

ESG and insolvency

Main repercussions of socio-environmental integrity for the legal framework of the business crisis

Ana Frazão

Attorney. Full Professor of Civil and Commercial Law at UnB. Former Commissioner of CADE.

On September 17, 2026, the 5th Congress of the Center for Women in Business Restructuring took place in São Paulo, an event at which I had the honor of being invited to speak on “sustainable restructuring: ESG and the new economics of insolvency”. I took the opportunity to systematize some reflections on what I consider most essential to the topic: the implications of the ESG agenda for the very purposes of business reorganization.

As is well known, bankruptcy is, after all, a mechanism for preserving capitalism itself, insofar as it prevents capital, labor and economic assets from remaining artificially trapped in unproductive activities. It is an important indicator that the continued presence of economic agents in markets, far from being a guarantee, depends on each one’s ability to face competitive risks.

Therefore, even from a strictly economic standpoint, it is not expected that all companies in crisis will be rescued. This conclusion is reinforced, nowadays, by the understanding of the legal framework of insolvency as a public policy aimed at linking the resolution of the business crisis to other important objectives, such as economic development, the encouragement of innovation and the strengthening of markets.

From this perspective, the ESG agenda adds a further layer of complexity by emphasizing that the legal framework of insolvency should not seek to preserve the company at any cost and that the success of the reorganization should be conditioned on the creation or maintenance of activities that equally meet standards of socio-environmental integrity.

This issue is directly connected to the principle of the social function of the company and to the idea that the resolution of the business crisis must also be considered in light of interests other than merely those of the debtor and its creditors. It is essential to consider other important *stakeholders*, as well as to reflect on whether and to what extent the continuation of the company is consistent with socially relevant values and expectations and in conformity with socio-environmental integrity.

If one of the most important consequences of the principle of the social function of the company is to broaden and diversify the interests to be protected in the exercise of business activity, its implications for insolvency are that, in the face of a crisis, other dimensions of the continuation of the activity must be considered with even greater reason, such as its impacts on the environment, workers, society as a whole, innovation, competition and even human rights.

This perspective broadens the traditional focus of insolvency, usually tied to the economic-financial paradigm, aimed at preserving the economic value of the company, maximizing creditors' interests, reducing transaction costs and avoiding the individual race to enforcement. After all, the excellence of the reorganization plan from a financial point of view may result precisely from the reduction of social and environmental investments, the elimination of internal controls and the increased risk of causing socio-environmental harm.

The situation is aggravated because many of the *stakeholders* affected by the company's crisis, as well as by its continuation, often do not even have a voice in the reorganization process, especially when the harmful conduct of the economic agent has not yet been translated into enforceable claims. Thus, the incorporation of ESG concerns into the business crisis will certainly need to be reflected in the reorganization procedures themselves, so that the socio-environmental impacts of the business can be properly understood and weighed.

Another repercussion of the ESG agenda on insolvency is to highlight the distributive aspect of reorganization and bankruptcy proceedings, prompting reflection on who actually bears the costs of insolvency and how to resolve asymmetries that allow large creditors to be protected by guarantees outside bankruptcy - such as hedges, insurance and other legal mechanisms –

while others directly bear the costs of bankruptcy, such as workers, small suppliers, consumers and the State. Such asymmetries become even more undesirable when those affected are harmed by the failure to meet objectives related to socio-environmental integrity.

This is a discussion about whether and to what extent the mechanisms for dealing with business failure are fair or whether, on the contrary, they end up favoring the rescue of large companies or large creditors, the perpetuation of unviable companies or the regressive distribution of losses, especially when one is faced with social or environmental harms that have already occurred or that become likely with the continuation of the business activity without the necessary adjustments.

This leads us to consider whether the activity to be preserved is environmentally and socially sustainable, who bears the costs of the crisis, whether the reorganization corrects or perpetuates the practices that produced the harms, and whether those who caused harms, such as controlling shareholders and managers, will be held duly accountable.

These are additional reasons demonstrating that insolvency cannot be seen merely as a financial negotiation between debtor and creditors, but also as a process of reorganizing business governance, risks and externalities, including socio-environmental integrity objectives.

Hence the importance of a careful look at the causes of the crisis, since the problem may not properly lie in financial management, market changes or exogenous causes, such as pandemics. If the cause of the crisis stems, for example, from social or environmental harms, it must be ascertained whether the reorganization is a way of resolving the roots of the problem or whether, on the contrary, it may perpetuate practices incompatible with socio-environmental integrity.

Indeed, from an ESG perspective, more than preventing the reorganization from being an instrument for externalizing environmental and social harms, it is imperative to ensure that it can be a means to achieve such goals and to overcome the exclusively financial concept of viability.

It is not enough, therefore, for the creditors to approve the plan, for the company to keep operating and for jobs to be maintained. The reorganization process must be guided by the objective of restoring or implementing sustainable

viability, becoming an important instrument of transition toward sustainable companies.

This certainly calls for a new look at the *fresh start*, since the second chance must be tied to the transformation of business conduct and the reorganization of governance. Moreover, this only makes sense if socio-environmental objectives are met during the crisis, since it is precisely in this period that such commitments become most threatened, in view of spending cuts.

Reflecting on the implications of the ESG agenda for insolvency therefore requires an integrated diagnosis of the crisis and not merely an accounting snapshot. On the environmental level, this includes discussions on the remediation of environmental damage, regulatory compliance, decarbonization, waste management and safety measures, among others. On the social level, one must consider the protection of workers, compensation of victims and preservation of jobs, among others.

Furthermore, this involves the adoption of measures for the protection and prioritization of the treatment of environmental and social claims, the conditioning of reorganization financing on ESG outcomes, the reframing of fiduciary duties also in relation to *stakeholders*, the management of the crisis in light of socio-environmental integrity and the redefinition of the profile of the judicial administrator. There will undoubtedly be an increase in the complexity of crisis management, which may even call for the presence of multidisciplinary teams, with engineers and experts in environmental or social matters.

In the Brazilian case, it is unquestionable that this will involve challenges for the interpretation of the Bankruptcy Law, especially its art. 47. Indeed, the law continues to be based on the paradigm of the economically sustainable company, in addition to not distinguishing between the causes of insolvency, being excessively creditor-centered and lacking a theory of good governance during the crisis.

What can be concluded is that probably the main consequence of the ESG agenda for insolvency is to redefine the role of reorganization, so that it is seen as a means of preserving organizations that create not only economic value, but also social, environmental and institutional value.

This redefinition requires, at a minimum, the internalization of socio-environmental costs and the transformation of the governance structures

that contribute to the failure to meet ESG goals, especially in cases where such problems were the cause of the crisis or contributed decisively to it.

Published on October 8, 2026

Link: <https://www.jota.info/opiniao-e-analise/colunas/constituicao-empresa-e-mercado/esg-e-insolvencia>

Note: This English version was translated from the original Portuguese by artificial intelligence (AI).