136th legislative session - 131st meeting 14 April 2009

Financial undertakings

Item 409

Spokesperson of the Economic and Trade Committee (Álfheiður Ingadóttir) (Left-Greens):

Mr Speaker: I present the Opinion of the honourable Economic and Trade Committee on the Bill of legislation amending Act No. 161/2002, on Financial Undertakings, specifically concerning the winding-up of financial undertakings.

The Bill concerned here 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 was created in Iceland upon the collapse of the banks last autumn. In drafting the Bill, emphasis has been placed, in particular, on ensuring equal treatment of creditors and that rules on restructuring and winding-up of financial undertakings accord with comparable rules on other undertakings and individuals. Those rules, found in the Act on Bankruptcy etc., No. 21/1991, have been tested extensively and have proved effective.

The Opinion recalls that in Act No. 130/2004 the Directive on the financial restructuring of financial undertakings and their winding-up and merger with other financial undertakings was transposed into Icelandic law. The Directive was, among other things, intended to establish harmonised rules on the financial restructuring and winding-up of financial undertakings in the European Economic Area.

We all know what happened in the autumn of 2008, when the Boards of Directors of the three largest banks in Iceland requested that the Financial Supervisory Authority take measures to take over the banks. Then the legal framework and legislation upon which it was based proved insufficient and emergency legislation had to be adopted. Such circumstances were 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 the provisions based upon this Directive assumed rather that one financial undertaking or part of the financial system might collapse, while the situation in financial system would, however, be relatively normal in other respects.

The response was to adopt the so-called emergency legislation, Act No. 125/2008. This made various changes to provisions of the Act on Financial Undertakings. The Financial Supervisory Authority was, for instance, granted wide-reaching authorisations to take over the management of a financial undertaking under certain circumstances and 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, to supervise the handling of their assets and carry out their operations.

This Act was subsequently supplemented and improved by the so-called November legislation, Act No. 129/2008. Three types of changes were made to the Act. Firstly the Act provided for a financial undertaking to be able to be in moratorium for up to 24 months. It 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. This provision was based on provisions in the emergency legislation which I mentioned earlier, that Resolution Committees and employees of the Financial Supervisory Authority were exempted from such liability. Finally, the November legislation prohibited the bringing of court actions against a financial undertaking in moratorium except in specified instances. It was this provision which was disputed especially when the Bill was being debated. The last-mentioned provision was considered to be in violation of the Constitution, of a person's right to enforce his/her right in court, and the Reykjavík District Court ruled this to be so earlier this winter.

This Bill being considered here proposes to repeal most of the provisions of the November legislation. The main points of this Bill are to cancel special rules on the length of a financial undertaking's moratorium, the arrangement whereby the Appointee in moratorium is not liable for damages and provisions that court actions cannot be brought against financial undertakings while in moratorium.

It could be said that the Bill, which proposes a new legal framework for the winding-up of financial undertakings, is based upon the financial undertaking itself taking the initiative of requesting that the Financial Supervisory Authority take over management of the undertaking. The mandate of the Board of Directors then becomes invalid and it is replaced by a provisional Board of Directors which is intended generally to operate for three months. Temporary Provision IV of this Bill furthermore provides for the Financial Supervisory Authority to be able to take the initiative in taking over the management of a financial undertaking, codifying most of the authorisations found in the emergency legislation, in Art. 100 a. There it is proposed that a financial undertaking be wound-up according to specific rules, although basically various provisions of the Act on Bankruptcy etc. will be applied, however, to the winding-up proceedings. For instance, instead of an administrator of an insolvent estate a special Winding-up Board shall be appointed. The objective of the Winding-up Board's work is to maximise the value of the undertaking's assets, invite creditors to lodge claims and take decisions on them. 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, as is generally the case in the Act on Bankruptcy.

Art. 9 then discusses the conclusion of winding-up proceedings, and also provides for similar methods as are found in the Act on Bankruptcy. However, most of the Committee's discussion, I think, could be said to have focused on the Temporary Provisions, as the Bill proposes to add four Temporary Provisions to the Act. Temporary Provision I, for instance, states that 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, this Resolution Committee shall automatically become a provisional Board of Directors, and then the handling of this undertaking's winding-up shall be covered by the general provisions of the Act. Here one could take the example of SPRON, for which a Resolution Committee has been appointed but which is not in moratorium.

Temporary Provision II, on the other hand, proposes several special rules concerning financial undertakings which have been granted a moratorium before the entry into force of this Act, which applies to Straumur-Burðarás and the three banks. Firstly, it is proposed that the moratoria of these financial undertakings continue despite the entry into force of the Act and Point 2 of the Provision states that during their moratorium certain provisions of the Bill on winding-up can 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 this is considered necessary in order that the moratoria of these undertakings continue to be recognised by foreign courts.

The Committee proposes a change to this Point to the effect that the Appointee in moratorium who has been appointed in the four instances I mentioned continue to supervise the disposition of the Resolution Committee.

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 general provisions of the Bill. These tasks are listed in Point 3 of the Provision and I see no need to go over them further unless special reason arises to do so.

The Committee has two proposals concerning these aspects. In the first place, it proposes 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 the empty seat unless this is considered necessary having regard to the tasks which the Committee has yet to complete. This is the opposite of what is provided for in the wording of the Bill.

Secondly, the Committee proposes a so-called "sunset clause" regarding the work of Resolution Committees: that the length of time Resolution Committees are to operate after the entry into force of the Act be limited so that, before six months have passed from the entry into force if the Bill becomes law, the Winding-up Board will take over those tasks which the Resolution Committees are intended to continue to attend to according to the Temporary Provision in Point 3. About one year will then have passed from the time the Resolution Committees began their work. It cannot be denied that this proposal of the Committee has proved to be considerably controversial and has been the subject of much criticism, in particular by the Resolution Committees, the persons comprising them and creditors who have had the most contact with them. Although I do not intend to speak on behalf of other Committee members, several of the members of the honourable Economic and Trade Committee have expressed a reservation concerning this provision and can be expected to give an explanation of that here.

Furthermore, I wish to state that the Committee agrees to take up this matter between readings to discuss this provision, the sunset clause, further. A fairly considerable number of opinions, suggestions and proposals in this regard have been received after the Committee delivered its opinion and it is appropriate to examine it with regard to them. I wish to point out that we will, precisely for these reasons, in the voting recall the proposed amendment with regard to this sunset provision, which if I recall is amendment 2c, until the 3rd reading. The reason for the Committee making this proposal is that the Committee considered it appropriate for the Resolution Committees to come to an end, and that it should not prove difficult to transfer tasks to the Winding-up Boards, as half a year was plenty of time for this. It could be pointed out that the task of the Resolution Committees was always regarded as a temporary task. The

first Resolution Committee which was appointed in Landsbanki was appointed for 30 days, the next for 60 days and the third for 90 days, and now six months have passed, so that an additional six months should prove to be sufficient time.

The Committee's Opinion also points out that the Bill is the result of an overall review of Chapter XII of the Act on Financial Undertakings and 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. As mentioned, the Committee will probably examine this between readings.

The Bill assumes that Appointees in moratorium will automatically take a seat on the undertakings' Winding-up Boards. Several suggestions or queries discussed whether this arrangement can be considered desirable with regard to considerations of eligibility. Here reference can be made to the fifth paragraph of Art. 75 of the Act on Bankruptcy etc., which states that, should it come to light after the appointment of an administrator, in this case an Appointee in moratorium, that he/she is ineligible to carry out a certain task due to ineligibility, without this being considered to be of any significance for the carrying out of the task in other respects, a judge may, at his/her request appoint another person to carry out the task. In instances where the eligibility of the Appointee in a Winding-up Board may be doubted, he/she can thereby recuse him-/herself from decision making.

The Committee also proposed that a new Point be added to Temporary Provision II to further tighten the provision that upon the entry into force of the Act all cost of moratorium and winding-up proceedings is to be paid from the assets of the financial undertaking concerned. Upon closer examination it was pointed out that this proposed amendment could cause a misunderstanding and encourage the interpretation that there was doubt about provisions of the emergency legislation concerning the state's responsibility for the winding-up proceedings of financial undertakings. The Committee accepts these comments and, when voting takes place, will recall this proposed amendment until the third reading, as it is clear that the emergency legislation states that the Treasury is responsible for the cost of implementing actions by the Financial Supervisory Authority in the winding-up and moratorium of financial undertakings. Despite the provision that the Treasury was responsible, the Treasury and the Financial Supervisory Authority have paid all costs accruing from the work of Resolution Committee and also assessment of the banks' assets. This was not the intention, at least not in my mind, when the provision was adopted, that it should be so but rather this provision was solely intended to ensure that the state would be responsible for the cost of winding-up which could not be paid from the assets of the financial undertaking concerned or its estate, as is generally the case in liquidation of insolvent estates.

Mr Speaker: In closing I wish to refer to the period of validity and Temporary Provision IV. The Committee proposes that the proposed time limit of the provision on period of validity in Art. 100 a of the current Act, which among other things states that the Financial Supervisory Authority itself can take the initiative in placing a financial undertaking in winding-up proceedings, be extended until 1 July 2010. The Bill originally proposed that this would expire at the end of the year, and according to a provision in the emergency legislation this was to be reviewed before the end of 2009. The Committee, in other words, proposes that this provision of the emergency legislation be extended and remain in force until 1 July 2010. I point out that of course the Financial Supervisory Authority can always revoke the operating license of financial undertakings in accordance with this Bill, if it becomes law, even if this Temporary Provision expires, as is proposed here, at mid-2010.

Mr Speaker: Birkir J. Jónsson and Gunnar Svavarsson were absent when the matter was concluded. Birgir Ármannsson, Pétur H. Blöndal, Árni Mathiesen and Jón Magnússon sign this Opinion with reservations. Others supporting this Opinion in addition to myself are Lúðvík Bergvinsson and Höskuldur Þórhallsson

I move that this matter, Item 409, be referred to Committee between the 2nd and 3rd readings, and furthermore recall the proposed amendments items c and d of Point 2 on Parliamentary document 858.