# ESG-Concerns in the Restructuring of Financially Distressed Companies

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*Abstract*

ESG or Environmental, Social and Governance concerns are at the top of the EU policy agenda. The threat of climate change has been a catalyst for renewed attention for objectives that go beyond blunt profit maximisation when defining the ultimate goals of economic policies. The ongoing developments within the field of EU company law are an apt example of this evolution. Following initiatives in multiple individual EU member states and large attention in academic literature, the European Commission has recently presented a proposal for a directive introducing a corporate sustainability due diligence obligation (COM/2022/71 final). According to this proposal, large companies will be obliged to identify and prevent or mitigate adverse impacts of their activities on the environment and on human rights throughout their entire value chain. Upon adoption, this would mean the formal end of the idea of shareholder primacy within EU company law. Directors will be legally obliged to address other interests than the profit maximising interest of the shareholders.

So far, there is no evolution, similar to the one within company law, ongoing in the area of insolvency law (yet), nor on the EU level, nor on the level of the member states. This observation, which is in our view at least remarkable, serves as the starting point of this paper.

Now that sustainability is on the top of policy agendas worldwide, it could be expected that the traditional concept of "creditor primacy" within insolvency law is being completed with ESG-concerns in setting the ultimate goal of insolvency procedures. This is particularly the case for what regards procedures that allow a transfer of business activities of financially distressed firms in going concern. We see sound policy reasons why courts should take into account alleged human rights infringements (*e.g.* trade in blood diamonds) or the environmentally hazardous character of certain activities, when the restructuring plan they are asked to approve includes the transfer of these activities. On the other hand, however, there are clear differences between company law and insolvency law in this respect too, in the first place with regard to the actors that should take potential ESG-concerns into consideration.

After (i) sketching the recent rise of ESG-concerns in EU company law and (ii) explaining the similarities and differences in this respect between company and insolvency law, this paper particularly (iii) aims to explore potential routes for policymakers to introduce ESG-concerns in the legal framework for restructurings encompassing the transfer of business activities in going concern. With respect to the latter, Belgian law and the 2019 EU Directive on restructuring and insolvency, both lacking whatsoever explicit reference to ESG or sustainability, will serve as the basis for our analysis.