

SUSTAINABILITY AND INSOLVENCY: AN ANTITHESIS?

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Abstract

While corporate sustainability received, in the last decade, a significant and dedicated attention by the European legislator with specific reference to solvent enterprises¹, the simultaneous development of the legal framework regarding insolvent enterprises substantially fails to consider — or at least fails to consider in the same way and with the same intensity — the topic of sustainability².

This singular circumstance deserves to be scrutinized, considering, on one hand, the fundamental importance acquired by sustainability from the corporate governance and financial perspective, and, on the other hand, the consolidated approach of insolvency law, at international level, towards the restructuring of companies in crisis instead of the related discharge from the market, this implying that a company managed in compliance with sustainability rules should

¹ Reference goes to the various European Directives on the topic, starting at least from Directive 2014/95/EU on disclosure of non-financial and diversity information by large companies and groups, to Directive (EU) 2022/2464 on corporate sustainability reporting (the so-called CSRD), until the recent Directive (EU) 2024/1760 on corporate sustainability due diligence (the so-called CSDDD).

² In this perspective, see at least Directive (EU) 2019/1023 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 (the so-called Insolvency Directive) as well as the most recent Directive Proposal dated December 7, 2022, aimed at harmonizing certain aspects of insolvency law.

continue to be in line with the related values, especially in the view of the desired financial restoration and continuation of the business³.

The Italian legal framework offers, in this perspective, an interesting observation point, not only due to the centrality acquired by business continuity in the overall system resulting from the new business crisis and insolvency Code (Italian Legislative Decree 12 January 2019, No. 14, hereinafter also the “Code”), but also for a number of relevant indexes of the potential importance of stakeholders’ interests emerging from the provisions ruling judicial liquidation (the “old” bankruptcy proceeding), among which, in particular, articles 211, 212 and 214 of the Code, regarding, respectively, the continuation of the business during the procedure, the lease and the sale of the business⁴.

The analysis of the above provisions, to be carried out along with the due consideration of some necessary conceptual adjustments, required by the different condition of an insolvent company in comparison with a solvent one (starting from the doctrine assumption of the acquisition of company’s control, in case of insolvency, by the creditors in place of the shareholders⁵), would be the occasion to outline, by this research, how sustainability could deal with insolvency in the current legal framework, awaiting further desirable legal developments.

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³ On this topic, see, in particular, D’Attorre (2021), Stanzione (2023), and Stanzione (2024). In the international debate, specific attention to the topic of sustainability in insolvency law has been dedicated by Linna (2019), while in the Italian doctrine, for the opinion which admits the potential consideration of stakeholders’ interests, in addition to that of the creditors, in the context of business crisis, see, in particular, D’Attorre (2021), Fabiani (2022), Inzitari (2023), Pacchi (2022), Santosuosso (2023), Stanghellini (2007), Stanzione (2023). On the contrary, for a critical view on the effective relevance of stakeholders’ interests in the management of business crisis, see, with a variety of arguments, Ballerini (2023), Fauceglia (2023), Galletti (2021), and Galletti (2023).

⁴ In this perspective, see, in particular, D’Attorre (2021) and Stanzione (2023).

⁵ See on this, in particular, in the Italian doctrine, Stanghellini (2007), Stanghellini (2004), and also, within the international doctrine, previously, Easterbrook and Fischel (1983).

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