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## *German Insolvency Reform – Introduction of Group Insolvency Proceedings (Konzerninsolvenzverfahren)*

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### **I. Executive Summary**

The reform, which was approved by the German Legislator on 9 March 2017 and which will come into force and effect shortly ("Reform"), has (newly) introduced provisions regarding German members of a group of companies becoming insolvent into the German insolvency code (*Insolvenzordnung*). The Reform does not conceptually deviate from the respective approach at the EU level.<sup>1</sup> The existing legal concept "one legal entity—one insolvency proceeding" also applies after the Reform. Moreover, the new provisions regarding group insolvencies are also strictly focused on procedural law with the aim of enhancing the effectiveness and coordination of independent insolvency proceedings by providing for (i) a group venue (*Gruppen-Gerichtsstand*), (ii) the possibility to appoint the same person as (group) insolvency administrator/receiver, and (iii) group coordination proceedings.

Given the rather limited rights and powers of the Group Coordinator under the Reform, a well prepared strategy and well-thought-out nomination of key positions will remain decisive for a successful restructuring.

### **II. Core Changes Due to the Reform**

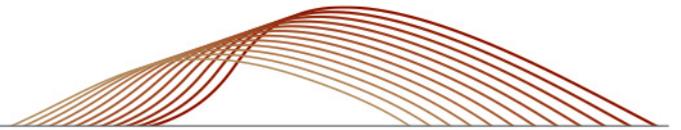
The key innovations of the Reform can be summarized as follows:

#### **A. Group Venue (*Gruppen-Gerichtsstand*)**

A member of a group of companies<sup>2</sup> can request that an insolvency court assumes jurisdiction over other members of the insolvent group of companies provided that the requesting entity (i) files an admissible application for the opening of insolvency proceedings and (ii) such entity is not of subordinate importance in the group.<sup>3</sup> The law provides for priority rules in case of conflict (whereas the biggest workforce is principally the decisive element) and sets forth the continued existence of the group venue even in cases in which the insolvency proceeding over the applying debtor are rejected, revoked or terminated.

#### **B. Same person (*Personenidentität*) to be appointed as a (group) insolvency administrator/receiver**

The Reform offers the possibility that insolvency courts appoint the same person as insolvency administrator/receiver for each of the insolvent entities (subject, among other criteria, to independence of the respective insolvency administrator/receiver and the absence of an apparent conflict of interest which cannot be overcome by a special insolvency administrator).



## C. *Group Coordination Proceedings*

To allow for a coordinated restructuring of the group, the Reform introduces procedural rules on the coordination of the insolvency proceedings of members of a group of companies (the "**Group Coordination Proceedings**"). This concept forms the largest part of the newly introduced provisions of group insolvency proceedings.

### 1. Cooperation Obligations

The Reform obliges the insolvency administrators/receivers, insolvency courts, and group creditor committees (*Gruppen-Gläubigerausschüsse*) to cooperate and to share necessary information in order to facilitate the respective insolvency proceedings.

### 2. Coordination Proceedings in detail

#### a. Coordination Court and appointment of a respective Coordinator

Subject to a respective application, the court having overall jurisdiction of the insolvent group may initiate coordination proceedings (*Koordinationsverfahren*) by appointing a Coordinator (*Verfahrenskoordinator*).

#### b. Coordinator

According to the Reform, the Coordinator should be independent from the (group) insolvency administrator/receiver and must not be a debtor itself (e.g., in so called "debtor in possession proceedings").

The Coordinator shall procure a coordinated approach regarding all respective insolvency proceedings in the group, if required by the (legitimate) interest of the involved creditors. The Reform especially enables the Coordinator to submit a Coordination Plan (*Koordinierungsplan*). The individual insolvency administrators/receivers are obliged to cooperate with the Coordinator and to provide the necessary information.

### 3. Coordination Plan (*Koordinierungsplan*)

The Coordinator is (primarily) entitled to submit a Coordination Plan. The Coordination Plan may contain everything which is expedient for the coordinated insolvency proceedings and in the interest of the involved creditors, including but not limited to (i) suggestions with the aim to restore the economic performance of certain debtors of the group, (ii) the settlement of intra-group disputes, and (iii) contractual agreements between the insolvency administrators/receivers.

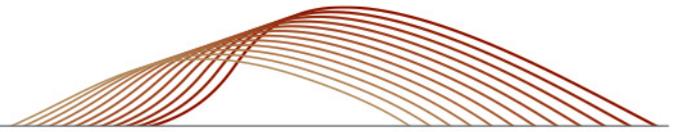
However, such Coordination Plan, which can form the basis of an insolvency plan for each insolvent entity, has no binding effect on the insolvency administrators/receivers of each insolvent entity of the group. In case of non-compliance/deviations from the plan, the insolvency administrators/receivers just have to justify their steps.

## III. **Brief Assessment of the New Group Insolvency Concept**

The newly introduced provisions may prove useful, especially with respect to the group venue and the Coordination Plan in well organized (and amicable) restructurings. However, given the lack of enforceable rights of the Coordinator, there appears to be little leeway in cases in which other insolvency administrators/receivers are not willing to support a joint effort.

Consequently, a well prepared strategy and a well-thought-out nomination of key positions will remain decisive for a successful restructuring.

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- <sup>1</sup> In this respect, reference is made to the Paul Hastings Stay Current <https://www.paulhastings.com/docs/default-source/PDFs/stay-current-new-eu-regulation-on-insolvency-proceedings.pdf>, chapter VI (*Insolvency Proceedings of Members of a Group of Companies*).
  - <sup>2</sup> Defined as legally independent entities with the center of main interest in Germany and which are (directly or indirectly) affiliated either by way of (i) dominant influence or (ii) uniform control.
  - <sup>3</sup> This is deemed not to be the case if (i) the balance sheet total (*Bilanzsumme*) of the applying debtor exceeds 15% of the balance sheet total and (ii) its turnover exceeds 15% of the combined turnover of the group while its workforce exceeds 15% of the combined workforce.

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