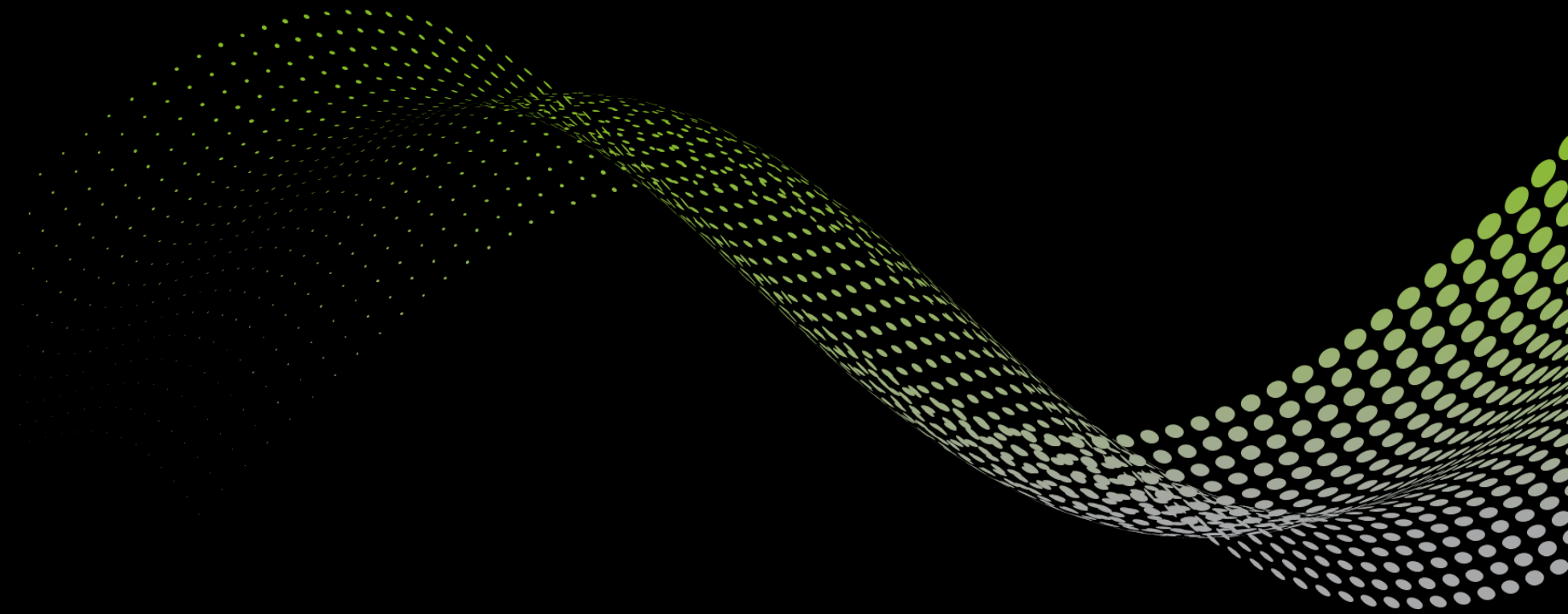


# Distressed M&A The Fine Art of the Bespoke Deal

Session II: Labour law options



**MAKING AN  
IMPACT THAT  
MATTERS**  
*since 1845*



Presentation and agenda

# Speakers

## Session II



**Frank Tschentscher, LL.M.**

Restructuring  
partner  
Attorney at Law  
Deloitte Legal

Phone: +49 40 378 538 0

Email: [ftschentscher@deloitte.de](mailto:ftschentscher@deloitte.de)



**Marcus Spangenberg**

Restructuring | Insolvency  
Senior Associate  
Deloitte Legal

Phone: +49 40 378 538 0

Email: [mshangenberg@deloitte.de](mailto:mshangenberg@deloitte.de)



**Elisa Ultsch**

Employment & Pensions  
Attorney at Law  
Associate  
Deloitte Legal

Phone: +494037853822

Email: [eultsch@deloitte.de](mailto:eultsch@deloitte.de)



**Dr Lars Hinrichs, LL.M.**

Employment & Pensions  
Lawyer | Specialist lawyer for labour law  
Partner  
Deloitte Legal

Phone: +49 40 3785 3828

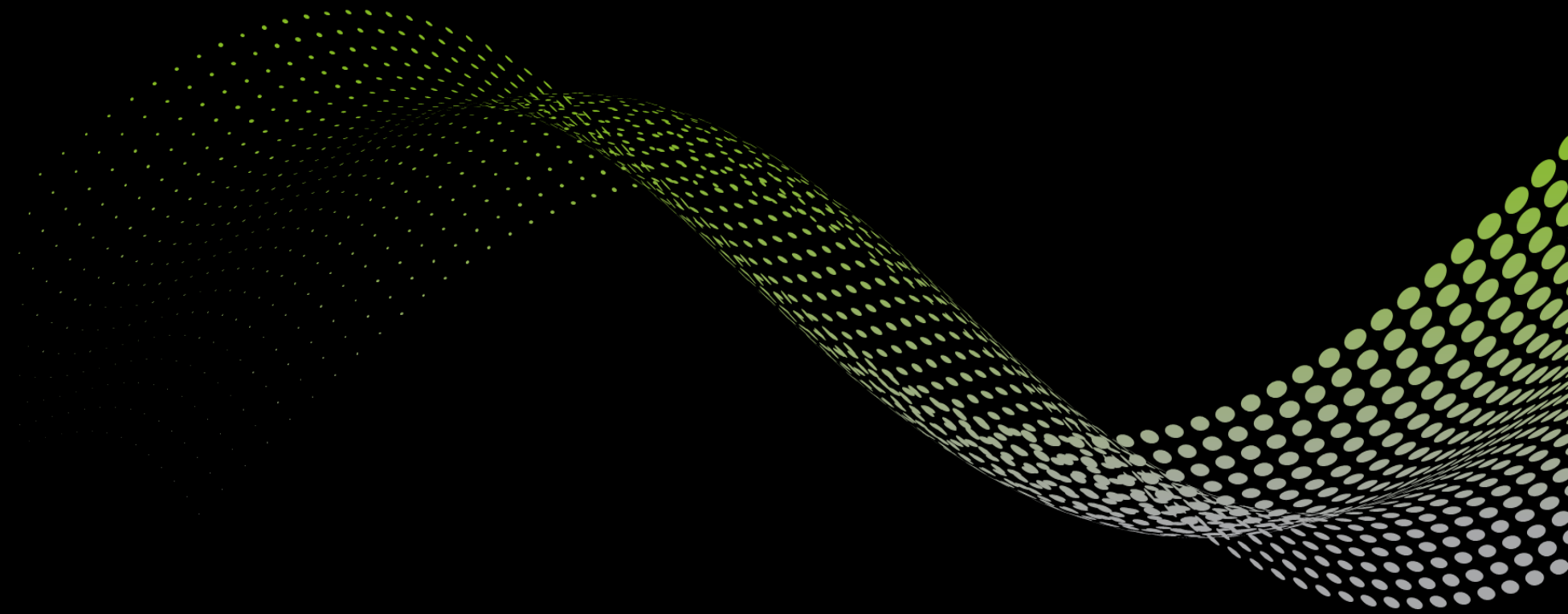
Email: [lhinrichs@deloitte.de](mailto:lhinrichs@deloitte.de)

# Agenda

## Session II

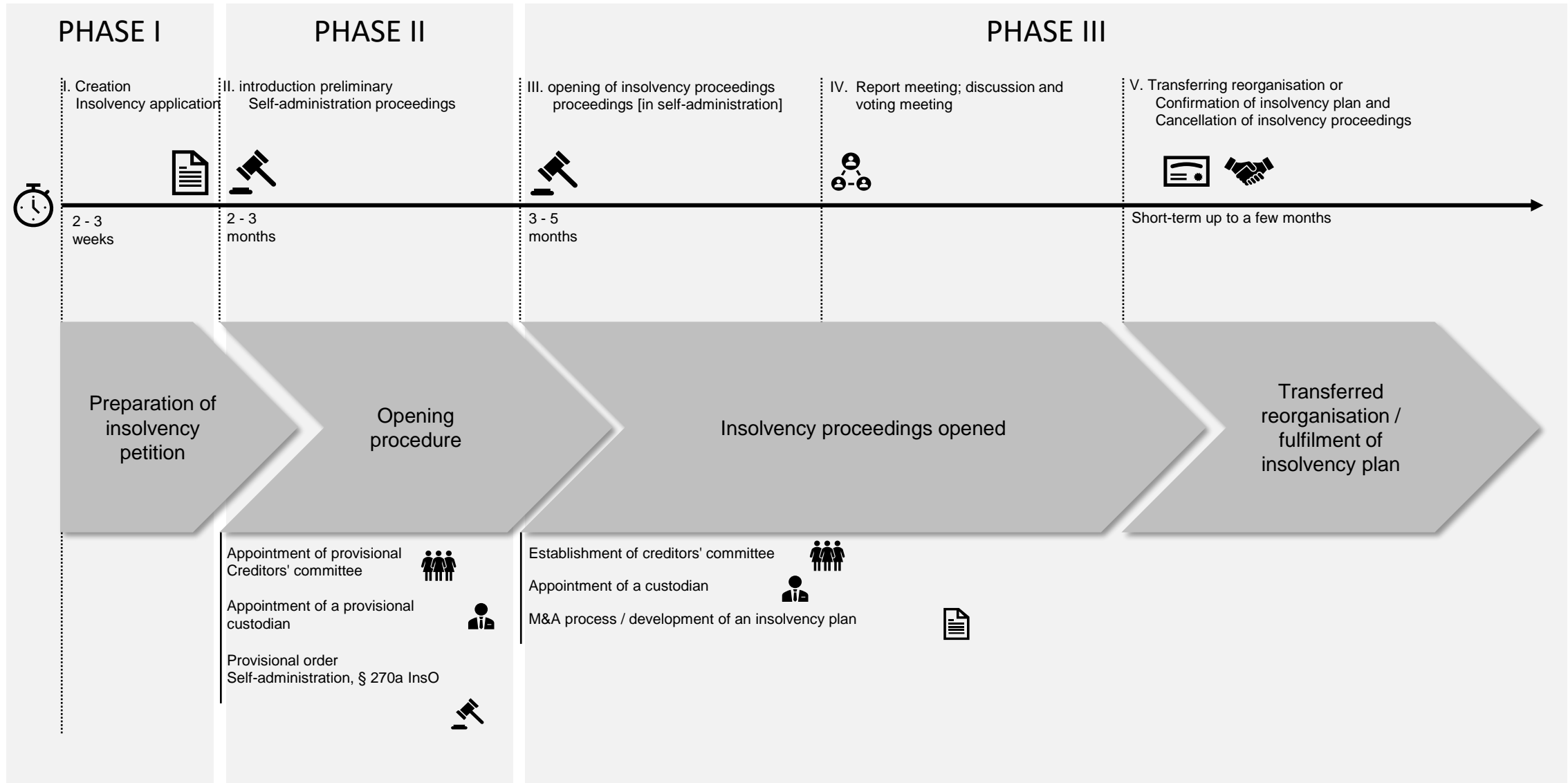
- I. Starting point
- II. The privileges of insolvency labour law
- III. Step plan: Acquisition of a (customised) company out of insolvency
- IV. Liability and changes to working conditions
- V. Key labour law regulations in the APA
- VI. Wrap-up: Challenges and success factors for a successful purchase out of insolvency
- VII. Q&A





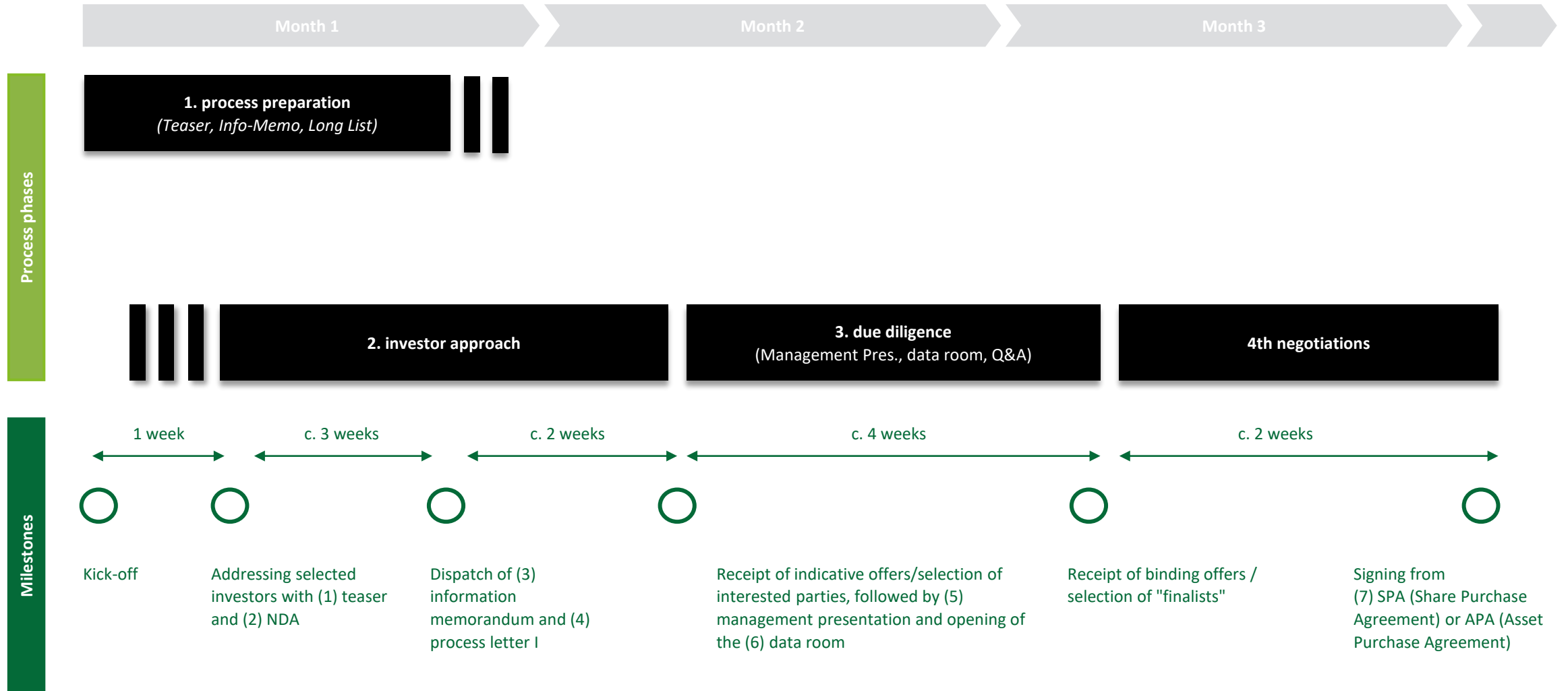
I. Starting point

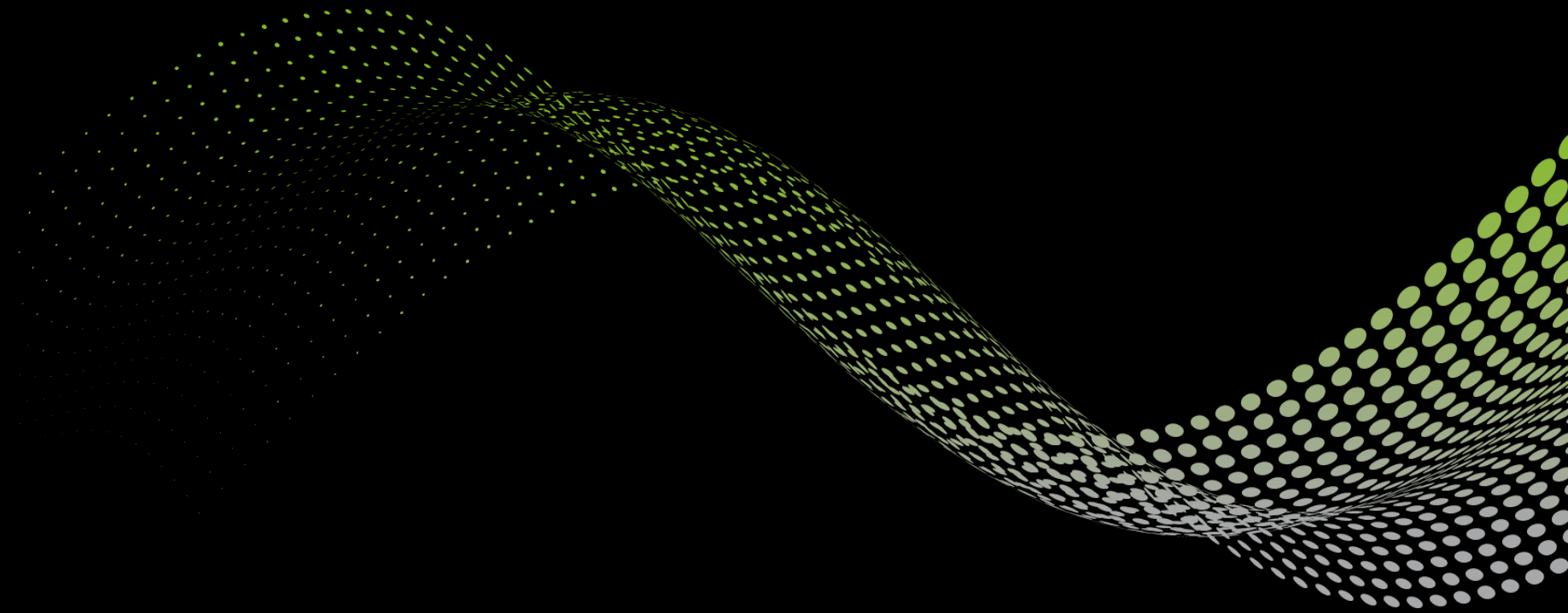
# Timeline



# Distressed M&A - Process structure

Sales processes from insolvency are extremely compressed and usually take no longer than 3-4 months





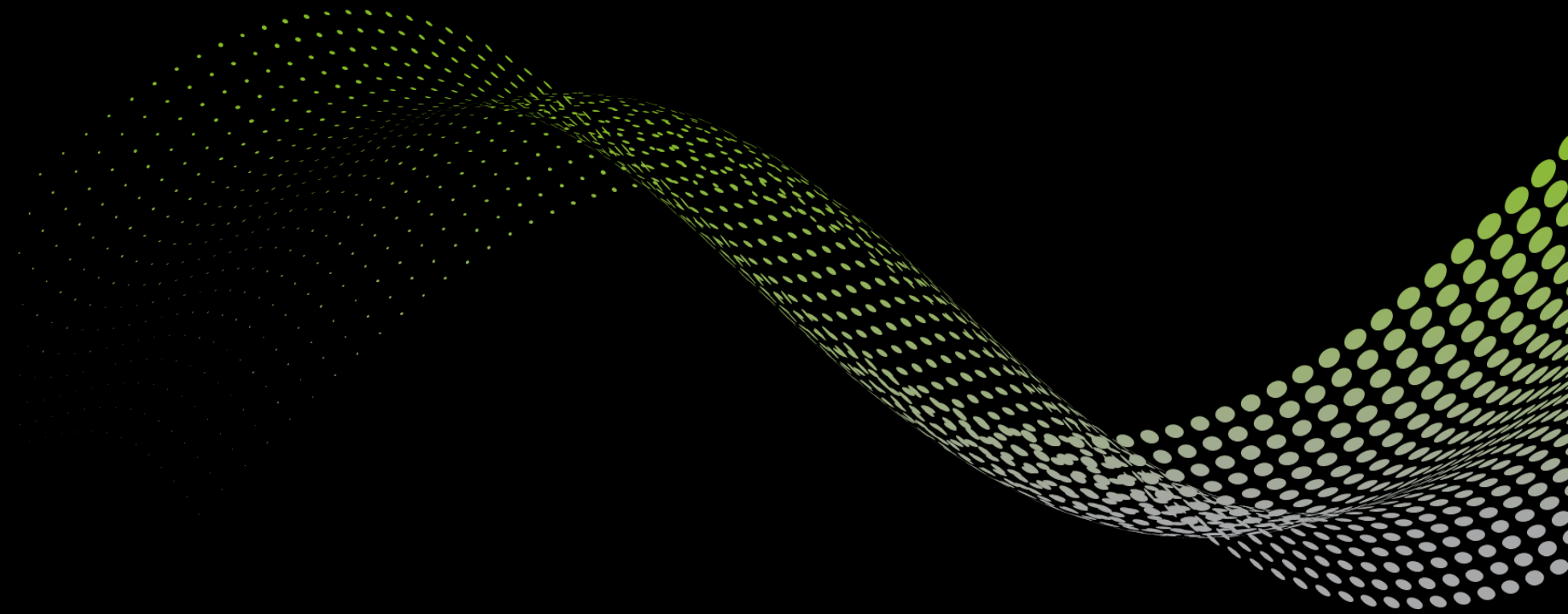
## II The privileges of insolvency labour law



# Options for structuring in the insolvency (labour) law **environment**

The privileges of insolvency labour law in restructurings with staff reductions

No.	Parameters	Realignment outside of insolvency	Realignment during insolvency
1	<b>Notice period (termination of the employment relationship)</b>	Contractual agreement/collective bargaining agreement in compliance with the statutory minimum notice periods of Section 622 BGB	Maximum of three months (Section 113 InsO); "premature loss" as insolvency claim ( § Section 113 sentence 3 InsO)
2	<b>Period of notice (cancellation of works agreements)</b>	Specific regulation in works agreement (often six-month notice period with effect from the end of the year)	Three months (§ 120 InsO)
3	<b>Accelerating the procedure for concluding the reconciliation of interests to implement the operational change</b>	Staged procedure with (often) final decision in/by the conciliation committee (Section 112 BetrVG); often requires the negotiation procedure to last several months	Court approval three weeks after the start of negotiations (§ 122 InsO)
4	<b>Legal requirements for labour law effectiveness of redundancies for operational reasons (reconciliation of interests with list of names)</b>	Facilitating regulations for employers in accordance with Section 1 (5) KSchG	On top: Further presumption effects for urgent operational requirements and more generous standard of review for social selection (Section 125 InsO)
5	<b>Volume of the social plan</b>	"To the limit of the employer's capacity" in accordance with the criteria of Section 112 (5) BetrVG	Absolute double cap: 2.5 monthly salaries, no more than one third of the assets are to be used (section 123 InsO)
6	<b>"Looking back": Liability for "old liabilities"</b>	Generally unrestricted in the legal framework of the statute of limitations ./ . forfeiture	Privileged liability for "old liabilities" from periods prior to the opening of insolvency proceedings



III. Step plan: Acquisition of a (customised)  
company out of insolvency

# Step plan: Acquisition of a (customised) company out of insolvency (part 1 of 2)

## Step 1: Drafting an acquisition concept in close consultation with the insolvency administrator

Acquirer concept

=

Binding concept for the continuation of the relevant business/operating unit with a reduced workforce

### Components of an acquisition concept

- Presentation of the current structure (including the reasons for the company's insolvency/crisis)
- Target company structure (including number of remaining jobs and remaining employees)
- Concretisation/operationalisation of the reasons for the reduction of individual jobs
- Determination of the employees to be dismissed and argumentation for an appropriate social choice under labour law for individual employees to be dismissed
- If necessary, use of the transfer company as a restructuring instrument



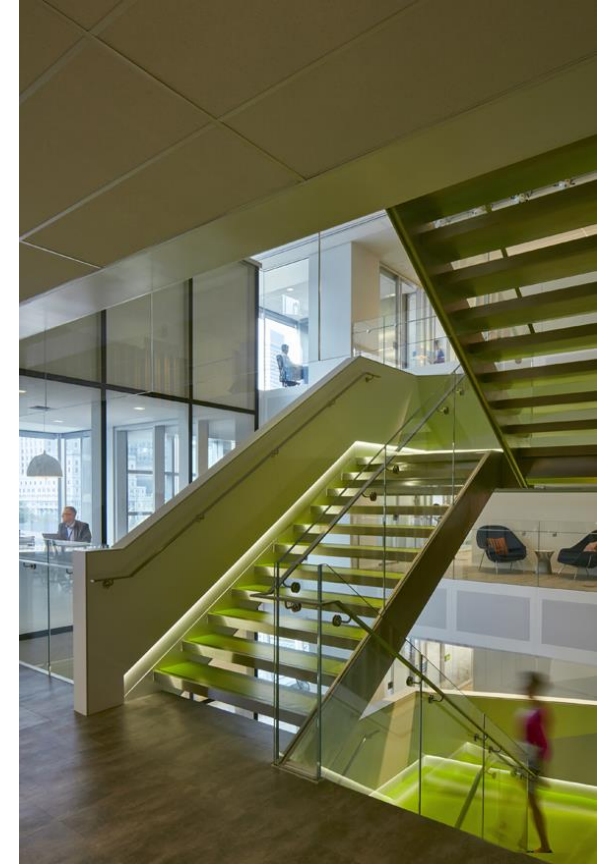
### Coordination with the insolvency administrator

- Final target operating structure (including the number of jobs retained) as a key (success) factor for a successful reorganisation of the company in the context of the insolvency proceedings
- Insolvency administrator negotiates and agrees reconciliation of interests and social plan for the acquisition concept with the works council

# Step plan: Acquisition of a (customised) company out of insolvency (part 2 of 2)

## Step 2 to 6: Realisation of the purchaser concept

<b>2</b>	<b>Informing the works council about the acquisition concept</b>
<b>3</b>	<b>Preparation of the negotiations according to step 4 (= coordination of reconciliation of interests/social plan with insolvency administrator)</b>
<b>4</b>	<b>Negotiation and conclusion of reconciliation of interests and social plan with works council</b>
<b>5</b>	<b>Mass redundancy notification to the employment agency</b>
<b>6</b>	<b>Termination of the employment relationship by the insolvency administrator [if transfer company is used: conclusion of tripartite contracts for the termination of the employment relationship with the insolvency debtor and establishment of the employment relationship with the transfer company]</b>



## Side view: Transfer company in the concrete transaction

<b>Legal/legal entity-related categorisation in transaction</b>	<ul style="list-style-type: none"> <li>• Independent legal entity (and in this respect independent of the insolvency debtor and NewCo)</li> <li>• "Needs-based selection" through a selection process agreed between the insolvency administrator and the purchaser</li> </ul>
<b>Financing</b>	<ul style="list-style-type: none"> <li>• short-time working allowance from the Federal Employment Agency and</li> <li>• by purchaser [directly via subsidy/mediately via purchase price (share)]</li> </ul>
<b>Establishment of employment relationship with transfer company</b>	<ul style="list-style-type: none"> <li>• By concluding a cancellation agreement with the insolvency debtor on the termination of the employment relationship and a fixed-term employment contract with the transfer company (term &gt; (maximum) three-month notice period in accordance with Section 113 InsO, maximum 1 year)</li> </ul>
<b>Remuneration/benefits of the selected employees</b>	<ul style="list-style-type: none"> <li>• Short-time working allowance (67% (employees with a dependent child)/60% (all other employees) of the last net salary in the employment relationship with the insolvency debtor) + top-up amount (in practice usually up to 80% of the last net salary); financing of the top-up amount via the purchase price).</li> <li>• Training budget as agreed in the social plan/allocation of the transfer company</li> </ul>



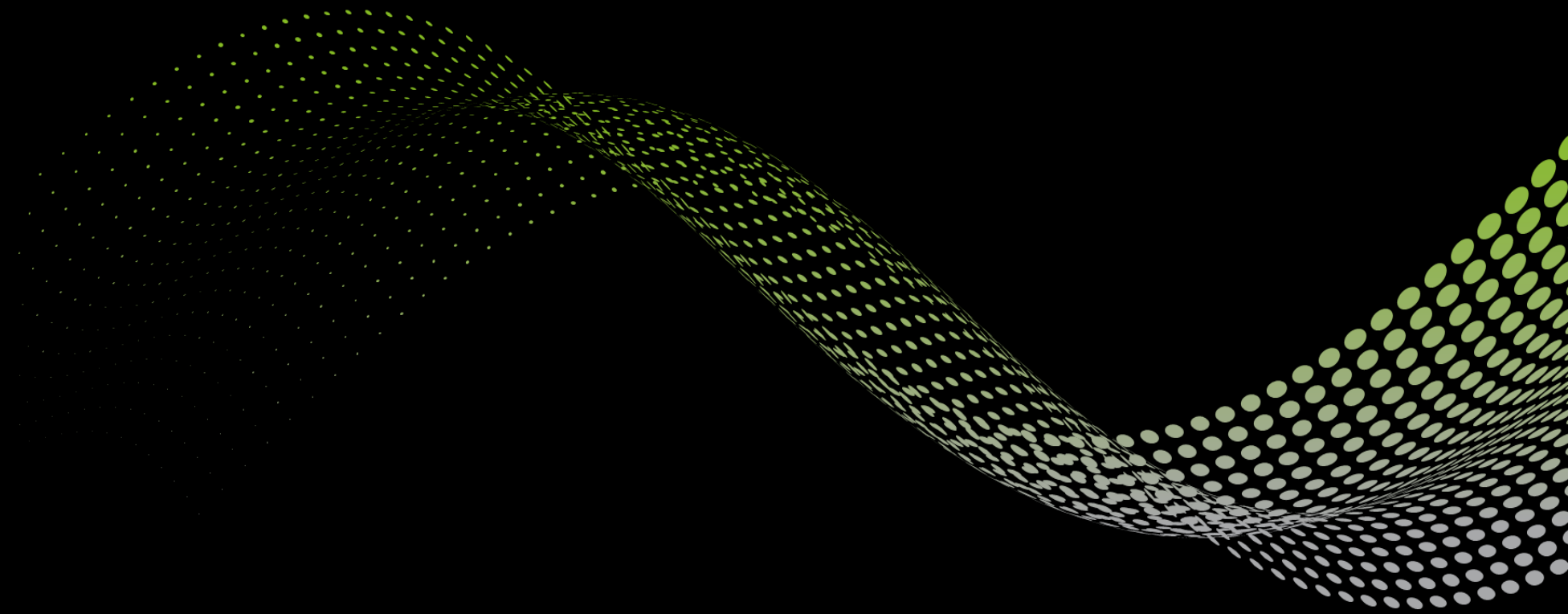
### Advantages of a transfer company in the specific transaction

#### For insolvency administrators/NewCo:

- Legal certainty with regard to the effective termination of the employment relationship with the insolvency debtor
- With a view to the duration of the fixed term > ordinary notice period in accordance with Section 113 InsO: Greater acceptance of the staff reduction in terms of personnel policy among affected employees
- With regard to financial resources (especially the amount of the top-up amount): Works council as multiplier for acceptance of the purchaser concept ("negotiation successes")

#### For employees in a transfer company:

- Extension of the status of an employment relationship subject to social security contributions with regard to the duration of the fixed term > Ordinary notice period in accordance with Section 113 InsO
- If the transfer company is technically good: Use of the transfer company's network to identify and establish a follow-up employment relationship
- With sufficient funding of the training budget: Targeted expansion of your own qualification profile



## IV. Liability and changes to working conditions

## "Looking back": Liability for "old liabilities" - occupational pension obligations

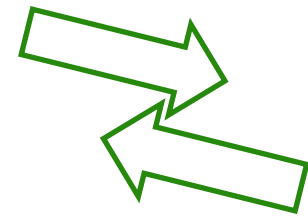
### Before the opening of insolvency proceedings | After the opening of insolvency proceedings

- |  |  |
|--|--|
| <ul style="list-style-type: none"><li>• vested entitlements are generally insolvency claims</li><li>• In the case of insolvency-protected occupational pension commitments, insolvency claims are linked to the PSV's statutory assumption of debt</li><li>• In the event of insolvency in self-administration: debtor warrant in the insolvency plan in favour of the PSV (Section 7 (4) sentence 5 BetrAVG) - by assuming the obligations ./ . financial settlement of the PSV</li></ul> | <ul style="list-style-type: none"><li>• Vested pension entitlements as part of the pension benefits to be paid by the acquirer after the end of the insolvency proceedings</li><li>• <i>Pitfall</i>: Ineffectiveness of a modification of the occupational pension commitment made before the opening of insolvency proceedings</li><li>• In individual cases: Closure of occupational pension commitments and settlement of entitlements earned after the opening of insolvency proceedings</li></ul> |
|--|--|

### (Partial) funding of obligations from occupational pension commitments: CTA

- CTA: Generally opening of insolvency proceedings as a security case - with regular termination of the administration trust relationship and subsequent settlement of the security trust relationship ⇔ Settlement with (pro-)active involvement of the PSV
- Status quo of the legal position of the beneficiary active employee after conclusion of the insolvency proceedings with continuation by the insolvency debtor ("CTA reloaded?")

# Change in working conditions



## Principle

§ Section 613a para. 1 sentence 1, 2 BGB:

*"If a business or part of a business is transferred to another owner through a legal transaction, the new owner shall assume the rights and obligations arising from the employment relationships existing at the time of the transfer. If these rights and obligations are governed by the legal provisions of a collective agreement or a works agreement, they shall become part of the employment relationship between the new owner and the employee and may not be changed to the detriment of the employee before the expiry of one year after the date of transfer."*

## Specific instruments for changing working conditions depending on the original legal source of the specific working condition

### Employment contract/operational exercise/total commitment

- Typical working conditions: (1) reduction of basic remuneration, (2) modification of variable remuneration (in each case primarily for non-executive employees), (3) reduction/cancellation of special payments (primarily if justified on the basis of company practice/overall commitment)
- Possible under individual law by amendment agreement / dismissal for operational reasons only within narrow limits (BAG: serious threat to the continued existence of the company) ↔ in the case of a risk-averse approach: Change through works agreement

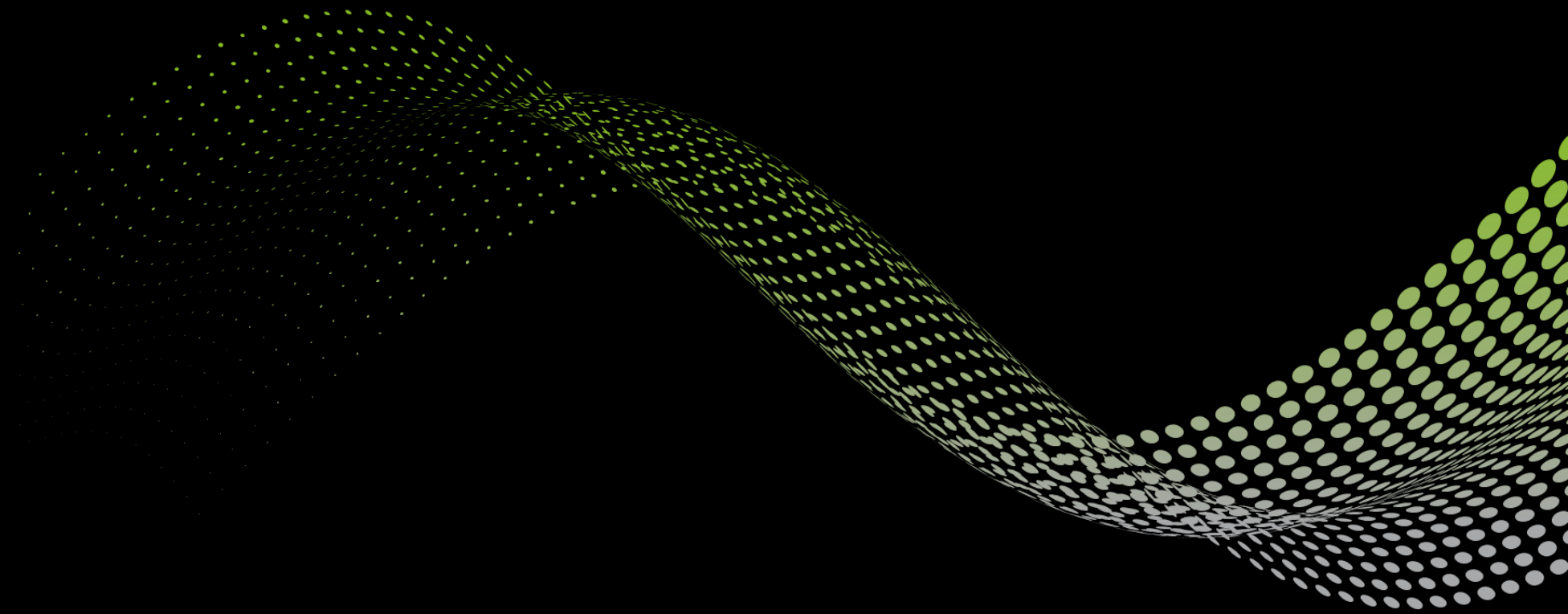
### Company agreement

- Typical working conditions: (1) modification of variable remuneration, (2) reduction/cancellation of special payments, (3) company pension commitments
- By works agreement (if the purchaser has a works council) ./.. By individual contract (if there is no works council) in compliance with Section 613a (1) sentence 2 BGB

### Collective labour agreement

- Typical working conditions: (1) Freezing/reduction of basic remuneration, (2) Extension of standard working hours (without separate remuneration), (3) Temporary suspension of special payments, (4) Reduction of occupational pension budget
- Amendment by collective agreement with the responsible trade union (usually as a company collective agreement)

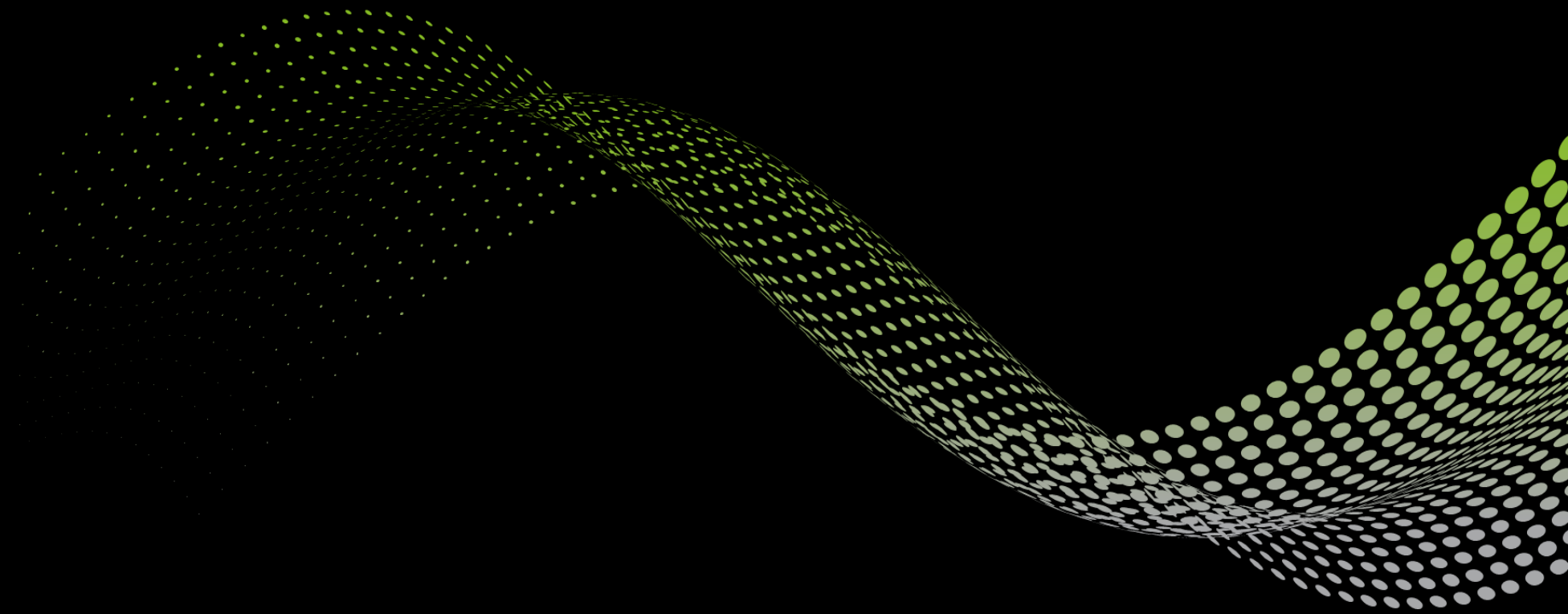




## V. Key labour law provisions in the APA

## Key labour law regulations in the APA

1. Delimitation of the group of persons of the insolvency debtor covered by the transfer of business pursuant to Section 613a BGB (including regulations on the distribution of risk with regard to "unwanted" employees of the insolvency debtor)
2. Rules on the specific implementation of the restructuring (including rules on risk and cost allocation in relation to the individual restructuring steps, including cost allocation in the event of termination disputes)
3. If a transfer company is used in the restructuring: Determination of the financing parameters, top-up payments and their financing
4. Regulations on the status quo of individual working conditions (e.g. occupational pension benefits)
5. Regulations on the delimitation of liability (taking into account Section 613a (2) BGB in the insolvency law environment)
6. Regulations on the implementation of the notification pursuant to Section 613a (5) BGB and on the distribution of risk with regard to the further implementation of the employment relationship of employees who object to the transfer of the employment relationship to the acquirer pursuant to Section 613a (6) BGB
7. Closing conditions: (1) Conclusion of reconciliation of interests and social plan and declaration of the dismissals of the employees affected by the staff reduction (in the case of a transfer company model, possibly with a condition precedent of the minimum number of termination agreements to be concluded, (2) Conclusion of notification in accordance with Section 613a (5) BGB
8. Guarantees: As a rule, only limited for labour law risks due to the insolvency environment (typically exclusion of individual risks purchase price adjustment); in individual cases (1) completeness of the group of persons covered by Section 613a BGB, (2) completeness of relevant working conditions



VI Wrap-up: Challenges and success factors for a successful purchase out of insolvency

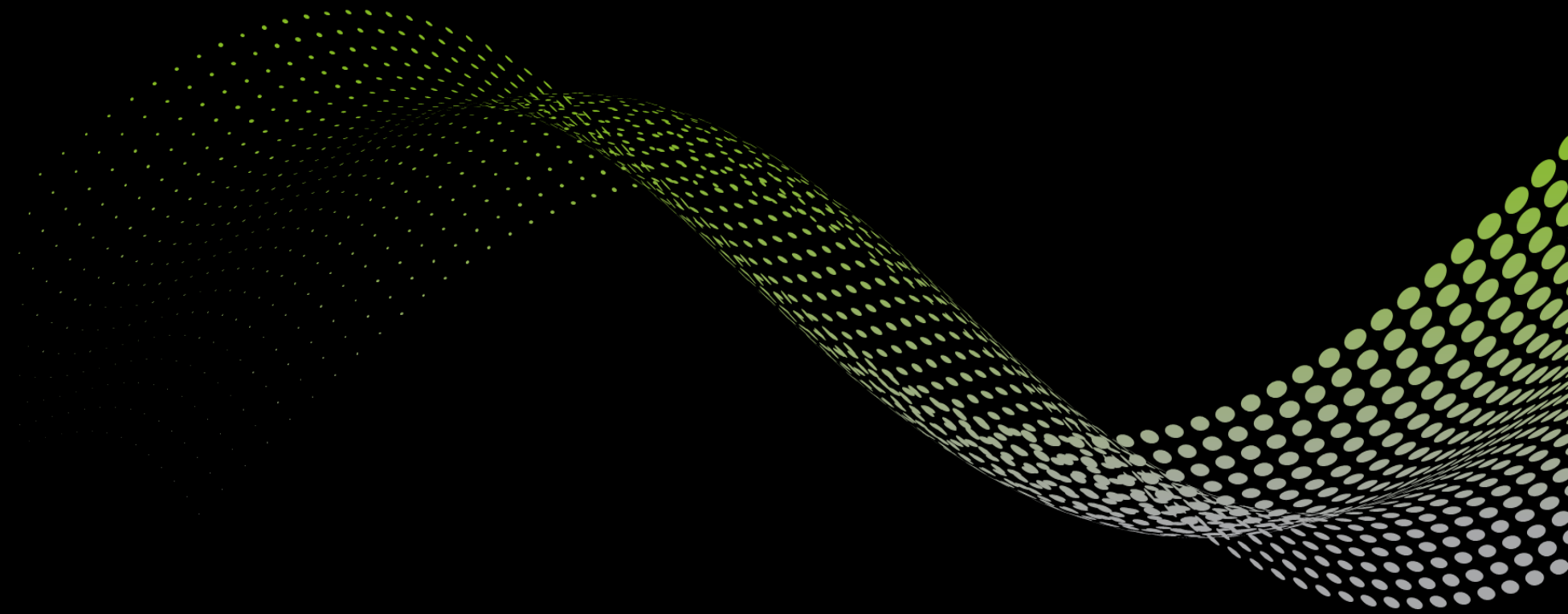
# Challenges and success factors when buying a company out of insolvency

## The challenges

- Robust management decision to implement the restructuring measures
- Compliance with the mandatory legal framework conditions: statutory participation rights of the works council, which require careful coordination and (necessary) transparency regarding operational changes
- Any employees to be dismissed must be properly identified
  - (i) by department and
  - (ii) in accordance with the statutory social selection criteria
- Rapid negotiation of an interest and social plan with the works council
- Avoidance of legal disputes under labour law
- If necessary, (partial) reorganisation of remaining departments and transferred employees

## Success factors

- **Structured acquisition concept** for the implementation of the management decision
- **Close cooperation with insolvency administrator and works council** to ensure transparency regarding operational changes
- **Prompt preparation of the reconciliation of interests and social plan negotiations with the works council**
- **Careful and coordinated (internal and external) communication for orderly implementation; if the transfer company is used as a restructuring instrument, dismissed employees must be convinced to transfer to the transfer company with effect from the effective date (and thus avoid the transfer of their employment relationship to the acquirer)**
- **Strong support for core functions to ensure business continuity**



VII Q&A



**Thank you very  
much**  
for your attention

# Appendix

# Step plan: Acquisition of a (customised) company out of insolvency (part 2 of 2)

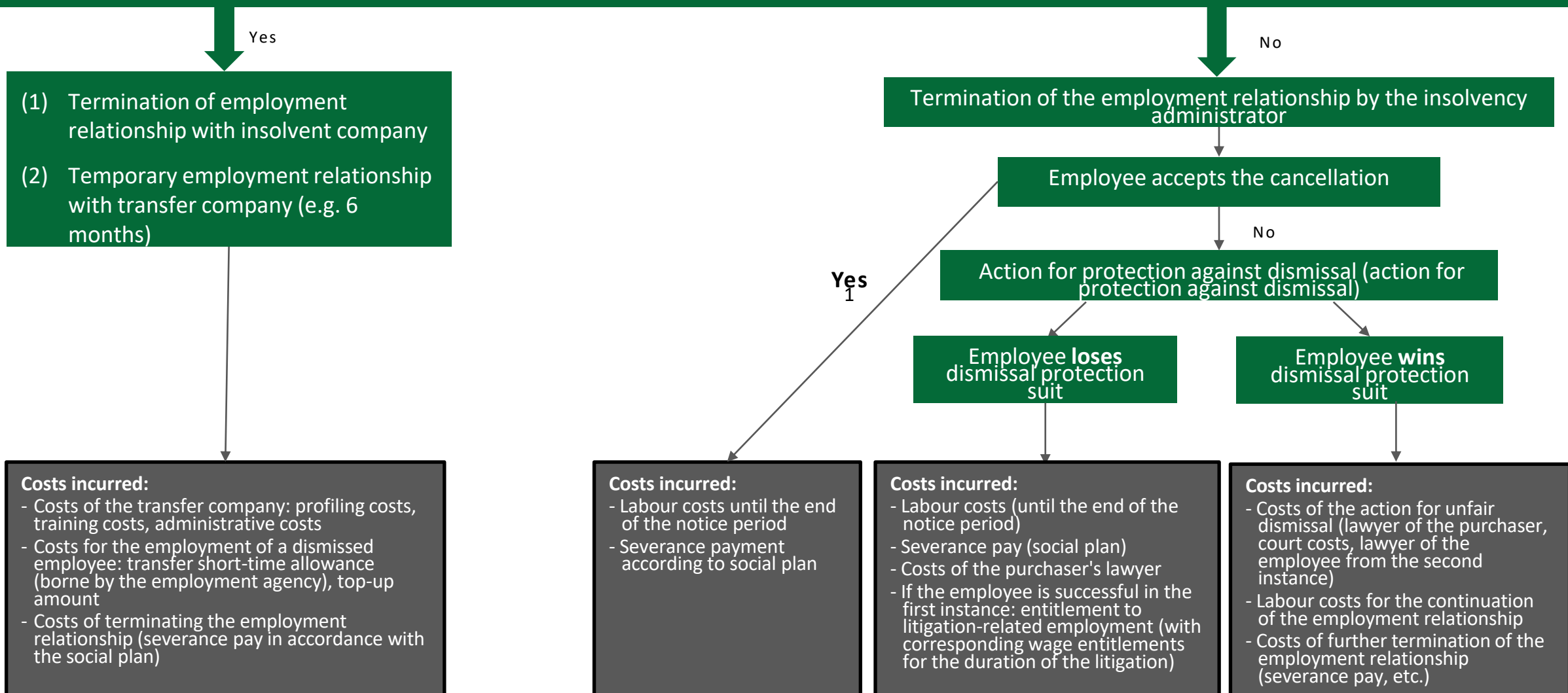
## Step 2 to 6: Realisation of the purchaser concept

2	<b>Notification of the works council about the acquisition concept</b>	→	Enabling proper preparation for negotiations on the reconciliation of interests and social plan
3	<b>Preparation of the negotiations according to step 4 (= coordination of reconciliation of interests/social plan with insolvency administrator)</b>	→	<ul style="list-style-type: none"><li>• <b>Reconciliation of interests</b> includes individual restructuring measures to achieve the final target company structure (including job cuts)</li><li>• <b>Social compensation plan</b> regulates severance payments/further compensation payments (if any) to employees</li></ul>
4	<b>Negotiation of reconciliation of interests and social plan with works council</b>	→	<ul style="list-style-type: none"><li>• Typically 3-5 rounds of negotiations</li><li>• Depending on the degree of unionisation of the employees: Representatives of the respective trade union can participate in the negotiations or agree relevant provisions on the reconciliation of interests and the social plan with the works council.</li></ul>
5	<b>Mass redundancy notification to the Federal Employment Agency</b> !!! Obtain the consent of the works council in advance for dismissals!!!	→	<ul style="list-style-type: none"><li>• Mass dismissal notification and involvement of the works council = formal prerequisite for effective dismissal of employees (who <u>do not</u> accept the offer to conclude a fixed-term employment contract with the transfer company).</li><li>• The consent of the works council is typically included/regulated in the reconciliation of interests.</li></ul>
6	<b>Termination by the insolvency administrator and Transfer of jobs to transfer company/to NewCo</b>	→	<ul style="list-style-type: none"><li>• <i>If a transfer company has been set up:</i> offer to terminate the employment relationship with the insolvent company and conclusion of the employment relationship with the transfer company → Employees must be given at least one week to (decide on) accept the offer</li><li>• Dismissal of employees who did not accept the offer of employment with the transfer company.</li></ul>



# Cost scenarios when using the transfer company: Dependent on the (re-)actions of the employees

**Offer of tripartite agreement with termination of the employment relationship and conclusion of a fixed-term employment relationship with the transfer company:  
Employee accepts offer**



# Deloitte Legal

## Your contact



**Frank Tschentscher, LL.M.**  
Restructuring  
partner  
Attorney at Law  
Deloitte Legal

Phone: +49 40 378 538 0  
Email: [ftschentscher@deloitte.de](mailto:ftschentscher@deloitte.de)



**Dr Lars Hinrichs, LL.M.**  
Employment & Pensions  
Lawyer | Specialist lawyer for labour law  
Partner  
Deloitte Legal

Phone: +49 40 3785 3828  
Email: [lhinrichs@deloitte.de](mailto:lhinrichs@deloitte.de)



**Elisa Ultsch**  
Employment & Pensions  
Attorney at Law  
Associate  
Deloitte Legal

Phone: +494037853822  
Email: [eultsch@deloitte.de](mailto:eultsch@deloitte.de)

# Experience the future of law, today

Experience the future of legal advice now

## Deloitte Legal, that is

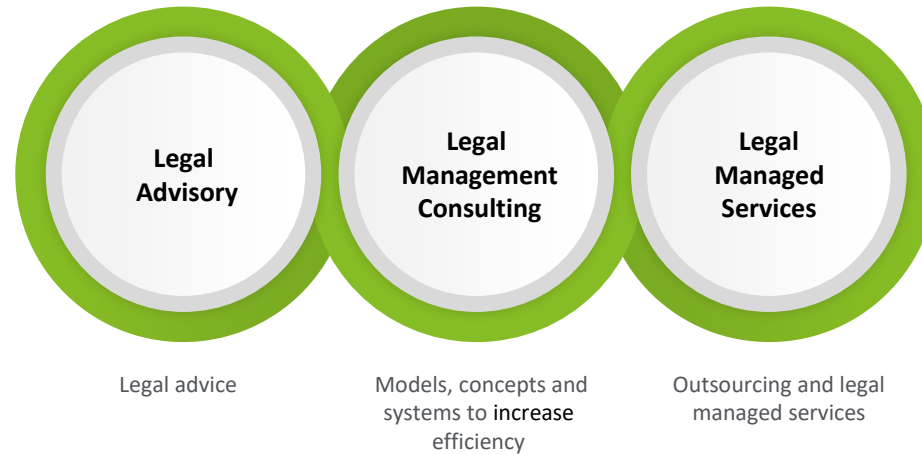
more than **2.500** Lawyers  
in **75+** Countries



**who work closely together**  
across national borders and together with  
other Deloitte business units

## Services from Deloitte Legal

Our three overlapping service areas enable us to advise our clients when and where needed and in the most suitable form to realise their visions.



## We create (added) value

As part of the Deloitte global network, Deloitte Legal works with a wide range of other specialisms to provide multinational legal solutions and globally integrated service:



**in harmony**  
with your company-wide vision



**customised**  
for your business units and branches



**technology-supported**  
for improved co-operation and transparency

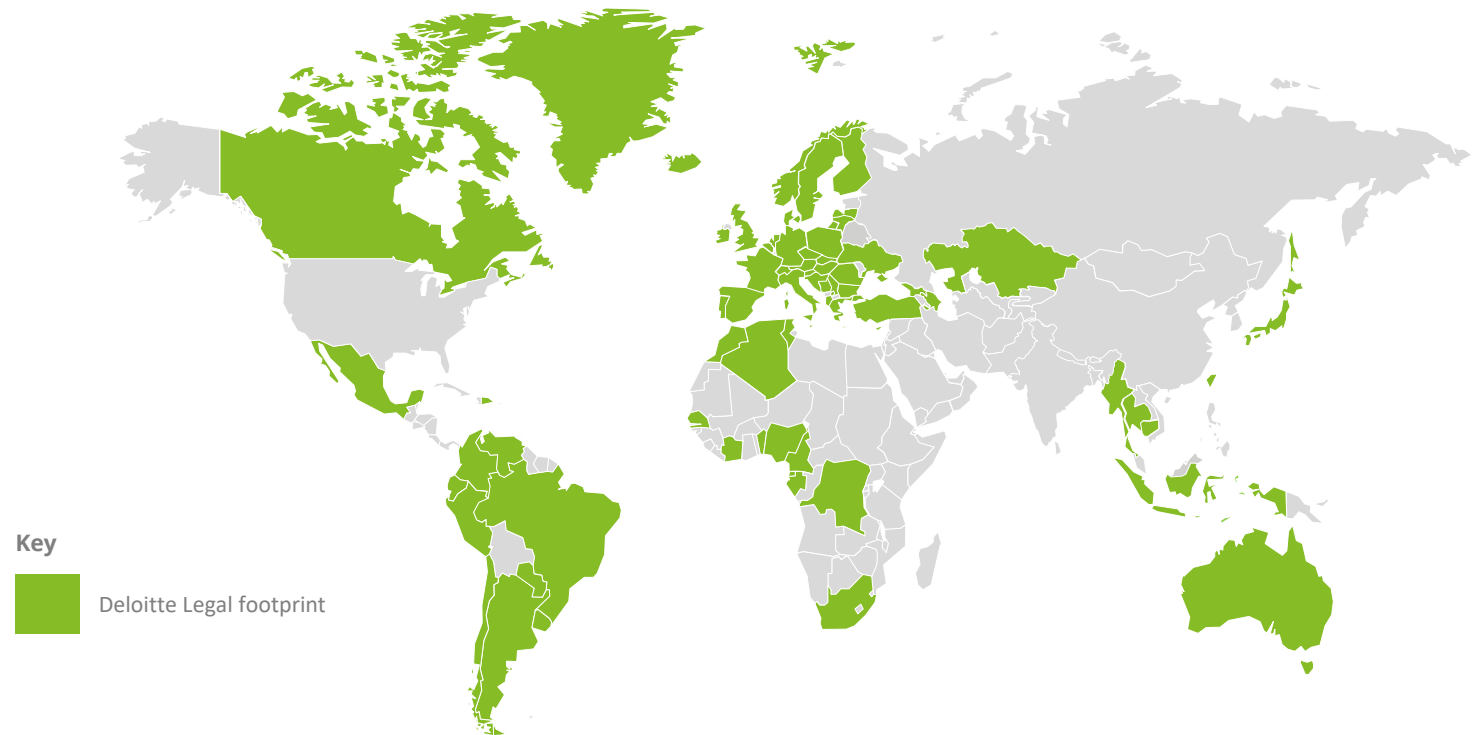


**harmonised**  
to your regulatory requirements

# Deloitte Legal has a strong global presence

It can be very challenging to coordinate a large number of legal advisors around the world without losing sight of individual aspects.

As one of the world's leading legal consultancies, Deloitte Legal helps you overcome challenges and realise your vision by being your single point of contact for your global legal needs.



## Deloitte Legal practices

- |               |                        |                          |                 |                  |                    |
|---------------|------------------------|--------------------------|-----------------|------------------|--------------------|
| 1. Albania    | 15. Chile              | 29. Gabon                | 43. Kazakhstan  | 57. Peru         | 71. Thailand       |
| 2. Algeria    | 16. Colombia           | 30. Georgia              | 44. Kosovo      | 58. Poland       | 72. Tunisia        |
| 3. Argentina  | 17. Costa Rica         | 31. Germany              | 45. Latvia      | 59. Portugal     | 73. Turkey         |
| 4. Australia  | 18. Croatia            | 32. Greece               | 46. Lithuania   | 60. Romania      | 74. Ukraine        |
| 5. Austria    | 19. Cyprus             | 33. Guatemala            | 47. Malta       | 61. Senegal      | 75. Uruguay        |
| 6. Azerbaijan | 20. Czech Rep.         | 34. Honduras             | 48. Mexico      | 62. Serbia       | 76. United Kingdom |
| 7. Belgium    | 21. Dem Rep of Congo   | 35. Hong Kong SAR, China | 49. Montenegro  | 63. Singapore    | 77. Venezuela      |
| 8. Benin      | 22. Denmark            | 36. Hungary              | 50. Morocco     | 64. Slovakia     |                    |
| 9. Bosnia     | 23. Dominican Republic | 37. Iceland              | 51. Myanmar     | 65. Slovenia     |                    |
| 10. Brazil    | 24. Ecuador            | 38. Indonesia            | 52. Netherlands | 66. South Africa |                    |
| 11. Bulgaria  | 25. El Salvador        | 39. Ireland              | 53. Nicaragua   | 67. Spain        |                    |
| 12. Cambodia  | 26. Equatorial Guinea  | 40. Italy                | 54. Nigeria     | 68. Sweden       |                    |
| 13. Cameroon  | 27. Finland            | 41. Ivory Coast          | 55. Norway      | 69. Switzerland  |                    |
| 14. Canada    | 28. France             | 42. Japan                | 56. Paraguay    | 70. Taiwan       |                    |



Deloitte Legal refers to the legal practices of Deloitte Touche Tohmatsu Limited member firms, their affiliates or partner firms that provide legal services.

This publication contains only general information which is not intended to address the specific circumstances of any particular case and is not intended to form the basis of any commercial or other decision. Neither Deloitte Legal Rechtsanwaltsgesellschaft mbH nor Deloitte Touche Tohmatsu Limited, its member firms or their affiliates (collectively, the "Deloitte Network") are providing professional advice or services by means of this publication. None of the member firms of the Deloitte Network is responsible for any loss of any kind suffered by any person in reliance on this publication.

Deloitte refers to Deloitte Touche Tohmatsu Limited ("DTTL"), a private company limited by guarantee, its network of member firms and its affiliates. DTTL and each of its member companies are legally autonomous and independent. DTTL (also known as "Deloitte Global") does not itself provide any services to clients. A more detailed description of DTTL and its member firms can be found at [www.deloitte.com/de/UeberUns](http://www.deloitte.com/de/UeberUns).

Deloitte provides auditing, risk advisory, tax advisory, financial advisory and consulting services to companies and institutions from all sectors of the economy; legal advice is provided in Germany by Deloitte Legal. With a global network of member firms in more than 150 countries, Deloitte combines outstanding expertise with first-class services and supports clients in solving their complex business challenges. Making an impact that matters - for Deloitte's approximately 415,000 employees, this is both a shared mission statement and an individual aspiration.