Insolvency Proceedings for Members of Company Groups: European Legislation is Nearing Completion

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Introduction

1 Work on a body of European law governing company group insolvencies has been proceeding apace and it appears likely that it will be completed in the spring of 2015. The ministers of justice of the Member States of the European Union on the “Justice” Council have given the green light for work to wrap up reform efforts on the European Insolvency Regulation and hence for a body of law governing insolvency of company groups in Europe as well.¹ In the wake of the political agreement achieved between the Council of Europe and the European Parliament,² the reformed European Insolvency Regulation is beginning to take shape and what new provisions on the insolvency of company groups are to be introduced is becoming more evident. The guest of honour has made a crucial contribution to the success of this project.

No Provisions on a Legal Venue in the Case of Company Group Insolvencies

2 It is at first glance surprising that all of the bodies involved in the reform of the European Insolvency Regulation have refrained from proposing or advocating a

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¹ For more details on this, see the press release issued by the European Commission on 4 December 2014: “The political agreement achieved today is an important step in our project of creating the best possible preconditions for growth and investment in Europe. We have successfully surmounted the challenges posed by the financial crisis and now intend to strengthen the internal market with new insolvency provisions.”

² Dossier 2012/0360 (COD), Document 15414/14 ADD 1, JUSTCIV 285, EJUSTICE 109, CODEC 2225.
legal venue for company group insolvencies. It would by the same token be conceivable at the European level as well to largely avoid the possible coordination problem by creating a legal venue for company group insolvencies. Possible solutions in deciding the court to have jurisdiction for all companies belonging to a group would be the head offices of the parent company, the position of the company in the group that is involved or the principle of priority. Wimmer, who advocates a modified priority principle, rightly points out that such a legal venue can only be established by petition because there is not a need for such an arrangement with each and every substance matter concerning a company group. He concedes an application right on the part of the governing institutions of the parent company, the insolvency administrator in the individual proceeding or the creditor. The solution proposed by Insol Europe goes in a similar direction. The authors would like to have the administrator in the main insolvency proceeding wield powers similar to the opening of a main and secondary insolvency proceeding in the event of the insolvency of a parent company and subsidiaries. At the same time, they suggest that Article 27 ff. of the European Insolvency Regulation be applied accordingly.

3 It is ultimately understandable that the Commission, European Parliament and Council of Europe refrained from proposing or advocating a legal venue for company group insolvencies. A proposal in which the focal point of attention is placed on the entire enterprise would largely ignore the legitimate interests of creditors because the centre of main interest (“COMI”) of their respective contractual partner would not automatically be discernible for them. Creditors would have to figure out the group structure in the event of a group insolvency. Small creditors would scarcely be in a position to do this. If on the other hand the head offices of the parent company were used, this would mean that a solvent parent company, but insolvent subsidiaries would be confronted with a foreign body of law applying to the proceeding of a group company even though it might be the only member of the group to file an application for the opening of an insolvency proceeding on its assets. Ultimately the introduction of a legal venue for company groups would not be expedient because secondary insolvency proceedings could still be opened at the COMI of the respective subsidiaries. The prerequisites for a branch office to be deemed to be present in accordance with Article 3, section 2 of the European Insolvency Regulation are automatically met there. The aim of uniform liquidation could therefore only be attained if the possibility to carry out secondary insolvency proceedings was waived. The compromise proposal from

3 P. Fazziani and M. Winkler, “La Proposa di Modifica del Regolamento sulle Procedure di Insolvenza” (2013) Diretto del Commercio Internazionale 141, assume that the committees refrained from instituting such arrangements for reasons relating to national sovereignty.
5 JurisPR-InsR 13/2012.
6 Kritisch Vallar, at 9.
7 Reinhart, NZI 2012, 304, 311.
8 Idem.
December 2014 does not take this path. In particular, it does not adjust secondary insolvency proceedings to the special needs of company group insolvencies. Even if the status of the main insolvency administrator is strengthened through the additional powers laid down in Articles 36 and 47E, this does not achieve the far-reaching centralisation of rights desired in the execution of the various insolvency proceedings in the hands of the main insolvency administrator.9

The Scope of the Provisions on the Insolvency of Company Groups

4 Neither the proposals of the Commission nor the compromise proposal from 4 December 201410 contain any arrangements regarding the scope of the provisions on the insolvency of company groups. While footnote 62 of the proposals forwarded by the Council of Europe still contain a suggestion that an additional ground establish that the provisions in the chapter on insolvency proceedings on the members of a company group should only be applied to the extent that proceedings have been opened on the assets of various members of the same company group in more than one member state, an explicit note along these lines is not to be found either in the numerous grounds for the compromise proposal (nos. 48 to 59) or in the proposed legal text. If one considers in this context that the June 2014 proposal of the Council of Europe that this be clearly established contained in footnote 62 was not taken into account in the political agreement from 4 December 2014 on the basis of document 15414/14 from 20 November 2014, it cannot be assumed that the provisions relating to the insolvency of company groups will only apply in the event that insolvency proceedings are opened in different member states. The lack of any explicit arrangement on the applicability of Article 56E ff. at the same time lead one to conclude that a transnational aspect could already lead to applicability of provisions on the insolvency of company groups. Advocates of this perspective could cite the ruling handed down by the European Court of Justice on 14 January 2014,11 according to which the regulation is not limited to substance matters in which at least two member states must be involved. If this aspect was sufficient, ground no. 50, clause 1,12 which in terms of its content largely corresponds to ground 20b of the Commission proposal, would be spurious.13 This arrangement is clearly based on the fundamental principle that the introduction of provisions on the insolvency of company groups presupposes the opening of at least two proceedings in different Member States. Otherwise the clarification provided in clause 1 to the effect that this must not restrict the possibility of opening all proceedings in a single member state would not make much sense. If solely a transnational aspect sufficed for application of the provisions on the

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9 cf. Verhoeven, ZInsO 2012, 2369, 2377.
10 Above note 2.
11 ZInsO 2014, 191 margin no.
12 Document 15414/14 (English version), at 18.
13 In effect also Thole, KTS 2014, 37.
insolvency of company groups, this ground would not have been necessary. Additional arguments for this perspective are to be found, for example, in Article 60, section 2, clause 3E and Article 62E. Under the former provision, the court that orders relief in accordance with the petition can require that the insolvency administrator take all measures under national law suited to protect the interest of creditors in the proceeding. Article 62E stipulates that in the case of petitions for the opening of a group coordination proceeding with courts of different Member States the courts petitioned earlier are to be declared to have jurisdiction instead of the courts petitioned later. Article 66, section 1E also stipulates “a court having jurisdiction in another Member State.” These arrangements at least indirectly indicate that the draft assumes that proceedings in different Member States will be coordinated.

**Cooperation and Communication Obligations**

5 As expected, the European Parliament and the Council of Europe agreed on the arrangements proposed by the Commission regarding cooperation and communication obligations of administrators and insolvency courts in their political agreement from 4 December 2014. This must be welcomed. These arrangements will contribute to making it possible for company group insolvencies to be steered in the direction of a solution serving overall interests if only due to the liability risk which administrators assume who attempt to escape the warranted coordination of proceedings. Special importance is to be attached here to information obligations. These can contribute to an avoidance of parallel proceedings. At the same time, it remains to be seen to what extent the provisions will prove to be effective in actual practice. Even if administrators and courts are willing to coordinate individual proceedings, there is a danger in view of the applicability of different bodies of law that cooperation and communication may possibly fail because the coordination measures that are taken or contemplated are not “compatible” with the “provisions applying to the individual proceedings” (cf. Article 56, section 1E).

6 The European Insolvency Regulation does not independently secure cooperation and information obligations in terms of legal liability. It thus remains left up to the law of individual states to deal with the issue of liability on the part of the administrator in the event of violation of obligations. It is not expected that German lawmakers will introduce an assignment of liability expressly referring to Article 56E ff. because Article 60 of the German Insolvency Code already establishes sufficient foundations for liability. This is because the cooperation and information

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14 “Where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group have agreed that a court of another Member State having jurisdiction is the most appropriate for the opening of group coordination proceedings, that court shall have exclusive jurisdiction.”
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obligations contained in the Commission proposal are to be comprised under the specific insolvency-related obligations of the regulation.

Introduction of a Coordination Proceeding

7 The coordination proceeding proposed by the European Parliament and based on the coordination proceeding (Article § 269 d. ff. Insolvency Code-E) in the draft act facilitating the execution of company group insolvencies submitted by the Federal German cabinet on 30 January 2014, which is reflected in detail in Article 61 ff. of the compromise proposal from 4 December 2014, is capable of creating the preconditions under procedural law for closer coordination of individual proceedings. The individual provisions rightly refrain from questioning the independence of coordinated individual proceedings, nor do they seek to consolidate these proceedings.

8 The provisions pursuant to the coordination proceeding offer the advantage that the parties involved are relieved of the conflictual task of first of all agreeing on one person to be assigned the task of steering and overseeing the entire process. Procedural precautions then ensure that the administrator has to address the proposals made within the framework of the coordination proceeding and may not stray away from these without good reason. They are for example above all subject to the obligation laid down in Article 70, section 1E to take into account the recommendations of the coordinating administrator and the group coordination plan. If an insolvency administrator fails to follow these recommendations, he or she must explain the reasons for deviating from such at the creditors’ assembly or before any other institution towards which he or she is held accountable under the law of the Member State involved. Insolvency administrators are consequently required to address and review the question as to whether the measures proposed within the framework of the coordination proceeding are likely to place the creditors in their proceeding in a better position than alternative strategies.

Regarding the Person of the Coordinating Administrator

9 By expressly ruling out the appointment of insolvency administrators that have been appointed for the members of the group as coordinating administrators, Article 70, section 2E takes into account the fact that the appointment of a neutral person can be expedient in terms of the group interests given the possibility of a struggle over assignment of assets between the individual insolvency proceedings. For the appointment it suffices for the coordinating administrator to be a person who is empowered under the law of a Member State to act as insolvency administrator. This alone would probably not be sufficient in cases of transnational company group insolvencies. It must be required, rather, that the respective persons have a mediating personality structure and can demonstrate experience in the area of mediation and major company group insolvencies. On top of this, excellent
English skills are also essential. To make possible a proper and effective decision in this selection, Article 63, section 3E therefore obligates the insolvency administrator filing the application to provide detailed statements on the suitability and qualifications of the coordinating administrator proposed.

Because it is to be assumed that arrangements pertaining to the coordination proceeding will be included in the European Insolvency Regulation, it is already foreseeable now that the proceeding will be significantly more expensive and will increase the administrative work required.\(^\text{15}\)

**Liability Issues**

10 While Article 42de (proposal 64) of the proposal submitted by the European Parliament still contained a special liability arrangement for the coordination proceeding, the compromise proposal from 4 December 2014 lacks any provision along these lines. This does not mean, however, that the violation of coordination obligations is not to be subject to sanctions. On the contrary, the principles proposed by the European Parliament, according to which administrators are to perform their obligations with due diligence and are to be held liable for damage that can be attributed and assigned to violations of their obligations, rather, will also probably help decide liability issues after the reformed European Insolvency Regulation enters into force. The question as to under which body of law action is to be taken for damages against the respective administrator is to be answered by the insolvency regulation. This is because this involves “legal disputes” that are directly related to the insolvency proceeding. Article 42, clause 2 of proposal for amendment no. 64 from the European Parliament also points in this direction. Under this proposal, the liability of the coordinating administrator is based on the law of the Member State in which the group coordination proceeding is opened.

\(^\text{15}\) Thole/Swierczok, ZIP 2013, 550, 556.