Insolvency proceedings from a sustainability perspective

Linna, Tuula

2019-06

Linna , T 2019 , ' Insolvency proceedings from a sustainability perspective ' , INSOL International Insolvency Review , vol. 28 , no. 2 , pp. 210-232 .
https://doi.org/10.1002/iir.1345 , https://doi.org/10.1002/iir.1345

http://hdl.handle.net/10138/342327
https://doi.org/10.1002/iir.1345

unspecified
publishedVersion

ARTICLE

Company Purpose in the Context of Business Sustainability and Insolvency Proceedings

TUULA LINNA: PROFESSOR OF PROCEDURAL LAW AT THE UNIVERSITY OF HELSINKI (FINLAND)*

The organizational and operational company purposes of the debtor company terminate in liquidation proceedings. In addition, the non-financial sustainability elements vanish in a piecemeal selling. Through a selling as a going concern, the operational company purpose and sustainability elements may be transferred to a byer company. In restructuring proceedings, both the organizational and operational company purposes remain, but the shareholder primacy shifts to a creditor priority. When choosing between liquidation and restructuring proceedings, there are two tests: the viability test and the best-interests-of-creditors test. In these tests, all obligatory non-financial sustainability elements, such as environmental requirements laid down in the law, must be considered. Voluntary non-financial sustainability investments for implementing the company operational purpose are allowed also during the restructuring plan if they benefit the creditors.

Keywords: Company purpose, sustainability, corporate social responsibility (CSR), insolvency, restructuring, liquidation proceedings, viability test, best-interests-of-creditors test (BIT)

1. INTRODUCTION

Over the years, many company law studies have focused on considering the definition of company purpose. In this article, the concept of company purpose is being analyzed in the contexts of business sustainability and insolvency proceedings, that is, when a company has ended up in financial troubles and faces an imminent insolvency.

The term of 'company' refers here to a limited liability company that is a common form of a legal person.[1] The format of limited liability company serves as the judicial organization or structure for business operations.[2]

In this piece, the starting point is the purpose-based approach of general corporate law.[3] The basic concept is the notion that a company is a judicial person with a purpose and that purpose benefits shareholders and other equity holders. The company purpose must always be pursued lawfully. The duty of the directors and other fiduciaries is to enable the corporation to achieve its purpose.[4]

Company laws provide rules for the decision-making, management and liabilities in a company, thus forming a legal framework ('shell') for the operations. The framework fulfils an *organizational company purpose*.[5] The purpose of a company shell is normally to perform as a *long-term* legal organization for operations. Usually, the company shell is not meant to be a project-based or otherwise time-limited organization. However, there are exemptions, and a company may be founded to complete a certain project and to wind down after finishing said task.

In addition to the organizational company purpose, a company has an *operational company purpose*. It may be based on legislation stating that the purpose of a company is to generate profits for shareholders. The company law legislation may also acknowledge other purposes[6] or purposes provided in the Articles of Association. Accordingly, the company exists and operates for all these purposes.[7] The relationship between the organizational company purpose and the operational

* Email: tuula.linna@helsinki.fi.

1 In this paper, the focus is thus not on 'corporate law' as a whole, which encompasses a wide range of entities in addition to companies, such as cooperatives, voluntary associations and partnerships.

2 The reason for establishing this kind of a company may be, inter alia, tax issues or the shareholders' limited debt liability. For the 'marriage' of the corporate form and limited liability, *see* e.g., Beate Sjåfjell & Mark Taylor, *Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose,* 13(3) Int'l & Compa. Corp. L. J. 40, 46–48 (2019), https://ssrn.com/abstract=3444050.

3 For the purpose-based approach, *see* Asaf Raz, *A Purpose-Based Theory of Corporate Law*, 65(3) Vill. L. Rev. 523 (2020), https://digitalcommons.law.villanova.edu/vlr/vol65/iss3/2.

4 *Ibid.*, at 529, 530, 534.

5 In some cases, when the engaged operations stand in conflict with the organizational company purpose – especially when indicating abuse of the framework – the company as a legal form may be set aside through a piercing of a corporate veil. In this sense, a company shell has its own purpose that should be used in the right (acceptable) way.

6 Comparative company law research shows that, in many countries, in company laws, shareholder profits is but one function of companies, and across jurisdictions, there are other purposes to consider, including employees and the environment. Sjåfjell & Taylor, *supra* n. 2, at 50–51, 66. The authors are convinced that without putting company law on a normative foundation of sustainability, the drive for the maximization of returns to shareholders will continue to be the decisive element in corporate decision-making. *See also* Ramachandran Ramakrishnan, *Mandatory CSR – Can It Help Indian Firms?* (8 Dec. 2017), https://ssrn.com/abstract=3497350. He notes that the best model for CSR is voluntary compliance with sensible social codes.

7 A multi-purpose company may, in addition to generating profits, afford, e.g., financial support for scientific research in a certain field. Many terms that have been used, such as mission-led business, social entrepreneurship and social enterprise, describe the movement towards a kind of business between a profit-driven and a non-profit organization.

Linna, Tuula. 'Company Purpose in the Context of Business Sustainability and Insolvency Proceedings'. *European Company Law Journal* 18, no. 5 (2021): 162–168.

company purpose is that the former serves as a judicial shell for the long-term operational company purpose or purposes.

The operational company purpose is connected to *company interest.* On a general level, all circumstances that enable the company organization to fulfil its operational purpose successfully in the long term indicate company interest.[8] Company law legislation may, for example, state that the management of a company shall act with due care and promote the interests of the company. The management is liable to choose between different ways to proceed – be the matter financial or other, such as sustainability investments – whichever best fulfils the operational company purpose in the long run.

Company interest, in turn, is linked to *company strategy.* If the operational company purpose changes, the strategy also usually needs to be updated.

In summary, for the purpose of this piece, four basic concepts are required: organizational company purpose, operational company purpose, company interest, and company strategy. It is worth emphasizing that the said systematization is only one possible alternative for the legal architecture of a company.[9]

Company law studies have for some time debated shareholderism and stakeholderism. Still, these concepts are quite obscure. For the purposes of this article, it is enough to divide stakeholders into two categories according to how they are related to operational company purpose. In a company with an operational purpose to generate profits, the shareholders are the *primary* stakeholders in relation to this purpose. Shareholder primacy is based on a beneficiary relation to the company.

However, because profit making must be carried out in compliance with the law, there are *secondary* stakeholders protected in other than company legislation, such as consumers, workers and creditors, as well as environmental requirements protecting the natural capital. Usually, the operational company purpose is not intended to profit secondary stakeholders,[10] but when profiting shareholders – or promoting some other purpose laid down in the Articles of Association – the company must respect the rights and interests of these secondary stakeholders, as laid down in the law. These rights and interests form the legal boundaries for the operations of a company when fulfilling its operational purpose.

As the tittle of this article indicates, the company purpose is viewed in an insolvency context, that is, when insolvency proceedings are opened vis-à-vis a company. Insolvency proceedings may be *liquidation* (bankruptcy) procedures with the purpose to terminate the operations of the debtor company or *restructuring* proceedings that aim to rescue the operations of the company.

In this article, both company purposes (i.e., organizational and operational) are studied in an insolvency context from a *business sustainability* perspective. Business sustainability refers to a business strategy for the long-term survival of the company on the market through operating in a responsible manner. It includes (a) financial economic sustainability performance (ESP) and (b) non-financial environmental, social, ethical and governance (ESEG) sustainability. ESP creates long-term company value by improving operational effectiveness, productivity, earnings and returns on investments, while ESEG sustainability presents intrinsic ethical value, regardless of whether it generates profit. ESEG elements promote ESP if the market values the ESEG investments that have been carried out, such as when consumers are willing to pay more for clean technology products.[11] Corporate social responsibility (CSR) is an important element of ESEG sustainability.[12]

The *research question* of this article is what kind of stakeholder ESEG sustainability elements, especially ecological values, there are when a debtor company is in insolvency proceedings – that is, in liquidation or restructuring proceedings – and what role company purposes play in this constellation. Some remarks will be made

Scott J. Shackelford & Janine Hiller & Xiao Ma, *Unpacking the Rise of Benefit Corporations: A Transatlantic Comparative Case Study,* Virginia J. Int'l L. 2019, Kelley School of Business Research Paper No. 19–15 (31 Jan. 2019), https://ssrn.com/abstract=3326852.

8 The time factor is important in transitioning from an extreme short-term maximization of shareholder value to long-term balanced value creation. *See* for the discussions, European Commission, Study on directors' duties and sustainable corporate governance, Final Report, 2020. The Report has generated some critical responses. *See* e.g., Mark J. Roe, d Holger Spamann, Jesse M. Fried & Charles C. Y. Wang, *The European Commission's Sustainable Corporate Governance Report: A Critique* (14 Oct. 2020). European Corporate Governance Institute – Law Working Paper 553/2020, Harvard Public Law Working Paper No. 20–30, Yale Journal on Regulation Bulletin, https://ssrn.com/abstract=3711652; Paul Krüger et. al., *Response to the Study on Directors' Duties and Sustainable Corporate Governance by Nordic Company Law Scholars* (7 Oct. 2020). Nordic & European Company Law Working Paper No. 20–12, University of Copenhagen Faculty of Law Research Paper No. 100, https://ssrn.com/abstract=3709762; Søren Friis Hansen & Troels Michael Lilja, *Shareholder Primacy and Property Rights Connected to Shareholding* (7 Dec. 2020). Copenhagen Business School, CBS LAW Research Paper No. 20–41, https://ssrn.com/abstract=3744162; Alessio Bartolacelli, *Sustainability and Company Law: A Long Path to Walk*, 18(1) Eur. Co. L. Volume 4–6 (2021).

9 For other ways to imagine the concepts of company purpose, *see* e.g., Beate Sjåfjell, Andrew Johnston, Linn Anker-Sørensen & David Millon, *Shareholder Primacy: The Main Barrier to Sustainable Companies, on Company Law and Sustainability*, https://ssrn.com/abstract=2664544, where at 89 is presented following parts: (1) a specific purpose, in relation to a particular context or relationship, that the companies legislation expresses; (2) an overarching purpose of the company as a matter of company law, which may or may not coincide with any specific purpose stipulated in companies legislation; and (3) the purpose of the company as a societal institution, the purpose for which society through law recognizes the existence of companies as separate legal entities.

10 However, this may be the thing and the company is maximizing the total value which they create for all their stakeholders, such as by creating value for employees by paying them generously or by creating value for customers by selling better products and services or by charging a lower price than the competitors. *See* Steen Thomsen, *Value Creation and Corporate Governance* 3 (13 Oct. 2020), https://ssrn.com/abstract=3710467.

11 Tuula Linna, *Business Sustainability and Insolvency Proceedings – The EU Perspective*, Journal of Sustainability Research 2(2020), https://sustainability.hapres.com/htmls/JSR_1212_Detail.html; Tuula Linna, *Insolvency Proceedings from a Sustainability Perspective*, 28 Int Insolv Rev. 210 (2019).

12 CSR promotes sustainability in the meaning of sustainable development and, in turn, sustainable development serves as a criterion for the responsibility of operations. Responsibility is not limited to the minimum ESEG requirements laid down in the law.

regarding the Directive on restructuring and insolvency (EU) 2019/1023 (hereinafter Restructuring Directive or Directive).[13]

2. LIQUIDATION OR RESTRUCTURING PROCEEDINGS?

2.1. Viability and Best-interests-of-creditors Tests: Tools for Choosing

When opening liquidation proceedings and the financial distress of a company is so deep that the company is facing imminent insolvency, in the Restructuring Directive, there are two tests for choosing between liquidation and restructuring proceedings: (a) a viability test and (b) a best-interests-of-creditors test (BIT).

According to Article 4(3) of the Directive, Member States may maintain or introduce a viability test under national law, provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and it can be carried out without detriment to the debtors' assets (see also Recital 26). Non-viable businesses with no prospect of survival should be liquidated as quickly as possible (Recital 3). A BIT, in turn, means a test that is satisfied if no dissenting creditor would be worse off under a restructuring plan than a creditor would be if the normal ranking of liquidation priorities under national law were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed (Article 2(6) and 10(2)(d) of the Directive). Thus, a BIT should be done when a creditor challenges the restructuring plan. Only after completing the test will the restructuring plan be binding for dissenting creditors or, as may be the case, dissenting classes of creditors (see Recital 52).

The stage when the tests should be carried out varies in different EU Member States because the Directive does not define the concepts of viability, insolvency or likelihood of insolvency but leaves them to the national laws to decide (see Recital 73). In the situation of a likelihood of insolvency, a viability test may indicate that the company can be rescued through a restructuring plan. If the proposal for a restructuring plan passes the BIT, bankruptcy is avoided and restructuring proceedings can be opened.

2.2. The Role of ESEG Elements

In a viability test, the role of ESEG sustainability elements may be decisive so long they are mandatory requirements for the operations of the debtor company. Reasons for this may be legislative, such as workers' occupational safety, consumer protection or environmental requirements laid down in the law or in an environmental permit. A company is not viable if it can recover only in breaking the law. When there are no realistic prognoses for recovery through a restructuring plan in accordance with the law, bankruptcy is inevitable.

In a debtor company, voluntary ESEG-sustainability elements may exist that designate responsibility beyond the law-required level, such as a high-standard environmentally friendly technology and highly specialized staff. If these elements promote the ESP, they also support choosing the restructuring alternative, and vice-versa; a company even with the best ESEG elements is unable to realize them through restructuring without one bottom line (traditional) profitability. Thus, when there is a profit-making support from ESEG elements, the prospects of recovery may be good.

However, although there are prospects for recovery but the BIT indicates a better distribution share for the dissenting creditors, the company may go bankrupt. The BIT minimum is the estimated distribution that a dissenting creditor could get in liquidation proceedings. In the BIT, ESEG elements affect the prognosis of returns during the restructuring plan. On the other hand, ESEG elements may affect the selling price prognosis in liquidation proceedings.

The effects of ESEG elements may be of a restrictive or supportive nature in both types of insolvency proceedings. For example, if the site of the debtor company is polluted and the law requires a cleaning before it is allowed to distribute the assets to the creditors (restrictive effect),[14] a comparison is needed, whether it is more expedient to continue the operations and during that take care of the cleaning or open liquidation proceedings. In the worst case, the value of the assets is negative. Then, the creditors get nothing, and the environmental costs are usually borne by society.

The supportive ESEG elements, in turn, facilitate getting a better selling price in liquidation proceedings if the assets of the debtor company will be sold as a going concern. In the hands of a new owner, the ESP may return to profitability with the ESEG elements' support. A buyer may be interested in a green production system and the brand build on it, and it is assumed able to continue operations. In a piecemeal selling, the interconnection between the ESEG sustainability elements will be split, and their value is lost partly or totally. However, even in this case, the bankruptcy may produce better disbursements to creditors than restructuring.

Thus, the ESEG elements may play a major role in a viability test and in a BIT. Their role is not, however, decisive because a BIT is grounded in the principle of which 'pays best': restructuring or liquidation. It is not, though, out of the question that the law requires some ESEG elements to be included in a BIT, that is, restructuring should be the choice even if the dissenting creditors get a bit less than in liquidation, for example, when the jobs can be saved. Many Articles of the Restructuring Directive protect workers (see, e.g., Article 2(1)(1), 9(4) and esp. Article 13 and 33).

13 Directive (EU) 2019/1023 of the European parliament and of the council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). Instead, this paper is not intended to be a legal comparison of national laws.

14 *See* e.g., *Supreme Court of Canada Judgment in case Orphan Well Association v. Grant Thornton Ltd. 2019–01-31,* 2019 SCC 5, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17474/index.do.

Nevertheless, there are no clear provisions regarding the protection of workers and the saving of jobs. The only point in the Directive with a hint to ESEG elements is Recital 49, which reads:

> Where Member States opt to carry out a valuation of the debtor as a going concern, the going-concern value should take into account the debtor's business in the longer term, as opposed to the liquidation value. The going-concern value is, as a rule, higher than the liquidation value because it is based on the assumption that the business continues its activity with the minimum of disruption, has the confidence of financial creditors, shareholders and clients, continues to generate revenues, and limits the impact on workers.

As the citation shows, the Member States decide how much emphasis ESEG elements should get. Ultimately, this is a highly political issue.

3. COMPANY PURPOSES AND SUSTAINABILITY IN LIQUIDATION PROCEEDINGS

3.1. The Organizational Company Purpose in Liquidation Proceedings

When liquidation proceedings are opened, the organizational company purpose (company shell) terminates at the end of the proceedings, that is, the company form will be dissolved, and the company does not exist anymore as a legal person. One of the main objectives of bankruptcy proceedings is to finish the company shell. Usually, already, the opening of liquidation proceedings means that the debtor company loses its authority over the assets and the control passes to the bankruptcy estate. This is necessary for achieving the objective of bankruptcy. Therefore, in the beginning of bankruptcy, the assets of the debtor will become subject to the authority of the creditors and the estate administrator. The debtor company – as an existing but non-operational shell – lasts during the bankruptcy until being dissolved at the end of the proceedings.

In other words, the management and the shareholders of the debtor company have lost their powers even if the formal company shell still exists. The organizational company purpose has ceased, and the operations are managed by a new procedural organization, the bankruptcy estate. In many legal systems, an estate administrator appointed by the court manages the assets and other administrations of the bankruptcy estate. The creditors usually have the decisive powers regarding other than everyday operations in the estate.

For the sake of clarity, it can be noted that the shift from original management to bankruptcy management does not mean a change in ownership. The ownership of the shareholders ends only when the company shell dissolves. Until then, even when all the property is sold and the operations ended, the shareholders have their empty shares. When the property is sold, the ownership is transferred to the buyer, but the ownership of the debtor company shares remains in the hands of shareholders until the dissolution of the company shell. The bankruptcy management does not operate through the share stock and company law, but their jurisdiction is based on insolvency legislation.

In a bankruptcy, usually the operations of the debtor company continue for some time after the opening of the proceedings, and there may be operations managed by the bankruptcy estate. At this stage, however, the original operational company purpose is converted to fulfil the purposes of bankruptcy proceedings. Bankruptcy proceedings pertain to all the liabilities of the debtor, and the assets of the debtor company are used for the payments of the creditors' claims, regardless of the original operational company purpose.

3.2. The Operational Company Purpose in Liquidation Proceedings

In a piecemeal selling, the operational company purpose ends earlier than the company shell will be dissolved. An item by item selling ends the business of the company, and the assets are then merely a property, not a business anymore. With the termination of the operations, the existing ESEG elements will be lost. They are useless because there are no ESP aspirations any longer.

The situation is different when the bankruptcy estate sells the assets as a going concern. The original operational company purpose maintains then its relevance. The bankruptcy management may continue the debtor company's operations to sell it in action for a better price. The original operational company purpose may continue in the hands of the new owner company. A reason to buy a debtor company's operations may be the prognoses of improved ESP. It may mean capturing new market shares or expanding production. It is also possible that ESEG elements play a role. For example, highly skilled and committed workers or a well-known green industry brand may be important factors in the going concern selling.

According to the law, usually, the way of selling (piecemeal or as a going-concern) must be selected depending on which way brings the best selling price and thus the greatest distribution to the creditors to minimize their losses. This is a one-bottom-line criterion for the selling. There is no company interest left and no need for a new strategy. No new funding is needed. The only thing that is left is the creditor interest to minimize the losses.

Yet, it is in the (political) consideration of the legislator to oblige the estate administrator to choose a balanced way of selling the assets of the debtor company so that certain ESEG sustainability elements are also considered. An important requirement is that the impact of the ESEG elements should not be a surprise to creditors but they should be able to protect their interests beforehand, for example, through collateral or pricing the money through an interest rate.

An interesting question is whether the bankruptcy estate is allowed, for a while, to continue the operations of the debtor company – not for selling purposes, but – for raising the distribution for the creditors when there is ESP available. In this case, the purpose of bankruptcy and the original operational company purpose are quite close. Nevertheless, two differences can be seen. First, the stakeholders are not shareholders but creditors. Thus, the primary stakeholder group changes from equity holders to non-equity creditors. Second, there is no long-term operational purpose, as it is in a conflict with the purposes of liquidation proceedings. A prospect for a long-term ESP perhaps indicates that restructuring would be a more reasoned alternative. In addition, 'bankruptcy ESP' operations require that all mandatory ESEG elements must be taken care of; no bankruptcy estate is exempt from complying with the law.

In summary, in liquidation proceedings, the debtor company as an organization terminates through dissolution, and even before that – immediately after opening the liquidation proceedings – it will be superseded by bankruptcy management. The operational company purpose ends in a piecemeal selling which converts the business to property. Piecemeal selling may be chosen in a case with no ESP outlooks in the operations. This way of selling usually causes ESEG elements to vanish. A going concern selling can be profitable when, in the operations of the debtor company, there are prospects for ESP. At least those ESEG elements that promote ESP will then be maintained and transferred to a new owner. It depends on the interests of the buyer whether the operations will continue, be merged or terminate. This also determines the final lot of ESEG sustainability elements.

4. COMPANY PURPOSES AND SUSTAINABILITY IN RESTRUCTURING PROCEEDINGS

4.1. The Organizational Company Purpose in Restructuring

For the opening of restructuring proceedings, the ability of the debtor company to recover has been assessed as realistic and the company is deemed viable. Passing the BIT requires that the expected profit during the restructuring plan is better than the estimated distribution in liquidation proceedings.

In restructuring proceedings, the organizational company purpose is maintained; the same company shell continues as an organizational framework for the operations. Accordingly, restructuring is, more or less, debtor in possession (DIP) proceedings, where the management of the debtor company can stay in place and in power.

Depending on the law, there may be an appointed administrator or some other kind of a control mechanism to monitor and secure that the directors of the debtor company implement the restructuring plan.[15] For other parts, the company shell continues its functions as usual. In addition, the shareholders and other equity holders, such as option holders, keep their positions.

4.2. The Operational Company Purpose in Restructuring

The normal operational company purpose, such as the purpose to generate profits for shareholders, is set aside for the period of the restructuring plan. Instead, the normal operational company purpose will be transformed to the dual objective of restructuring, that is, (a) to rehabilitate the distressed debtor company's business through a restructuring plan and to ensure its continued viability and profitability (*recovery*) and (b) to repay creditors according to the repayment schedule (*repayments*). The main rule is that during the restructuring plan, the shareholders and other equity holders' interests are subordinate to the creditor priority. Nevertheless, the purpose of restructuring is not merely to satisfy creditors, but also to recover the debtor company in the long run. After the restructuring plan has ended, the company returns to business as usual. Thus, the operational company purpose and the company interest prevail during restructuring.

Restructuring does not dissolve the company shell, and the operational company purpose will be modified temporarily in response to the interests of creditors. Compared to liquidation, the satisfaction of the creditors is in accordance with the interests of the shareholders and other equity holders if the restructuring succeeds. In liquidation, the value of the equity is usually zero, whereas after successful restructuring the shareholders and other equity holders are the winners. Actually, the outcome may be startling especially if the haircut of the creditors' claims has been notable, such as 50%. Through a haircut, the company will survive and the shareholders and other equity holders maintain at least some part of the value of their assets. Although, in restructuring systems, there are different kinds of balancing factors, such as voluntary (usually based on company law) or obligatory debt-for-equity swaps to provide creditors an opportunity to enjoy the forthcoming increase in company value. This is a balanced way of creating shared value (CSV) among stakeholders.[16]

An essential question is what a role ESEG elements play in restructuring from an operational company purpose perspective. This matter is related to both purposes of restructuring, that is, recovery and repayments.

If the ESEG sustainability elements are mandatory according to the law, there is no way to avoid these costs in restructuring proceedings. As noted above, restructuring is not a permit to break the law. ESEG sustainability elements are secondary stakeholders limiting the ESP. If recovery is not achievable in a legal sense, the only alternative is bankruptcy.

The matter is more complex when we consider voluntary ESEG sustainability investments during the restructuring plan. If the ESEG

15 This duty is different compared to the normal duties of directors. Cf. Restructuring Directive, Art. 19, that provides diverse duties to directors already before the insolvency proceedings are opened. According to it, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to (a) the interests of creditors, equity holders and other stakeholders; (b) the need to take steps to avoid insolvency; and (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business. Art. 19 is an example of regulatory intervention in the directors' duties. *See* Florian Möslein & Karsten Engsig Sørensen, *Sustainable Corporate Governance: A Way Forward*, 18(7) Euro. Co. L. 1 (2021).

16 However, some risks may threaten the creditors, if the debt-for-equity swap is irreversible in a bankruptcy opened after failed restructuring.

investments promote profitability already during the restructuring plan, and support the ESP, the situation is ideal: then, both purposes of restructuring – that is, recovery and repayments – are fulfilled, in addition to respecting intrinsic ESEG values. That is an optimal CSV triple-win situation.

A more problematic question is whether such voluntary ESP-supportive ESEG investments that support the ESP only after the termination of the restructuring period are justified. Then, the ESEG investments burden the returns to the creditors during the restructuring plan without any compensation. On the other hand, in this case, the ESEG investments are in unison with the operational company purpose and company interest, that is, long-term survival on the market. As we can see, the two purposes of restructuring may conflict with each other: The recovery purpose of restructuring meets the operational company purpose by promoting ESP through slowly affecting ESEG investments, but it is in conflict with creditors' interests in repayments.

If the ESEG investments are necessary for the company to recover, then the investments are justified because the recovery of the debtor company is the purpose of restructuring. However, there are two limits linked to repayments: the restructuring plan and the BIT minimum. It is not in the creditors' interest to invest in such ESEG elements that reduce the distribution to creditors below the confirmed repayment schedule or the level that the creditors could get in liquidation proceedings. It is important that the creditors can to take a stand against to 'excessive' ESEG sustainability investments when deciding whether to accept the proposal for a restructuring plan. Perhaps there is no fresh financing available without commitment, for example, to a more environmentally friendly production technology. Nowadays, many banks and other financiers deny funding to industry that has not incorporated ESEG elements in their business strategy and are not using triple bottom line accounting and reporting. Therefore, it may be in the interests of creditors to accept reasonable ESEG investments also during the restructuring plan.

In summary, during the restructuring plan, it is rational to make such ESEG investments that are necessary for the recovery of the debtor company at least when not breaking those two limits, that is, the confirmed repayment schedule and the BIT minimum. A challenging question is whether it is justified to maximize the afterwards profits more than what is necessary for the recovery of the debtor company, for example, to invest in an expensive clean technology that produces high profits after restructuring. These kinds of investments may be in accordance with the operational company purpose and company interest. The question is whether the company interest should be set aside for creditors' interest only within the limits of the repayment schedule and the BIT minimum. In other words, when the profits of the debtor company exceed the requirements of the repayment schedule, is the surplus free money for the debtor company to invest in accordance with the long-term operational company purpose?

If the law lacks regulation regarding a surplus and if, in the restructuring plan, there are no provisions concerning supplementary payments, the creditors have accepted the repayment schedule without a right to additional distribution. Then, the debtor company is allowed to use in its own interest the possible surplus for ESEG sustainability investments according to the operational company purpose. When the repayment purpose of the restructuring is sufficiently satisfied, the company can invest in ESEG elements beyond the level of rescue in pursuing long-run high profitability in accordance with the operational company purpose. All this may require revising the business strategy of the debtor company. Restructuring the company is a natural point to make changes in the business strategy to ensure that the operational company purpose will be realized successfully in the long run. In restructuring, necessarily, 'something' must be done to avoid liquidation proceedings.

5. CONCLUSIONS

This article demonstrates that the organizational and operational company purposes terminate or remain in different ways in liquidation (bankruptcy) and restructuring (rescue) proceedings. In completed liquidation proceedings, the organizational shell of the debtor company usually ends. In a selling as a going concern, the original operational company purpose of the debtor company may continue as such or be modified as the operational company purpose of the buyer company. In addition, non-financial ESEG sustainability elements that support the financial ESP may then be preserved. Instead, in a piecemeal selling, the business of the debtor company is split into property abolishing the operational company purpose and the existing ESEG-sustainability elements. In liquidation – be it selling as a going concern or in a piecemeal way – there is no operational company purpose or company interest of the debtor left, only the creditor interest to minimize the losses.

The opening of restructuring proceedings requires that in a viability test, the ESP prospects of the debtor company reach the survival level (recovery) and the BIT minimum (repayments in comparison to the distribution in liquidation proceedings) with all mandatory ESP-limiting ESEG sustainability elements included. In restructuring, both company purposes (organizational and operational) remain, but the shareholder primacy is converted to creditor priority at least to the degree that satisfies the requirements laid down in the restructuring plan and the BIT. It is not in the creditors' interest to invest in such ESEG elements that support ESP only after the restructuring period. For this, the consent of the creditors may be obtained through a debt-for-equity swap. Moreover, in some cases, ESEG investments are required by the new financiers and a new business strategy will be developed in addition to restructuring plan.

The paper indicates that company purposes and ESEG sustainability elements in different kinds of insolvency and selling proceedings form a complicated pattern. It is essential that insolvency courts and administrators see the interaction between these elements. For the EU Regulation, business sustainability in the context of company purpose and insolvency proceedings is still in its infancy. In the future, business sustainability factors likely become increasingly important also in this context.

This, in turn, can promote corporate restructuring which usually provides more effective protection of ESEG elements than liquidation proceedings. However, it is crucial that the company to be restructured must always be viable. Without the company's profitability, there can be no sustainability either.