of its assets to shareholders or guarantee capital owners. Finally, it is proposed that, under certain circumstances, the Winding-up Board will be obliged to request liquidation of the financial undertaking's estate.

Temporary Provisions

Discussion in the Committee was focused in particular on the Bill's Temporary Provisions, as it proposes to add four Temporary Provisions to the Act. According to the provisions, for instance, if a Resolution Committee has been appointed for a financial undertaking which is not in moratorium prior to the entry into force of the Act, the Committee shall automatically become a provisional Board of Directors.

Temporary Provision II also proposes several special rules for those financial undertakings which benefit from a moratorium upon the entry into force of the Act, if this Bill becomes law. Firstly, it is proposed that their moratorium remain in force despite the entry into force of the Act.

In the second place, Point 2 of the Provision states that during their moratorium certain provisions on winding-up be applied as if the undertaking had been placed in winding-up by a court order on the date the Bill becomes law. The winding-up proceedings will continue to be referred to as a moratorium as long as the latter remains in force. The Committee proposes an amendment to this Point, so that the Appointee in moratorium will continue to supervise the dispositions of the Resolution Committee. This is considered necessary in order for these

undertakings' moratoria to continue to be recognised by foreign courts. Thirdly, it is proposed that the Resolution Committee of these undertakings continue to operate and perform specifically defined tasks which the Winding-up Board is to undertake according to provisions of the Bill. These tasks are listed in Point 3 of the provision and are as follows: Resolution Committees shall, under the supervision of the Financial Supervisory Authority and despite the revocation of operating licenses, handle certain activities of the financial undertaking's estate subject to license, as long as this is considered necessary for disposition of the undertaking's interests. Furthermore, the Resolution Committees shall exercise the rights and obligations of the undertaking's Board of Directors and shareholders or guarantee capital owners. They shall also assess whether it appears that the financial undertaking's assets will suffice to cover its obligations, i.e. once the time limit for lodging claims has expired. Resolution Committees shall also dispose of the interests of the financial undertaking according to the same rules as apply to the administrator's direction of an estate in liquidation. Their objective, however, shall be to maximise a financial undertaking's assets, including by waiting if necessary for its outstanding claims to mature rather than realising them sooner. Furthermore, Resolution Committees shall call a creditors' meeting for the same purpose as an administrator holds a meeting with creditors of an estate in insolvency proceedings. It is proposed that the wording of the second sentence of Point 3 be altered so that, should a seat on the Resolution Committee become vacant after the entry into force of this Act, the Financial Supervisory Authority does not have to appoint a person to fill it unless this is considered necessary having regard to the tasks which the Committee has yet to complete. It is also proposed that the time Resolution Committees are to operate after the entry into force of the Act be limited; the Committee proposes that the Winding-up Board will, before six months have passed from the entry into force, if the Bill becomes law, take over those tasks which the Resolution Committees are intended to continue to attend to according to Point 3 of the provision; approximately one year will then have passed since they began their work. The Committee considers it appropriate that the Resolution Committees come to an end, and that it should not prove difficult to transfer tasks to the Winding-up Board, as plenty of time is allowed for this. It may be pointed out that the Bill is the result of an overall review of Chapter XII of the Act on Financial Undertakings and it contains proposals for new rules on the winding-up proceedings of financial undertakings. The Committee considers it appropriate that only the new rules be followed as soon as possible, if the Bill becomes law, and that a double system should not exist for an unspecified period. Fourthly, the Winding-up Boards of these financial undertakings which will be appointed by a District Court Judge are entrusted with handling all other tasks provided for in the Bill which are not handled by the Resolution Committees, in accordance with Point 3 which are referred to above; the Committee proposes that the members of the Winding-up Boards be increased in number if necessary when they take over the tasks of the Resolution Committees, although they shall never be more than five in number. It is assumed that Appointees in moratorium will automatically take a seat on the undertakings' Winding-up Boards. The Committee discussed whether this arrangement can be considered desirable with regard to considerations of eligibility. It was pointed out that the Appointee can be expected to be in the minority when decisions are taken by the Board. Despite this, the Committee discussed the possibility that the conceivable ineligibility of the Appointee could result in the ineligibility of the entire Winding-up Board. The Committee points out that the fourth paragraph of Art. 6 of the Bill provides for the rules concerning administrators in insolvency liquidation apply to the Winding-up Board, its work and the persons who comprise it, unless otherwise provided for in the Bill. The fifth paragraph of Art. 75 of the Act on Bankruptcy etc. states that, should it come to light after the appointment of an administrator, that he/she is ineligible to carry out a certain task due to ineligibility, cf. Point 6 of the second paragraph of the same Article, without this being considered to be of

any significance for the carrying out of the task in other respects, a judge may, at the administrator's request appoint another person to carry out the task. In instances where the eligibility of the Appointee may be doubted, he/she may therefore recuse him-/herself from decision making. The Committee also proposes that a new Point be added to Temporary Provision II which further tightens the provision that upon the entry into force of the Act the cost of moratorium and winding-up proceedings is to be paid from the assets of the financial undertaking concerned.

In Temporary Provision III it is proposed that the reference date in the winding-up of a financial undertaking shall be determined by the second paragraph of the Temporary Provision of Act No. 129/2008, as applicable, notwithstanding the fifth paragraph of Art. 101 of the Act, cf. Art. 6 of the Bill.

Finally a Temporary Provision IV proposes to codify part of Art. 100 a. The provision was adopted with the above-mentioned emergency legislation. This provides for the Financial Supervisory Authority to be able, if certain conditions are satisfied, itself to take the initiative in placing a financial undertaking in winding-up proceedings. The provision states that this should be cancelled at the end of 2009. The notes on this state that it is necessary to retain such rules in legislation for the moment, but that it will be examined specifically whether rules of this sort should continue to remain in force. If this route is taken, suitable amendments will have to be made to legislation before the provision expires. The Committee proposes that the limit for the validity of the provision be extended until 1 July 2010, as it is unclear at this moment how the Icelandic financial system will develop.

The Committee proposes that the Bill be **adopted** with the above-mentioned changes which are proposed in a separate document.

Birkir J. Jónsson and Gunnar Svavarsson were absent when the matter was concluded.

Birgir Ármannsson, Pétur H. Blöndal, Árni M. Mathiesen and Jón Magnússon sign this Opinion with reservations.

Althingi, 30 March 2009

Álfheiður Ingadóttir,
Chairman, Spokesperson

Birgir Ármannsson,
with reservations

Lúðvík Bergvinsson

Pétur H. Blöndal,
with reservations

Árni M. Mathiesen,
with reservations

Jón Magnússon,
with reservations

Höskuldur Þórhallsson