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Business Sustainability and Insolvency Proceedings—The EU Perspective

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ABSTRACT

Business sustainability refers to economic sustainability performance that promotes profitability and to non-financial sustainability that may or may not create profitability. This paper concentrates on the relation between business sustainability and insolvency proceedings by asking what role business sustainability plays when choosing between restructuring (rescue) and liquidation proceedings. This choice is based on two tests: a viability test and a best interest of creditors test, the latter meaning that no dissenting creditor should be worse off in restructuring than in liquidation proceedings. In addition, the paper asks what role business sustainability plays when making the choice between restructuring and liquidation and what the consequences of this choice are for business sustainability elements. In addition, the paper asks who the stakeholders for business sustainability are in insolvency situations. The finding of the study is that creditor interest should be better balanced with non-financial sustainability, but with the requirement that creditors know the risks beforehand and are able to protect their interests, for example, through securities. Regarding environmental hazards, the paper suggests a "super responsibility" of bankruptcy estates to handle environmental problems, according to the precedent of the Canadian Supreme Court.

KEYWORDS: business sustainability; economic sustainability performance; non-financial sustainability; insolvency proceedings; restructuring; liquidation; environmental hazard

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ABBREVIATIONS

BIT, the best interest of creditors test; CSR, the responsibility of enterprises for their impact on society; ESEG, environmental, social, ethical, and governance sustainability; ESP, economic sustainability performance; EU, European Union; GTL, Grant Thornton Ltd.; RI Directive, the EU Directive on restructuring and insolvency (EU) 2019/1023; TBL, Triple Bottom Line; TEU, Treaty on European Union; TFEU, Treaty on the Functioning of the European Union; UN, United Nations

INTRODUCTION

Business sustainability refers to a corporation's strategy for long-term survival on the market and for operating in an ecologically, socially, and culturally responsible manner. Business sustainability includes *financial* economic sustainability performance (ESP) and *non-financial* environmental, social, ethical, and governance (ESEG) sustainability. ESP refers to long-term profitability and financial sustainability (operational effectiveness, efficiency, productivity, earnings, returns on investment, and market value), which create company value, whereas ESEG sustainability may or may not create this kind of value [1]. That is, ESEG sustainability owns intrinsic ethical value without being subordinate to profitability. ESEG sustainability is linked to "sustainable development", a normative and holistic conceptual framework for integrating economic development, social well-being, and environmental protection into decision making [2]. The concept originates from Brundtland-Commission's Report (1987) [3].

The first introduction to corporate sustainability thinking was the *corporate social responsibility* (CSR) concept, nowadays viewed as a part of business sustainability. According to the European Union Commission's definition, CSR is "the responsibility of enterprises for their impact on society". Besides respecting regulations, companies can become socially responsible by integrating social, environmental, ethical, consumer, and human rights concerns into their business strategy and operations [4].

Tensions may occur between financial ESP and non-financial ESEG sustainability: the management of a company is perhaps unwilling to invest in ESEG sustainability against shareholders' ESP interests. In addition, tensions may ride inside concerning the components of ESEG sustainability: within the limits of scarce resources, management must be selective in its ESEG initiatives. However, it is possible to see financial and non-financial sustainability performance—not conflicting but—integrated in the multiplayer field of sustainability, with possibilities of promoting both financial and non-financial objectives. Frameworks with an integrated and holistic approach to business sustainability and reporting have been developed in sustainability science, identifying management, shareholders, governance participants, society, and the environment as stakeholders [1].

An essential part of sustainability performance, commitment, and transparency is the *reporting system* used by a company. Traditional *one bottom line* financial reporting—showing the balance sheet, the profit and loss account, and the notes—leaves a loophole for companies to escape from issuing the non-financial information on the environmental and societal impacts of their operations. Instead, by presenting a *triple bottom line* (TBL) accounting and report (a framework including social, environmental, and financial elements) [5], a company can evidence its commitment to ESEG sustainability. The integrated reporting system combines financial and non-financial information (profit, planet, and people) [6].

The ESP/ESEG sustainability discussion has concentrated on the *operations* of companies. However, not all companies will survive the competition on the market. For example, in the European Union (EU), every year, insolvency or imminent insolvency is the fate of 200,000 firms, and acute crises could multiply this number. A bankruptcy of one company may lead to a domino effect and cause the collapse of many other companies in the same production or supply chain; one in six corporate insolvencies occurs due to the collapse of a partner company [7]. When the value of a company drops, the investors and shareholders suffer losses. Nevertheless, insolvency is a natural factor and a common risk on the market. With this in mind, surprisingly, little research is available studying corporate sustainability in *insolvency* situations. This paper aims to fill this gap and stimulate discussion by viewing business sustainability in an insolvency context.

In cases of deep insolvency without the likelihood for viability, liquidation proceedings are the only alternative, whereas in the opposite situation, a *choice* between liquidation (bankruptcy) and restructuring must be made. This leads either to the opening of liquidation or restructuring proceedings. On this account, as there is an obvious shortage of funds in insolvency situations, all stakeholders—especially investors, other creditors, subcontractors, and employees—cannot be satisfied in full, and it is not possible to continue business as usual. By this point, the business has come to a crossroads, perhaps even an end. Accordingly, a competition of scarce funds starts between the different stakeholder groups. In the insolvency state of affairs, a prominent feature is added interests of *creditors*, both as a collective body but also as mutual conflicting interests inside this body.

The viability of businesses and the objective of procedure divide insolvency proceedings into two separate proceedings: restructuring (rescue) and liquidation (in many countries called “bankruptcy”). Liquidation is understood here as a “conventional” bankruptcy with the aim to sell the assets (piecemeal or as a going concern), in contrast to “strategic bankruptcy” through which restructuring-like proceedings are initiated to preserve value for stakeholders [8].

Restructuring aims to ensure a company’s recovery to a profitable business through a reorganization plan and repayment schedule, perhaps including a partial discharge of debts. On the contrary, liquidation proceedings do not aim to continue the operation beyond selling the assets (for this difference, see, e.g., the judgement of the Court of Justice of the European Union in *Smallsteps BV* case, C-126/16) [9]. At the end of liquidation proceedings, the operation ceases and the legal structure of the company will be wound up and the entity removed from the registry.

This paper will concentrate on the *relation* between business sustainability (ESP/ESEG) and insolvency proceedings. This relation will be reflected with a focus on the *choice* between restructuring (rescue) and liquidation proceedings.

First, this paper views the *criteria* for making the choice of "restructuring versus bankruptcy" from a sustainability perspective. The court or other competent authority decides whether the company is still viable. If not, liquidation proceedings will be opened. In legal systems with separate proceedings for rescue and liquidation from the beginning, this choice must be made in the opening phase, whereas in systems with single insolvency proceedings to be opened, this choice is made later, during the proceedings. Nonetheless, at some point, the choice is unavoidable: to rescue or liquidate? *Second*, this paper queries, from a sustainability perspective, the *consequences* of choosing between rescue and liquidation. The *third* topic asks who the stakeholders are that must be considered in an insolvency situation, as well as the position of ESEG elements there.

In summary, the following issues will be discussed to develop an approach to the relationship between business sustainability and insolvency proceedings:

(a) What role as criteria does business sustainability (ESP/ESEG) play when choosing between restructuring (rescue) and bankruptcy (liquidation)?
(b) What are consequences of this choice for business sustainability elements?
(c) Who are the stakeholders for business sustainability in an insolvency situation; are the ESEG elements included?

The *purpose* of this article is to clarify the importance of discussing business sustainability in a common situation in which a company faces financial difficulties and is in or on the edge of insolvency. The main approach here takes the perspective of the *EU Community acquis.* Accordingly, a legal comparison of the national laws of member states is omitted. Even within the EU, national laws concerning bankruptcy vary, including the value of assets at the beginning of the procedure, the claims structure (such as seniority), and the legal environment of the proceedings [10]. Much of the same applies to restructuring.

Sustainability science divides sustainability into *weak* and *strong*. Weak sustainability adopts the notion that natural capital is substitutable and the essential matter is the total amount of capital stock. In contrast, strong sustainability postulates the non-substitutability of natural resources (not reproducible by human efforts) [9]. When referring to an environmental element within the ESEG elements or values, this article denotes *strong sustainability*, that is, ESEG sustainability is not substitutable by improving ESP in insolvency proceedings.

The paper is divided into six parts. The first part analyzes the role of ESP/ESEG elements using a viability test and best interest of creditors test (BIT) when choosing between rescue and liquidation. The second part focuses on the consequences for different stakeholders of the choice between rescue and liquidation in an ESP/ESEG context. The third section views environmental sustainability elements in restructuring and liquidation. Finally, before conclusions, the purpose of a corporation is discussed in a combined insolvency and sustainability context.

RESCUE OR LIQUIDATION?

The Choice Is Inevitable in Insolvency Situations

Before opening insolvency proceedings, the company should be defined as a debtor company that is facing an insolvency or imminent insolvency. Opening insolvency proceedings against profitable and healthy businesses is harmful and may indicate abuse of the legal system or creditor/debtor misdemeanors. This is why it is important that the court or other competent authority has the power to determine the status of a company (insolvency "diagnose").

The meaning of the term "insolvency" varies in different countries. For example, in the EU Directive on restructuring and insolvency (EU) 2019/1023 [11], hereinafter the RI Directive, the concept of "insolvency" is not determined but left for the national laws to define. Insolvency may refer, for example, to a non-temporary cash/liquidity crisis and/or to over-indebtedness. In the same way, the term "imminent insolvency" is left open, as well as the term "viability". Notwithstanding, they are the core concepts of corporations in economic crisis. For example, the usual prerequisite for restructuring is that the debtor company must indicate, on the one hand, imminent insolvency that will likely turn to (full) insolvency in default of restructuring and, on the other, the possibility of recovery—not only impermanently—through restructuring. In other words, at the same time, there must be a risk for insolvency and enough potential to recover.

In an insolvency or imminent insolvency situation, the choice between liquidation and restructuring is not arbitrary or free, but two tests must commonly be done: (a) a viability test and (b) a BIT. In the case of viability, rescue is well grounded; otherwise, a non-viable company should be set in liquidation. A viability test includes a *comparison* of the current status of the company (without any reorganization plan and payment schedule) and the prognoses of profitability. A BIT, in turn, means that no dissenting creditor should be worse off in restructuring than in liquidation proceedings (whether piecemeal or as a going concern). According to Article 2(6) of the RI Directive, the test is satisfied if no dissenting creditor would be worse off under a restructuring plan than if the normal ranking of liquidation priorities under national laws was 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. The next-best-alternative scenario refers to "an upgraded EU BIT" and can be, *inter alia*, a different restructuring plan with adequate support or the continuation of the debtor's business without any restructuring plan [12]. However, in this paper, for the sake of clarity, the BIT refers only to official liquidation proceedings as an alternative. Thus, the BIT includes a *comparison* of two types of insolvency proceedings, demonstrating the financial result from a creditor's viewpoint.

The relation between these two tests is not quite clear. A viability test may show that, in the long run, the company is viable, but in the short run, some or all creditors may be worse off compared to after liquidation proceedings. At the same time, a viability test measures shareholders' interests when evaluating the prospects for company survival. At first, a viability test is usually carried out by the management and finally by the court or other authority that is competent to open the official insolvency proceedings. In turn, a BIT is usually done by the court when a creditor is challenging the choice of restructuring proceedings as detrimental to the creditor's interests compared to liquidation.

When facing insolvency, a company is at a crossroads: "something" has to be done. The transition from economic distress to a performing enterprise on the market is a decisive moment for any company. Taking efficient measures for revival on the market is a true test of a corporation's capability to analyze its weaknesses and potential strengths. It is also imperative for the management to take quick action: in the case of viability, management should, for example, ensure a better competitive position on the market; improve the financial balance, usually with "fresh money", and implement strategies to develop the business toward recovery [13]. In the case of non-viability, quick action is needed, as well. Otherwise, the situation will drift toward unintended and late liquidation proceedings, perhaps with no assets left.

In an imminent insolvency state, the management has no reason to postpone the choice between restructuring and liquidation. On the contrary, management is required to make a conclusive choice quickly: rescue or liquidate. Usually, no compromises are available and—without good luck, like a sudden market recovery—the situation will likely lead to the unintended and uncontrolled end of the business; restructuring by change is not realistic and leads to liquidation. A partly viable company or group of companies (note that the mother company and the subsidiaries form separate insolvency estates) may be split; for the viable parts of the business, restructuring proceedings are opened, and the rest will be liquidated and wound up. However, even then, the choice must be made between restructuring and liquidation.

The Choice Is Determined by the Viability Test and Best Interest of Creditors Test

According to Article 4(3) of the RI Directive, member states may maintain or introduce a viability test under national laws, provided that such a test has the purpose of excluding debtor companies that do not have a prospect of viability and that it can be carried out without detriment to the debtors' assets. Satisfying the test is a condition for access to a preventive restructuring procedure (Recital 26 of the Directive). Furthermore, a BIT should be applied in the case of dissenting creditors or dissenting classes of creditors in a cross-class cram-down (the RI Directive, Articles 10(2)(d) and 14(1)(a)).

Thus, two evaluations must be done according the RI Directive when a company is in an imminent insolvency status: to avoid liquidation, the business must be viable, that is, it must be able to recover and return to the market through restructuring (the prospect of viability). In addition, the outcome of recovery should not be detrimental to any dissenting creditor compared to liquidation. For example, for a company with assets that bring through liquidation to a creditor 50,000 US dollars, restructuring proceedings should not be opened if it is expected that the same (dissenting) creditor would get only 40,000 US dollars, even if there is, in the long run, a prospect of viability.

Insolvency means a shortage of financial resources so that not all creditors can be satisfied in full when their receivables fall due. In other words, there is a lack of liquid assets or assets that can be transformed to liquid to satisfy creditors. Nevertheless, in the debtor company, there may be plenty of other than merchantable resources, such as highly proficient personnel, know-how and some highly specific and contextual intellectual property rights (IPR), a stable supply chain, clean technology, loyal customers, and a good reputation. Some of these non-monetary resources (“assets”) promote financial ESP, some are linked to non-financial ESEG sustainability, and some to both. These kinds of “soft variables” exist in every company and give the company added value, though they draw relatively little attention, perhaps because of their illusive nature [14]. For this paper, an essential matter is what role non-financial (“soft”) resources play in a viability test and a BIT.

Currently, the two mentioned tests are based solely on financial parameters: a viability test is a prognosis of whether a business can restore *profitability* according to traditional one bottom line accounting and, if so, whether, according to the BIT, the value of the assets in liquidation would bring a better *monetary* outcome (share) to creditors. An indispensable question is whether, at the same time, it is possible to consider the preservation of non-financial resources, such as jobs, know-how, IPR, skills, and developed clean technology, in these two tests.

ESEG Elements in Viability Test

In a viability test, ESP is a natural part of the evaluation. Actually, the matter is whether the debtor company is able to return to economic sustainability performance. As noted, in a viability test, prognoses of profitability means *traditional profitability* or—at least—the ability to generate profit (revenue minus expenses). Naturally, profitability is a fundamental standpoint for staying on the market, and a positive cash flow keeps the company’s business in operation.

If restructuring produces only a short-term recovery not even reaching a level of profitability and leaves creditors worse off than in liquidation, it is not the right option. The criteria of viability and restructuring, dismissing recovery that will be only impermanent, largely identify with the criteria of ESP, that is, *long-term* profitability and financial sustainability. However, it can be argued that "normal" profitability and financial sustainability are enough to open restructuring: there need not be prospects for long-term financial sustainability, but on the other hand, short-term financial sustainability is not enough. The essential objective of restructuring is to raise the debtor company to a "healthy" level of profitability. After recovering, the ex-debtor company can, again, pursue ESP as auspiciously as possible. With this reservation, this paper uses *viability* and *ESP* as parallel notions.

The above-mentioned notion is indirectly seen in the RI Directive. The Recital (at 1, 2, and 32) states that restructuring should enable debtors in financial distress to *continue* operating and stay in business and (at 68) that the aim is the *survival* of the debtor's business. Thus, "rescue" means, at the first step, to help the company gain enough strength through a reorganization and a payment schedule to continue on the market. In fact, a too-ambitious objective for restructuring would favor liquidation; the opening of restructuring could be rejected with the argument that rescuing the business would allow it to reach only "normal" profitability. After recovery, the path to maximal profitability is clear.

For restructuring, there must be available, *inter alia*, a competent management, enough financing, and lucrative products/services that the market wants. The products of the debtor company may be technically outdated or carry a bad reputation, such that the market is not interested in them. Accordingly, there is then no prospect for ESP, and, consequently, non-financial ESEG sustainability elements play either role. ESEG sustainability is dependent on profitable ESP: an unprofitable company is unable to care for ESEG sustainability either. And, depending on the market and the competitive edge, vice versa.

ESEG sustainability is a part of proper viability testing when some or all ESEG elements are legally or otherwise *mandatory* or factually *necessary* for the operation of the debtor company. For example, there may be costs for the obligatory protection of the environment during the production process. Naturally, in a viability test, all mandatory operational costs will be considered. Instead, non-obligatory ESEG elements have a double character: with a short cut, ESEG elements may produce mere costs, but in the longer run, they may promote ESP. For example, a company may invest in more environmentally friendly products or production processes for five years before any profit can be expected. A situation where ESEG elements will be part of ESP only in the long run is problematic for creditors, whereas owners are willing to wait, because the alternative is liquidation and winding up the company, zeroing the value of shares.

According to Article 4(3) of the RI 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 the prospect of viability and that it can be carried out without detriment to the debtors' assets. The Article does not specify the *time limit* for this prospect. Recital 3 notes that in restructuring frameworks, the rights of all parties involved, including workers, should be protected *in a balanced manner*. On the other hand, where "a debtor in financial difficulties is not economically viable or cannot be *readily restored* to economic viability, restructuring efforts could result in the acceleration and accumulation of losses to the detriment of creditors, workers and other stakeholders, as well as the economy as a whole." This Recital statement indicates quite clearly that creditors are not expected to wait long for the effects of the operational changes to be carried out according to the restructuring/reorganization plan. Indeed, for the sake of legal and economic security, long-term forbearance should be provided by law if required from creditors. Creditors should be able to trust that only such ESEG elements that improve the profitability of the debtor company in a relatively short run are included in the viability test. The timeframe is the proper duration of the repayment schedule; such ESEG elements that will not improve profitability enough during a reasonably long repayment schedule are detrimental to creditors.

Thinking of the future, however, would it be reasonable to include in a viability test ESEG elements with a negative impact on profitability, though not destroying prospects toward healthy ESP in a reasonable time ("TBL-viability test")? In other words, should, for example, such voluntary environmental costs be considered in a viability test that diminish profitability to some degree? Should the objective of restructuring be maximum ESP or balanced ESP/ESEG profitability? Further, could balanced ESP/ESEG profitability mean that creditors are not satisfied maximally but must accept partial discharge of their receivables?

I think the answer should be yes. The legitimate objective of restructuring should be a balanced framework for all stakeholders. The TBL parameters used in accounting and reporting could be used as tools to measure diverse interests. An insolvency practitioner should ask for help from, for example, environmental authorities. In conflict situations, the court or other competent authority decides relations between different shareholders.

Creditors can be protected through a BIT so that their share is not considerably smaller than in liquidation. For legal security reasons, the legislator can provide a percent limit for this to protect creditors. Discarding the maximal profitability objective of restructuring, however, requires potential creditors, such as financers, investors, and subcontractors, to know this *beforehand*, thus giving them the ability to protect their interests through, for example, pricing and securities. In this way, the balanced model does not lead to final losses for prudent creditors, and the costs and risks will be decentralized into the market. In the end, the consumers will pay. In addition, there should be available *secondary compensation schemes*, such as funds, guarantees, or insurances, financed by the particular industry and/or society. The safest option would be that the conditions for a TBL viability test are provided in the law. The fundamental justification for this balanced model is ethical, as is the whole concept of ESEG sustainability. However, at the possible point where consumers collectively adopt said ethical base, it transforms into a normal market factor to be compared to consumers' requirement that the products and services be healthy and of a high quality. At this point, the ESEG elements become real competitive edge factors encouraging companies to exceed the minimum ESEG requirements.

Restructuring means a crossroads for a company to take a new direction in business. The interests of creditors, if protected in the above-mentioned way, should not prevent the debtor company from taking—in addition to following legal and market-based environmental policy instruments—voluntarily ESEG actions, such as reducing harmful environmental externalities or saving jobs even when it diminishes profitability to some degree. The creditors' interest in receiving a maximum share in a minimum time could be balanced with ESEG elements in a viability test as well. This means that it should be accepted that the repayment schedule (a part of restructuring/reorganization plan) can be quite long, back end-weighted, and perhaps mean the partial discharge of receivables.

Nevertheless, at the same time, the domino effect should be avoided. A creditor company that must wait long for the repayment of a significant receivable easily drifts into financial troubles. It can be argued that an important ESEG element is to minimize the reflective effects of the restructuring of a debtor company—a functioning market is a prerequisite for ESP and, at the same time, a part of social/governance sustainability in western countries. An important restriction for a "TBL viability test" is that it should not affect the choice between rescue and liquidation; too meager a share for the creditors in ESEG-oriented restructuring may lead to liquidation according to the BIT.

ESEG Elements in Best Interest of Creditors Test

In a BIT, the evaluator (judge or other competent authority) compares the share for the dissenting creditor in liquidation and in restructuring. As noted, a dissenting creditor should get in restructuring at least as much as he or she would in liquidation. The test requires a simple comparison: which gives the greater dividend to a dissenting creditor: restructuring or liquidation? The purpose of the BIT is to turn down restructuring that is detrimental to a dissenting creditor. Detrimental restructuring means a benefit to the owners at the sacrifice of the creditors. It is not the responsibility of creditors to finance restructuring and benefit the shareholders when liquidation gives a better dividend.

As already noted, the relation between the viability test and the BIT is unclear. The starting point is that these two tests should not be discordant. Therefore, a logical requirement is that the share for a creditor is calculated according to the repayment schedule in restructuring. As argued in the previous part, non-financial ESEG sustainability elements should be implemented in a balanced way, seeking return to the market and recovery to profitability. Regarding the BIT, it is essential that the payment schedule when considering ESEG sustainability elements is not too strict, thus favoring instant liquidation. Therefore, three factors must be balanced: (a) ESEG sustainability components, (b) repayment for creditors in restructuring, and (c) share in liquidation. Even when implementing voluntary ESEG elements, the creditors' interest must be on a sufficient level so that unnecessary instant liquidation can be avoided. Voluntary ESEG elements in the test should be balanced so that liquidation is not the best choice if the company is still viable.

One important factor in the comparison between restructuring and liquidation is whether liquidation would take place by piecemeal vending or by selling the assets as a going concern. Here, again, decisive in liquidation is which selling form produces the best financial outcome for the creditors. In a going-concern framework, manufactured capital, such as plants, machines, and technology, as well as human capital, such as intangible resources (patents, trademarks, business secrets, data protection systems, know-how, and reputation) accumulated and stored in the business of the debtor, can be retained [15].

From a sustainability viewpoint, there is an important difference between selling a debtor's *property* and selling a debtor's *business*. In the latter case, the added value gathered in the business (compared to "pure" property) can be maintained. Sustainable selling benefits creditors, whereas the position of employees usually depends on whether the buyer is willing to hire them (see the above-mentioned *Smallsteps* case). From a strong sustainability perspective (that is, a non-substitutability paradigm concerning natural resources), however, selling the assets as a going concern does not necessarily mean a pleasant outcome. For example, selling a mine that pollutes the surroundings and spoils water systems is not a triumph for nature, even if the mining activity is legal and fulfils the requirements set out in the environmental permit. Thus, preserving a functional business entity is in accordance with sustainability for saving the company history with investments in functionality but, in the end, the most crucial matter is whether the saved entity operates in accordance with sustainability. However, it is not the task of the insolvency system to prevent legally operating ESP from recovering and continuing.

According to Recital 2 of the RI Directive, preventive restructuring frameworks should enable debtors to restructure effectively at an early stage and to avoid insolvency, thus limiting the unnecessary liquidation of viable enterprises. These frameworks should help to prevent job losses and the loss of know-how and skills and maximize the total value to creditors, in comparison with what they would receive in the event of liquidation of the enterprise's assets, as well as to owners and the economy as a whole.

By this, the RI Directive indicates non-financial ESEG sustainability. Article 19 features the same "signals" according to which directors must have due regard for the interests of creditors, equity holders, and "other stakeholders". Some kind of tendency toward the border stakeholder concept, even if not a deviation from the BIT and creditor protection, is to be seen. It is not justified to say that the Directive underlines the maximum individual or collective return to creditors (common pool theory) either [16,17].

There is some kind of a dilemma in the BIT: if the non-monetary assets that do not directly promote profitability, such as expensive clean technology that presents a valuable ESEG element, are considered purely as costs in restructuring, it impairs the possibilities for restructuring by offering perhaps a lower share to creditors compared to in liquidation. Another way of looking at the matter is to calculate an integral TBL "share" in the BIT, thus expanding the stakeholder set. If the ESEG elements are totally set aside to be abandoned in future operation, the outcome is that insolvency leads automatically to a shift in the business culture of the distressed company—one could say, in the opposite direction than signaled by the EU (see later the EU Green Deal).

THE CONSEQUENSES OF THE CHOICE BETWEEN RESCUE AND LIQUIDATION

Should Creditors' Interests Yield for the Sake of ESEG?

Surely, the choice between opening restructuring and liquidation proceedings has highly different consequences in all sections of financial ESP and non-financial ESEG sustainability.

In *liquidation*, ESEG sustainability elements, such as jobs, skills, goodwill, cultural values, investments in ecology/clean industry, and some highly contextual IPRs, may be lost entirely if the estate is sold in a piecemeal way. This demonstrates the difference between selling the *property* versus selling the *business* of a debtor company. When the assets intended for sale form a functional entity, which is kept in operation or as a whole in a stand-by status for sale, the debtor's business will be sold, not only the property. From a sustainability perspective, the business-based ESEG elements and their added value in the property are then preserved. The ESEG elements gathered in the company remain in the original context and in a mutual interaction in such a combination that it is lucrative for purchasers and that promotes profitability. If not, piecemeal vending may be a better alternative. Naturally, then, ESP is not relevant due to the splitting of the property and, subsequently, the business.

When the bankruptcy estate aims to sell the assets as a going concern to get a better selling price in liquidation, the bankruptcy practitioner can temporarily operate the business as usual or at least keep it whole until a purchaser is found. In the best case, all relevant ESEG sustainability resources may be saved. However, from the ESEG perspective, this is only luck; usually, the decisive matter in liquidation proceedings is not saving ESEG resources but the selling price. If the financial outcome is better for the creditors, the liquidation system is blind to losing other kinds of resources. Therefore, we may ask whether creditor protection is too excessive.

Here, an important matter is *predictability*: if the creditors know the risks beforehand, it is reasonable to save valuable ESEG resources in liquidation. However, some creditor groups are in advance unable to protect their interests. On the other hand, these creditors, such as tax administration, are able to open the bankruptcy proceedings on time to prevent additional damage. Moreover, secondary compensation systems can be available for creditors suffering from the saving of ESEG elements in the public interest.

On certain conditions, laid down in the law, the bankruptcy practitioner should be allowed to make the choice between piecemeal selling and selling as a going concern on the basis that valuable ESEG resources can be saved even if creditors do not get the maximum dividend. It is not excluded that piecemeal selling protects ESEG elements efficiently. Splitting assets and introducing them to new hands may, in some cases, be the best way to save ESEG resources and perhaps, at the same time, bring the best selling price. For example, selling IPR and high technology equipment without "walls" may be the best alternative. However, if it does not bring a better selling price, it is not a consolation for creditors with unpaid claims to know that the resources are being recycled somewhere in the market in a sustainable way.

In *restructuring*, the possibilities for saving resources may be better than in liquidation. However, in restructuring, there is always the *risk for failure*. The market is not more sympathetic toward a company in restructuring proceedings than any other company. Moreover, as restructuring is more or less debtor in possession (DIP) proceedings, there may prevail higher risks than usual, depending on the skills of the management and owners and whether a successful reorganization has been implemented; a debtor company faces normal business risks and the requirement of competent management combined with the ability to implement a rescue strategy. Without normal business risks, the market would be unable to eliminate non-viable businesses that, in turn, would distort competition on the market.

Let us assume that the debtor company in restructuring has avoided failure and rescue has succeeded. After reorganization, more or less, ESEG sustainability factors have remained (jobs, IPR, know-how, environmental inputs, etc.)—how much depends on the ESP/ESEG relation: to strive for maximal profitability during the repayment schedule, the debtor company may have to abandon ESEG elements that diminish one bottom line profitability. For example, a debtor company that has been investigated for voluntary ESEG sustainability, thus having a too-expensive ecological production system compared to the competitors on the same market, is obliged to abandon these inputs to regain its competitiveness. Otherwise, restructuring fails because the debtor company is unable to operate on the market, so it produces enough profit after covering ESEG expenses. In this case, there are two alternatives: either obviating extra ESEG costs or resulting in liquidation. The BIT protects creditors by ensuring that profitability during the repayment schedule reaches the same level as the creditors' share in liquidation.

A Wide Stakeholder Cluster

An important business culture matter is that companies should be encouraged not to lose sight of long-term sustainable strategies, even in financial distress [18]. The literature asks why directors continue to respect their sustainability and responsibility (CSR) obligations even in insolvency proceedings. One argument against the responsibility is that these functions pose an unnecessary and costly burden on companies in distress. Others may argue that sustainability is a valid function in insolvency, and management should have the same responsibility in this regard as before opening the insolvency proceedings: why should sustainability aspects become any less important just because of insolvency proceedings? It can be argued that directors may have obligations to a wider group of stakeholders, not only to creditors [19].

A wider stakeholder cluster, including ESEG values, may or may not diminish the weight of creditor interest. It depends on the relation between this cluster and ESP/profitability. This paper suggests, for the optimal governing of the consequences of insolvency proceedings on ESEG elements, that:

- Creditor interest should yield to some degree so a viable company can be rescued;
- Creditors should, however, get reasonable repayment during a reasonably long repayment schedule in restructuring;
- ESEG values should be saved to the degree that would make all this possible.

This requires BIT be modified accordingly so a slightly better share in liquidation does not lead to the liquidation of an otherwise viable company and that creditors be aware in advance of the protection of ESEG values (provisions in law). In addition, some secondary compensation systems can be available for creditors according to political decision-making.

The first to react in imminent insolvency is the management of the company. The tradition that underlines creditors' interests seems to be in transition regarding management. There are some indications of this in the RI Directive, where Recital 71 highlights that the responsibility of management to make the right decisions in time in imminent insolvency has been stressed in the RI Directive. Directive Article 19 (Duties of directors where there is a likelihood of insolvency) obliges member states to ensure that where there is the likelihood of insolvency, directors *have due regard*, as a minimum, to the following: (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. The duties are not easy to implement, and a "safe harbor" defense been argued to allow the directors of a company in financial distress to explore restructuring options without the risk of liability for insolvent (wrongful) trading [20].

It has been argued that the duty owed by directors to creditors is a form of *creditor protection* to prevent systemic troubles in the financial system due to a certain kind of chain reaction. In other words, the company owes a duty to its creditors to keep its property unviolated and available for repayment of its debts. Special attention should be paid to unsecured creditors who are only protected by contractual rights and always get a small (if not non-existent) amount when the company goes into liquidation [19]. The interest relations among management, creditors, and shareholders are complicated. It has been noted that, in practice, the management and shareholders are, on the one hand, working on a rescue attempt and, on the other, looking for ways to reduce their exposure in case the attempt is unsuccessful. In restructuring, the management may stay in place, and there is a possibility that shareholders retain their equity partly or totally. In successful restructuring, shareholders and management may benefit the most [21]. Real creditor protection requires objectivism beyond these matters.

The new way of thinking is that management must have due regard for the interests of not only creditors, but also equity holders and "other stakeholders". This may be called "stakeholderism". The problem is that in the RI Directive, there is not a word about who these other stakeholders are. A "stakeholder" can be defined as any person whose rights or interests are affected directly or indirectly by insolvency or restructuring proceedings, which is why they may have to be involved under insolvency and restructuring laws [20,22–24]. Is, for example, the "green stakeholder" (nature) one?

Within the collective body of the creditors, interests are mutually competitive ("insolvency crowd" in decision making [25]) and considered according to the provided priority and otherwise according to the equal ranking following the *pari passu* principle. This inside competition does not prevent the mutual and collective interest of getting the best possible selling price. Only secured creditors are unrelated to the selling price, but this is merely when the value of the collateral completely covers the secured claim. In corporation bankruptcy, virtually the most evident group of stakeholders at risk is unsecured creditors.

Before focusing sustainability on “all stakeholders”, more analysis is required concerning the matter of who the stakeholders *are* in different insolvency proceedings compared to the normal operations of a company. Categorization into *internal* and *external* stakeholders can be conducted [26]. In normal business operations, the internal stakeholders of a company are the management, the owners (shareholders and other equity holders), and the employees, whereas external stakeholders are the creditors/financers, suppliers, customers, and society (public interest). When liquidation proceedings are opened, the management is removed from their position due to the non-DIP character of the proceedings. The owners stay as internal stakeholders in liquidation—and lose the value of the shares, as the company will be dissolved. The shareholders’ ownership is supplanted by the creditors (whose rights are turned into equity-like rights), and the creditors are the major stakeholders in the proceedings [19]. In piecemeal liquidation, the employees change their position from internal to external stakeholders, whereas when selling as a going concern, the employees can remain internal stakeholders, now with a new owner. In liquidation, nature is an external stakeholder, not in the role of a green creditor but rather representing public interest with the demand to take care of environmental responsibilities.

In restructuring proceedings, the management remains an internal stakeholder controlled perhaps to some degree—depending on the type of DIP—by the insolvency practitioner appointed by the court. As with the management, the shareholders lose some of their power depending on the modification of the DIP scheme. Before insolvency, it is in the interest of the shareholders (internal stakeholders) to satisfy the claims of the creditors (external stakeholders) to prevent the creditors from initiating insolvency proceedings. In an insolvency situation, instead, this mutual interest shifts into a competition scheme: shareholders pursue to retain within the company as many assets as possible, whereas creditors seek a maximum share from the same assets. However, the competitive interests of the shareholders do not extend beyond the point where the creditors get more in liquidation. That is, even in an insolvency situation, the shareholders’ interest is to satisfy the claims of the creditors to the point where the creditors are better off than in a liquidation. The interest of the shareholders is to retain restructuring as an option. Liquidation is the worst option for shareholders but not always for creditors. Regarding workers, in restructuring, they remain internal stakeholders and can maintain their position if the restructuring works out. In this pattern, the environmental ESEG elements belong to an external stakeholder position representing the public interest.

ENVIRONMENTAL SUSTAINABILITY IN RESTRUCTURING AND LIQUIDATION

Operator Is Responsible, but What if There Is No Operator?

Regarding ecological matters, in *restructuring*, handling possible environmental hazards is a part of the business. If the environmental problem is known, the responsibility for taking care of it is a cost of operations. As in restructuring, where the operations of the debtor company continue “business as usual”, the same environmental requirements prevail as before opening the restructuring proceedings. In the EU, there is in force a “polluter pays” principle [27], which applies even when the debtor company continues its operation in restructuring proceedings. If an environmental hazard occurs later during reorganization, it presents a normal responsibility to act, leading to expenses the company must cover, possibly even resulting in a failure of restructuring.

When the opened insolvency proceeding is *liquidation*, the debtor company does not continue “business as usual”. Instead, the purpose of liquidation is to cease the business of the debtor company. However, this does not prevent *someone else* from continuing the same business. The bankruptcy estate may continue the debtor company’s operations to sell it as a going concern. Then, there are well-founded reasons to require that the estate bear all the normal environmental responsibilities provided in the law for an operator. In this case, the bankruptcy estate is in a similar situation to other operators, and it must take care of the “new” environmental problems (originating from the estate’s operation), as well as “old” problems (originating from the debtor company’s previous operation). For example, if the bankruptcy estate continues mining and selling ore, the administrator has to consider, on the one hand, the responsibilities of an operator according to the law and required by the permit for operation and, on the other, the expected additional selling price as a going concern.

A complicated question arises when the bankruptcy estate does not continue the operations of the debtor company but keeps the business in stand-by mode, aiming to sell it as a non-going concern (or to sell the property in a piecemeal way). The bankruptcy estate, for example, does not extract or sell ore, but it maintains the mine as a whole unit with facilities and vehicles ready for operation. It is not obvious whether the estate then is responsible for caring for the “old” environmental problems or the “new” problems that occur despite passivity, that is, the problem that occurs or worsens is self-aggravated due to the past actions of the debtor company.

One possibility to answer this question is to connect the responsibility of the bankruptcy estate to the *acuteness* of the present environmental hazard. If the situation is serious and public interest is prominent, the bankruptcy estate must act as anybody else would in the same situation and use the assets to prevent additional damage and repair the harm that occurred. The estate has no right to expect society (taxpayers) to act instead of the estate.

Of course, a bankruptcy estate without any assets is unable to act, and no liability can be laid on a bankruptcy administrator or the creditors, even if the environmental situation is serious. Then, in the name of public interest, society must act. The other matter is whether someone is responsible for repayment to society due to negligence or crime (management/owners).

Again, this is the legal side of the matter. From a sustainability perspective, it is not important who bears responsibility for the costs of preventing or repairing an environmental hazard or damage. Society may be willing to take responsibility, and so safeguard start up and funding for an important industry, such as mining and energy production. Ultimately, the matter is political. The legislator has to balance the public interest in sustainability and the possibilities for industry to get financing at a reasonable rate. “Nature does not know” who caused and who repaired the damage; an ethical demand is that “somebody” bears the responsibility. Moreover, there are many possibilities of decentralizing the responsibility using different kinds of secondary funds, guarantees, and insurance systems.

The situation is akin to when a non-acute environmental problem causes cleaning costs (for example, tons of scrap metal in the area) so extensive that the property is deemed *worthless* or to have a *negative value*, meaning no one is willing to take the property, even free. If there are no assets in the bankruptcy estate, nothing can be done and the site must be cared for by society. In this case, there should be provisions that make it possible for society to expropriate the land to avoid orphan lands.

If there are assets with value in the insolvency estate, the tricky question is whether the estate is allowed to cut off the contaminated part of the property and keep the rest or whether the estate is obliged to use the assets for reparation or cleaning the spoiled part of the property. Externalizing the spoiled part of the property means factually abandoning that property. For example, leaving the polluted land in the possession of the original company means factual abandonment, as the original company will be wound up (dissolved) at the end of the proceedings and removed from the company register. Usually, the ex-company is then without management and legal capacity. The abandoning of the polluted part of the assets is acceptable only if outlined in the law, whereas as a one-sided action from a bankruptcy estate, that is, without “permission”, abandonment is hardly acceptable.

The option of leaving the liability for the spoiled property to shareholders is excluded unless there is some ground for liability other than owning shares of the company. This is a fundamental principle concerning limited liability companies. Otherwise, for example, owning mine shares would be highly risky regarding personal liability.

A Global Problem: Bankruptcy Estate Liability for Environmental Problems

Around the world, there has been a dilemma regarding environmental liabilities in bankruptcy proceedings. Thus far, the EU legislation has been surprisingly silent. Accordingly, different EU member states have resolved the dilemma in different manners or left it untouched. In the RI Directive, there is not a word on nature, environmental, or ecological matters. Nothing can be found in the Insolvency Regulation, Recast (EU) 2015/848 either [28]. This Regulation applies to cross-border situations in the insolvency proceedings that member states have listed in Annex A of the Regulation.

However, in the EU *Community acquis* (regime), some important guidelines can be found: Article 11 of the Treaty on the Functioning of the European Union (TFEU [29]) sets environmental protection as a *general* objective of EU law in all areas. Article 11 of the TFEU (under Title II: Provision having general application) reads as follows: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development". In other words, Article 11 requires the national institutions and authorities to *promote* environmental protection when implementing EU policies and interpreting EU law.

Article 11 of the TFEU is linked to Article 191 (Environment) TFEU and to Article 3(3) of the Treaty on European Union (TEU [29]). Article 3(3) of the TEU refers to economic, social, and environmental sustainability: the Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability; a highly competitive social market economy, aiming at full employment and social progress; and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

The above-mentioned articles concerning environmental sustainability are *legally binding rules* in the EU. However, their precise legal effects are still uncertain, and there have been many challenges in enforcing them [30]. The mentioned rules are quite abstract and they are not easily applicable to concrete situations. Nevertheless, they should have a strong interpretation impact on national laws. Optimistically, this impact will gather even more strength and concretion when the EU document "The European Green Deal" 2019 (Communication that sets out a European Green Deal for the European Union and its citizens [31]) is realized. The Green Deal "resets the Commission's commitment to tackling climate and environmental-related challenges that is this generation's defining task." *All EU actions and policies are supposed to contribute to European Green Deal objectives*. The Green Deal is a part of the implementation of the United Nation's (UN) 2030 Agenda [32] and sustainable development goals. The UN 2030 Agenda for Sustainable Development affirms (at point

"Planet") that we are determined to protect the planet from degradation, including through sustainable consumption and production, sustainable management of its natural resources and urgent action on climate change so that it can support the needs of present and future generations. Further, at point "Prosperity", the Agenda announces that we are determined to ensure all human beings can enjoy prosperous and fulfilling lives and that economic, social, and technological progress occurs in harmony with nature.

The EU Green Deal includes a *green oath:* "*do no harm*". All EU actions and policies should pull together to help the EU achieve a successful and just transition to a sustainable future. In addition, the Commission will offer better regulation guidelines and improved support tools addressing sustainability and innovation issues. The aim is for all Green Deal initiatives to achieve their objectives in the most effective and least burdensome way. An explanatory memorandum including legislative proposals and delegated acts is in preparation.

Unfortunately, the Green Deal includes not a word on how to proceed and promote the program when corporations face economic distress. In some stages of the business life cycle, a significant number of companies fall into financial troubles, such as start-up companies. It is unclear why this natural status of companies is not considered in the Communication.

Hopefully, however, the Communication gives some guidelines, for example, for national "battles" related to the problem of bankruptcy estates struggling with environmental hazards. A bankruptcy practitioner perhaps has no clear rules to follow, and the creditors demand the assets that are left in the debtor company. At the same time, an environmental hazard should be repaired or at least its consequences limited to protect the environment, such as groundwater, soil, and air. This conflict of interest has proven difficult for many countries around the world.

Canada Shows the Way

Canada presents a precedent to follow, that is, the decision of the Supreme Court of Canada in the *Orphan Well Association v. Grant Thornton Ltd.* case (31 January 2019, 2019 SCC 5, number 37627). The core ruling is that the bankruptcy estate must *fulfill environmental obligations before paying creditors*. In the case, an additional question arose as to whether the federal Bankruptcy and Insolvency Act (BIA) and provincial Acts were conflicting and questions concerning the application of the doctrine of federal paramountcy. However, the majority of the judges (5–2) found no conflict. Here, the relation between Canadian Acts is set aside, and the focus is on the part of the judgment that concerns the environmental responsibilities of the bankruptcy estate.

Redwater was an oil and gas company that owned over a hundred wells, pipelines, and facilities (hereinafter "oil wells") and Grant Thornton Ltd. (GTL) was appointed its receiver in 2015. The Redwater company went into bankruptcy in 2015. Under provincial legislation, the Alberta Energy

Regulator will not grant a license to extract, process, or transport oil and gas in Alberta unless the licensee assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures, and restoring the surface to its previous condition ("abandonment" and "reclamation"). The Energy Regulator notified GTL that it was legally bound to fulfill abandonment obligations for all licensed assets prior to distributing any funds or finalizing any proposal to creditors. The provincial Regulator required these end-of-life responsibilities with respect to oil wells. Dismantling the sites and restoring the land would have cost millions of dollars more than they were worth. To avoid costs, the trustee of the bankruptcy estate was not taking responsibility for the company's unproductive oil and gas assets. The bankruptcy trustee decided to leave aside the useless wells and sell the productive sites to pay the creditors.

The Regulator and the Orphan Well Association (OWA) filed an application for orders requiring GTL to fulfill the end-of-life obligations. GTL brought its own cross-application. The chambers judge and a majority of the Court of Appeal judges agreed with GTL. In the Supreme Court, an above-mentioned majority of judges stated that bankruptcy is not a license to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. The Supreme Court decision noted that the non-monetary *obligations* that are binding on the bankrupt estate *could not be reduced to provable claims*, and this does not conflict with the BIA, notwithstanding the consequences for the bankrupt's secured creditors. The purpose of the BIA was the equitable distribution of the bankrupt's assets among the creditors, not setting aside environmental responsibilities. The Supreme Court ruled that the end-of-life obligations binding on GTL were not claims provable in the Redwater bankruptcy and not all environmental obligations will be claims in bankruptcy.

The Supreme Court used a so-called "*Abitibi*" test to determine whether a particular regulatory obligation amounts to a claim provable in bankruptcy. If so: (1) there must be a debt, liability, or obligation to a creditor; (2) the debt, liability, or obligation must be incurred before the debtor becomes bankrupt; and (3) it must be possible to attach a monetary value to the debt, liability, or obligation. The decisive matter for the case was the first requirement. The Supreme Court noted that a Regulator exercising power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. The Regulator acts in the public interest, where the public is the beneficiary of environmental obligations, and the province does not gain financially from them.

The conclusion of the Supreme Court was that that GTL cannot walk away from the environmental liabilities of the bankrupt estate. The Court held that through a proper application of the *Abitibi* test, the Redwater estate must comply with ongoing environmental obligations that were not claims provable in bankruptcy. Accordingly, the appeal was allowed and the Regulator's request for an order that the proceeds from the sale of Redwater's assets be used to address Redwater's end-of-life obligations was granted.

The conclusions of the Canadian Supreme Court are well grounded and present that non-monetary obligations to protect public interests do not transform to monetary claims (receivables) to be lodged in the bankruptcy proceedings. On a more general level, it can be argued that, in the same way, a bankruptcy estate must continue to obey other obligatory legislation, such as protecting employees from work accidents. The purpose of liquidation proceedings is "clearing" an insolvency situation by dealing the assets to creditors according to a priority list and ceasing the operations of the debtor company. This purpose does not set aside other responsibilities laid down in the law if not otherwise specified.

Sometimes the responsibility to act against an environmental hazard is called a *super priority* [9]. The term is reasonable where, in the first place, authorities have been obliged to act to prevent further damage. Then, the authorities can take the costs with the highest priority from the estate. Otherwise, the responsibility of the bankruptcy estate to act itself would be too lucrative to ignore. As noted, according to the Canadian precedent, environmental responsibility is not a receivable but a responsibility to act. From this perspective, one could talk about a *super responsibility* of the estate to take care of the environmental problems.

If this super responsibility is reduced to an ordinary claim provable in a liquidation, it affects also the choice between restructuring and liquidation when favoring liquidation: it is a huge advantage for the creditors if society gets compensation for the costs of the environmental hazard only as a share according to the *pari passu* rule, compared to restructuring where the company, as a normal operator, must take all actions the law requires repair the environmental problems. Inevitably, the BIT indicates to choose liquidation if the costs for preparing environmental damage will be diluted according to the *pari passu* rule, compared to restructuring, where the debtor company continues as an operator and is responsible to act and bear the costs. The super responsibility principle does not cause this kind of a bias.

DISCUSSION: INSOLVENCY CHALLENGING THE PURPOSE OF A CORPORATION

In August 2019, the American Corporate Governance Business Roundtable released an updated Statement on the Purpose of a Corporation to Promote "An Economy That Serves All Americans" [33]. The statement redefined the purpose of a corporation to promote an economy that serves all Americans. The Statement moved the focus *from shareholder primacy to commitment to all stakeholders*. The statement reflects the modern way corporations operate. A corporation generates added value to shareholders, but the best-run companies put the customer first and invest in their employees and communities, thus generating long-term value and sustainability for business and society. The statement includes a commitment to:

- Deliver value to customers
- Invest in employees: fair compensation; support through training and education; fostering of diversity and inclusion, dignity, and respect
- Deal fairly and ethically with suppliers
- Support the communities: respect for people and protection of the environment by embracing sustainable practices across businesses
- Generate long-term value for shareholders

The statement notes that each stakeholder is essential, and the companies commit to deliver value to all of them for the future success of the companies, communities, and country.

The general tendency seems to be that during operations, ESEG factors are considered increasingly. Surely, behind this tendency is some kind of win–win thinking: ESP gains from implementing ESEG elements in the long run. This standpoint is true also in restructuring, whose objective is to make it possible for the debtor company to continue on the market. However, as above noted, creditor interest may require that the maximal preservation of ESEG elements not be implemented when it diminishes the repayment too much or takes too long. Optimal intersection can be found among the following three parameters: (a) the amount of repayment to creditors in restructuring, (b) the share for creditors in liquidation, and (c) preserving sustainability resources.

In summary, *a viable company should be restructured in a way that does not give considerably less to creditors than in liquidation when preserving ESEG values as much as possible*. It is the best win–win result available. In the end, the shareholders (or other equity holders) are perhaps the biggest winners: the value of the shares will be preserved, forming thus a win (creditors)–win (ESEG)–win (owners) situation. This outcome is in accordance with the above-mentioned statements concerning the purpose of a corporation.

In liquidation proceedings, such a triple win situation is not reachable: shareholders lose the value of their shares in any case, creditors usually get only a minor repayment, and ESEG cannot necessarily be addressed. In a penniless bankruptcy estate, indeed, there is a triple loss situation. Meanwhile, an estate with some assets arouses the question of what to do first: pay the creditors or take care of the environmental hazard. This paper suggests that, also in liquidation, solving environmental problems (including handling waste and end-of-life obligations) is a super responsibility. There is no connection left to the purpose of a corporation, as the liquidation ceases operations and the company will be wound up. Instead, public interest supersedes business sustainability. On the contrary, in restructuring, there is no reason to give up the above-mentioned modern operation rules.

CONCLUSIONS

In insolvency proceedings, we must ask whether the focus should be moved from creditors' primacy to commitment to all stakeholders. When weighing the tests for choosing between restructuring and liquidation, one crucial question is whether it is possible—or ethically justified—to create shared value for all stakeholders, ecological values included. The question reflects one of the fundamental issues in sustainability science: how far we can expect that certain stakeholders can be withdrawn from the satisfaction of their interests in favor of non-financial ESEG sustainability values, that is, who "pays" for the sustainable development?

Actually, there is a gap between business sustainability regarding a company in normal operation and a company in insolvency proceedings. Traditionally, creditors' interests have been prominent, as evidenced in the viability test and the best interest of creditors "one bottom line" tests. However, through the triple bottom line test, an optimal point can be made: creditors get a fair share that is not considerably smaller than in liquidation and the sustainability elements are preserved as much as this allows. In liquidation, some balancing between creditor interest and non-financial sustainability values is possible when choosing between piecemeal selling and selling the assets as a going concern. In liquidation, environmental problems must be cared for primarily, as they indicate the responsibility to act and are not reducible to monetary claims beneath. On a general level, it can be noted that creditors, as a group, have the benefit of the environmentally, socially, or ethically risky, or even heedless, operations of the debtor company, even if the last creditors are those who bear the consequences. The important thing is that creditors are able to protect their interests in advance and, according to national policy making, secondary compensation systems can be developed. The creditors, though a heterogeneous group, are linked more closely to the operations of the debtor company than taxpayers. In the end, the creditors' risks transform into the prices of products and services and higher transaction costs in that industry. Compared to taxpayers' burden, even this seems more justified.

ESEG elements have an increasing role in the EU *Community acquis* generally and a certain role in the goal setting of the RI Directive. However, when defining the tests for the choice between liquidation and restructuring, ESEG elements are invisible. This is a problem because the fate of ESEG elements depends on which insolvency proceedings will be initiated. Many times, restructuring is a better option, but not always. This paper aimed to stimulate the discussion of the importance of acknowledging the consequences of the choice between liquidation and restructuring for ESEG elements, even when they are non-financial and do not promote the profitability of the company. The ESEG "stakeholders", such as the environment, and social responsibility for employees, are left outside, especially in the BIT. Perhaps, there should be a best interest of ESEG stakeholders test as well. Inevitably, this would lead to a weakening of creditor supremacy, but not necessarily of creditor protection. Final losses for creditors can be limited if they are able to beforehand protect their interests through pricing and securities. Legal certainty should be maintained through provisions in the law.

The outcome of the paper is that, when choosing between restructuring (rescue) and liquidation, non-financial ESEG values should play a more prominent role as stakeholders, but in a balanced way. The current creditor supremacy applied by one-sided financial parameters in insolvency proceedings should yield to some degree so ESEG elements can be retained. However, the consequence should not be too strong a stakeholder position for ESEG elements to undermine financial ESP in restructuring thus leading to unnecessary liquidation. In an imminent insolvency situation when there is still ESP potential in a company, an optimum balance can be found to maintain both ESEG elements and to respect the interests of creditors.

The current RI Directive is quite strict and "close" to the BIT and it allows only a narrow margin for ESEG elements. The national implementation of the new Directive is presently under way. In this situation, it is confusing to note that the Directive is not in accordance with ESEG aspects or, for example, with the EU Green Deal.

CONFLICT OF INTEREST

The author declares that there is no conflict of interest.

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