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## IMPLEMENTATION OF THE DIRECTIVES ON THE REORGANISATION AND WINDING UP OF CREDIT INSTITUTIONS AND INSURANCE UNDERTAKINGS IN FINLAND

### 1 General aspects on insolvency legislation in Finland

The current established insolvency legislation in Finland dates back to the 19<sup>th</sup> century. The Finnish Bankruptcy Act (9.11.1868) (“*Konkurssisääntö*”) came into force in 1868. Naturally, the insolvency legislation has been amended and revised several times during the years, but still today, the Bankruptcy Act comprises fundamental provisions from the original legislation.

An overall revision of the Bankruptcy Act has been underway for the past few years. Finally, in December 2003, the Finnish Parliament passed the Government bill on the new Bankruptcy Act. The new Bankruptcy Act (“*Konkurssilaki*”) will come into force on September 1, 2004. Generally speaking, the new Bankruptcy Act codifies the principles set forth in the long-term Finnish legal praxis.

The Companies Act (29.9.1978/734) regulates the liquidation process of limited companies.

The Restructuring of Enterprises Act (25.1.1993/47) deals with the rehabilitation of viable enterprises and the rescheduling of debts by emphasizing the active continuation of business during the restructuring process. Respectively, The Act on Adjustment of the Debts of a Private Individual (25.1.1993/57) attempts to remedy the financial situation of an insolvent private individual.

Both current and the forthcoming Bankruptcy Act, as well as the Restructuring of Enterprises Act also apply to credit institutions and insurance undertakings. However, the Finnish legal system comprises also special insolvency legislation concerning these types of companies.

The Commercial Bank Act (1501/2001), The Cooperative Bank Act (28.12.2001), The Savings Bank Act (1502/2001) (hereinafter jointly referred to as “the banking acts”) and The Insurance Companies Act (1062/1979) deal with special issues relating to winding up procedures with respect to credit institutions and insurance companies. Furthermore, with respect to reorganization, the so-called Intermission Act (1509/2001) comprises special regulation regarding credit institutions.

Needless to say, the Finnish insolvency legislation has and will be revised largely due to the harmonizing legislation of the European Communities. Ow-

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ing to the Directive 2001/17/EC on the Reorganisation and Winding-up of Insurance Undertakings and the Directive 2001/24/EC on the Reorganisation and Winding up of Credit Institutions, the Finnish insolvency legislation will take another leap towards a harmonious and centralized EU-wide legal system.

## **2 The implementation process in Finland**

The implementation process regarding the Directive 2001/17/EC on the Reorganisation and Winding-up of Insurance Undertakings and the Directive 2001/24/EC on the Reorganisation and Winding up of Credit Institutions has not been running to time in Finland. According to the Directives, the Directive 2001/17/EC should have been implemented in the Member States before 20 April 2003 and the Directive 2001/24/EC on 5 May 2004.

The implementation process regarding Directive 2001/17/EC concerning insurance companies has now been completed and the pertinent Finnish legislation shall enter into force on 15 May 2004. Also the implementation process regarding Directive 2001/24/EC concerning credit institutions is expected to enter into force in June 2004.

Regarding the Directive 2001/17/EC concerning insurance companies, the Ministry of Social Affairs and Health received statements and propositions from the National Association of Insurance Companies and the Consumers' Insurance Office. These organizations proposed that the precedence regarding different types of insurance claims ought to be revised. The Finnish Parliament recognized this proposal, which is described in Chapter 3.1 below.

With respect to the Directive 2001/24/EC concerning credit institutions, the Ministry of Finance, which is responsible for the implementation process in Finland, received only some statements and propositions from the relevant interest groups, such as the Financial Supervision Authority and the Finnish Bankers' Association. This is mainly due to the nature of the implementation process. That is to say, the implementation has been, in general, rather "technical" by nature. The Directive does not comprise a large number of optional solutions for the national legislators that might lead to keen debates between the interest groups.

## **3 Implementation of the Directive 2001/17/EC on the Reorganisation and Winding-up of Insurance Undertakings**

### **3.1 Essential amendments in the Finnish legislation**

In a technical sense, the Directive 2001/17/EC (hereinafter "the Directive") does not significantly alter the related Finnish legislation. That is to say, no entirely new acts will be established on the basis of the Directive. Hence, the new regulation is incorporated within the current related acts. The essential effects of the implementation are described below.

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As it was stated in the Government bill (149/2003), hereinafter “the Bill”, the implementation of the Directive required that The Insurance Companies Act, The Act on Foreign Insurance Companies (17.3.1995/398) and The Insurance Associations Act (31.12.1987/1250) were amended. However, no fundamental revisions were needed.

With respect to insurance associations, the provisions of the Directive are peremptory only regarding large-scale associations. However, the Finnish legislation on the issue is peremptory in respect of all insurance associations, regardless of their size.

*Home Member State principle*

The Directive includes a similar home Member State principle as the Directive 2001/24/EC. Accordingly, the administrative or judicial authorities of the home Member State shall alone be empowered to decide on the implementation of reorganization measures or to decide on the opening of winding-up proceedings concerning an insurance undertaking, including branches established in other Member States.

After the implementation process, liquidation procedures in Finland may be opened only due to a decision made by the insurance undertaking’s shareholder’s meeting, the Insurance Supervisory Authority (ISA) or the competent Finnish court.

*Information requirements*

The Insurance Supervisory Authority is, in accordance with the provisions of the Directive, responsible for informing the supervisory authorities of all other Member States of the decision to adopt reorganization measures or the decision to open winding-up proceedings.

*Applicable law*

According to the Directive, an insurance undertaking is wound up or the reorganization measures applied in accordance with the laws, regulations and procedures applicable in the home Member State. The Insurance Companies Act has been amended respectively.

*Recognition of decisions*

The Act on Foreign Insurance Companies has been amended in accordance with the Directive. Thus, the decisions taken by authorities in another Member State regarding initiation of reorganization measures or winding-up proceedings will be fully effective in Finland in accordance with the legislation of that Member State without any further formalities.

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*Publication requirements*

The Directive's requirement on publication of a decision regarding initiation of reorganization measures or winding-up proceedings is taken into account in the revised Finnish legislation by ordering the pertinent administrator or liquidator to make such publication in the *Official Journal of the European Communities*.

*Treatment of insurance claims*

The Directive requires that Member States must ensure that insurance claims take precedence over other claims on the insurance undertaking either (a) with absolute precedence over any other claim, or, (b) with the only possible exception of (i) claims by employees arising from employment contracts and employment relationships, (ii) claims by public bodies on taxes, (iii) claims by social security systems, or (iv) claims on assets subject to rights *in rem*.

The Finnish legislators have concluded that the latter option should prevail. As a consequence, only a pledgee's claim regarding the pledged assets and claims arisen from the liquidation or bankruptcy proceedings will take precedence over insurance claims.

The aforesaid principle applies to both liquidation and bankruptcy. It is emphasized in the Bill, that it is important that the said principle shall prevail also in liquidation (and not only in bankruptcy) because the actual financial state of an insurance undertaking may be estimated too optimistically during liquidation procedures. Should not the said principle prevail, there could be a risk of premature payments to creditors with inferior claims.

This principle is a major amendment to the current Finnish legislation. Until now, mainly the policyholders with respect to life insurances and insurances against loss or damage have had such privilege.

However, the new legislation includes provisions, according to which not all insurance claims have similar precedence. The Finnish Parliament recognized a proposal, which was originally provided by the National Association of Insurance Companies and the Consumers' Insurance Office, stating that the consumers, housing companies and realty companies (if founded substantially for housing purposes) ought to have precedence over other insurance claims. This solution is in line with the Directive's wording, since the Directive does not regulate the precedence between different types of insurance claims.

It is not stated in the Bill, however, why the rest of the possible types of claims listed in the Directive did not take similar precedence in the Finnish legal system. The only reference to this question is a statement, according to which it is not the policy in the Finnish insolvency legislation to give precedence to claims arising from employment contracts, claims by public bodies on taxes or claims by social security systems.

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*Renunciation of special receivership*

The former legislation included a concept of special receivership. The said concept means that the assets, which cover *inter alia* the underwriting reserves and the unit-linked insurances, constitute a special receivership in winding-up proceedings. As the precedence will in the future concern all insurance claims and the entire assets of the insurance undertaking, this kind of special arrangements will not be needed any longer. It is very important to realize, however, that the special receiverships preceding the implementation will exist as before until the bankruptcy proceedings are terminated. In other words, past special receiverships will not be dissolved because of the implementation.

Due to the implementation process, the concept of special receivership will cease to exist. Hence, it is estimated that the administration of winding-up proceedings shall be somewhat lighter and less expensive in the future as there will be no longer two receiverships within one insolvency process.

### **3.2 Requisite provisions of the Directive already in force in Finland**

The Finnish authorities will already obligate the administrators of bankruptcy estates to inform known creditors who have their domiciles, normal places of residence or head offices in another Member State about reorganization measures that have been taken or initiated winding-up proceedings. As a consequence, the Directive's respective requirements are already met in Finland.

## **4 Implementation of the Directive 2001/24/EC on the Reorganisation and Winding up of Credit Institutions**

### **4.1 Essential amendments in the Finnish legislation**

The implementation of the directive 2001/24/EC (hereinafter "the Directive") will technically be carried out equal with the implementation of the directive 2001/17/EC; that is to say, no new acts will be established. The current relevant acts, most importantly, the Companies Act (734/1978), the Insurance Companies Act (1062/1979) and the new Bankruptcy Act, shall be amended in order to meet the requirements of the Directive.

As mentioned in the previous chapter, there are separate acts that deal with different types of credit institutions. The operations of commercial banks, cooperative banks and saving banks are each regulated by separate legislation. As a consequence, the Directive will be implemented by amending each of the aforesaid banking acts as well as The Intermission Act, The Credit Institutions Act (30.12.1993/1607) and The Act on the Operations of a Foreign Credit and Financing Institution in Finland (30.12.1993/1608).

*Home Member State principle*

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Due to the Directive, the so-called home Member State principle will, according to the Bill, be implemented in the pertinent acts. Accordingly, the administrative or judicial authorities of the home Member State shall alone be empowered to decide on the implementation of reorganization measures or to decide on the opening of winding-up proceedings concerning a credit institution, including branches established in other Member States.

*Information requirements*

The Directive requires that the administrative or judicial authorities of the home Member State shall provide information for the competent authorities of the host Member State with respect to their decision to open winding-up proceedings or to adopt any reorganization measure. As set forth in the Bill, the aforesaid banking acts shall thus include provisions, according to which the Finnish Financial Supervision Authority will be responsible for providing such information regarding winding-up proceedings. Respectively, The Intermission Act would enact that the Ministry of Finance is responsible for providing such information regarding initiation of reorganization proceedings as well as temporary intermissions of a banks operations.

The Directive enacts that the administrative or judicial authorities of the host Member State of a branch of a credit institution having its head office outside the Community shall, without delay, inform the competent authorities of the other host Member State in which the institution has set up branches of their decision to adopt any reorganization measure. However, no such provisions are, according to the Bill, planned to be included in the forthcoming legislation.

*Applicable law*

According to the Directive, a credit institution is wound up or the reorganization measures applied in accordance with the laws, regulations and procedures applicable in the home Member State. The Directive also includes an example list on issues governed by the laws of the home Member State. Although the aforesaid principle will be implemented in the banking acts, the example list shall be, according to the Bill, excluded. The policy of using explicit example lists in the written law is somewhat alien to the Finnish legal system. However, the said exclusion should not alter the interpretation of the pertinent provision.

*Recognition of decisions*

The Act on the Operations of a Foreign Credit and Financing Institution in Finland is proposed to be amended by enacting that the decisions taken by authorities in another Member State regarding initiation of reorganization measures or winding-up proceedings will be fully effective in Finland in accordance with the legislation of that Member State without any further formalities.

*Lodgements of claims*

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The Directive empowers any creditor who has his domicile, normal place of residence or head office in a Member State other than the home Member State to lodge his claim or submit observations relating to his claim in the official language of that other Member State, provided that such lodgement or submission bears heading “Lodgement of Claim” or “Submission of observations relating to claims” in the official language of the home Member State. In addition, the creditor may be required to provide a translation into that language.

With respect to the aforesaid, the pertinent languages in Finland are Finnish and Swedish. According to the Bill, the Finnish banking acts shall not, however, require a translation of a lodgement or submission into Finnish or Swedish. According to the new Bankruptcy Act, the administrator’s duty is to translate such documents. However, the translation costs can be deducted from the creditor’s claim.

It should be noted, however, that the special receivership represents all the policyholders as a collective and takes care of the lodgement on their behalf. Although the special receiverships will no longer be separated from the bankruptcy estate after the implemented legislation enters into force, the special receiverships already in existence will continue to exist until the relevant bankruptcy proceedings have been terminated.

### *Consultation requirements*

According to the Directive, the competent authorities of the home Member State must be consulted in the most appropriate form before the governing bodies of a credit institution make any voluntary winding-up decision. In the forthcoming legislation, such competent authority in Finland will be the Financial Supervision Authority. According to the Bill, the banking acts shall not, however, include provisions on consultation; only a prior notification of such decision is required.

### *Withdrawal of the authorisation*

According to the Bill, The Credit Institutions Act shall be amended in accordance with the Directive by enacting that the authorization of a credit institution shall be withdrawn if it is decided to initiate the winding-up proceedings.

## **4.2 Requisite provisions of the Directive already in force in Finland**

The Directive includes, according to the Bill, several requirements that are already met in the current Finnish legislation. Hence, such provisions in the Directive do not require any further measures to be taken by the Finnish legislators.

The Finnish authorities have already an obligation to inform known creditors who have their domiciles, normal places of residence or head offices in another

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Member State about reorganization measures that have been taken or initiated winding-up proceedings.

Furthermore, according to the current legislation, any creditor who has his domicile, normal place of residence or head office in another Member State shall have the right to lodge claims or to submit written observations relating to claims. Respectively, the Directive's requirement that the claims of all creditors whose domiciles, normal places of residence or head offices are in another Member State shall be treated in the same way and accorded the same ranking as claims of an equivalent nature which may be lodged by the creditors of the home member State, is already in force.

## 5 Conclusions

If EU Directives are not implemented into national law by the deadlines Member States themselves agreed, this creates an unlevelled playing field and harms the competitiveness of the EU economy as a whole. Therefore, the European Commission decided in January 2004 to refer Finland, together with Belgium, Greece, France, Luxembourg, the Netherlands, Sweden and the UK to the European Court of Justice for having not implemented Directive 2001/17/EC by the deadline.

Although behind schedule, the Directive 2001/17/EC concerning insurance companies has been implemented in the Finnish legal system and the pertinent legislation will enter into force on 15 May 2004. The outcome of proceedings in the European Court of Justice remains unclear as the Directive 2001/17/EC has been implemented just in the interim.

The Directive 2001/24/EC concerning credit institutions will most likely be implemented by June 2004. The fundamentals of the Finnish insolvency legislation have not substantially been altered during the process.

The Insurance Companies Act has been clarified with respect to priority regulations and administration proceedings, and the precedence system has been revised substantially.

The banking acts as well as other pertinent legislation will also be revised in order to improve the creditors' position within the European Economic Area as a whole.

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