

1. INTRODUCTION

1.1. BACKGROUND

Recent political and legislative developments at the European Union¹ level call for a positive attitude towards risk-taking and failure. In its Communication on the “Challenges for enterprise policy in the knowledge-driven economy”, the European Commission considers that “*Europe must re-examine its attitude to risk, reward and failure. Thus, enterprise policy must encourage policy initiatives that reward those who take risks. Europe is often reluctant to give another chance to entrepreneurs who failed. Enterprise policy will examine the conditions under which failure could acquire a less negative connotation and it could be acceptable to try again. It will encourage Member States to review bankruptcy legislation to encourage risk-taking*”.²

It is with these key weaknesses in mind that the European Commission³ aims to promote entrepreneurship and competitiveness, to simplify and improve the regulatory environment for businesses, calls for examining the conditions under which failure could acquire a less negative connotation and proposes to encourage the Member States to review bankruptcy legislation in order to encourage risk-taking. Its strategy is clearly oriented to promote the survival of viable businesses, to enable a smooth exit for not viable businesses and to offer the possibility of a fresh start for entrepreneurs who have tried but failed.

Linked directly to all these economic realities, new aspects of insolvency practice await legal solutions by identification of principles and guidelines for an efficient and effective insolvency and restructuring practice. In this line, an emerging trend in the different national legislative systems is the inclusion of a positive policy of rehabilitation for insolvent debtors, through a variety of procedures designed to assist them in overcoming an economic crisis without experiencing the total impact of bankruptcy or liquidation: various procedures (some adapted from existing provisions for the concluding of controlled compositions with creditors) have been implemented. Under these procedures, the debtor can enjoy the protection of a legal moratorium against acts of enforcement by the creditors singly or collectively, for a defined period during which efforts can be made -under professional guidance or control- to restructure the debtor's affairs so that equilibrium is eventually capable of being restored.⁴ The range of insolvency procedures available within each country demonstrates several contrasting approaches to the regulation of the problems of insolvency⁵. U.S.

¹ Charter for Small Enterprises adopted by the General Affairs Council, 13 June 2000 and welcomed by the Feira European Council, 19/20 June 2000

² Communication from the European Commission - Challenges for enterprise policy in the knowledge-driven economy - Proposal for a Council Decision on a Multiannual Program for Enterprise and Entrepreneurship (2001-2005)

³ Communication from the European Commission - Challenges for enterprise policy in the knowledge-driven economy - Proposal for a Council Decision on a Multiannual Program for Enterprise and Entrepreneurship (2001-2005)

⁴ Ian F. Fletcher, “*Cross-border insolvency*”, 1998, p 272

⁵ B. Surlement, B. Leleux, S. Denis, *Enabling entrepreneurship : the role of personal and corporate bankruptcy legislation in Europe, USA and Japan*, Babson College-Kauffman Foundation Entrepreneurship Research Conference, Columbia, May 12-15, 1999, 10p.

bankruptcy law is characterised as pro-debtor because it allows managers (appointed by equity holders and so thought to be beholden to them) to continue to run the firm while negotiations are under way. In the United Kingdom, an insolvency practitioner would be put in charge, giving to him the exclusive right to propose a reorganisation plan. Entrusting the operation to the existing board of managers or appointing a new overseer could have consequences on the timing and negotiations of the bankruptcy filing. European bankruptcy occurs more quickly, not because of the procedures but because of the negative attitude of the financial parties towards the failing entrepreneur⁶.

Nevertheless, an entrepreneurship policy at the international level should encourage an effective insolvency and creditor rights systems built on the simple premise that sustainable market development relies on access to affordable credit and capital investment. A policy in favour of the entrepreneurship should rely on quick and easy rehabilitation legal procedures, provide sufficient protection for all those involved in the process, provide a structure that permits the negotiation of a commercial plan, enable a balance between the business and creditor's interests, offer the necessary standard of protection for the creditors; and provide for judicial or other supervision to ensure that the process is not subject to manipulation or abuse.

Furthermore, although there is widespread agreement that the globalisation of trade and enterprise requires a co-ordinated approach to international bankruptcy, the field of bankruptcy law has remained persistently territorial. The philosophical position occupied by "territorialism" or the "grab rule" has prevailed despite the evolution of modern times. When a person or a company with international operations falls into serious financial trouble, each country employs its insolvency laws to grab local assets and administer them locally according to the procedures and priorities of that country's laws.

At the European level, insolvency proceedings with cross-border effects within the European Union lacked a general framework governing the interference of the various national laws and jurisdictions applicable to such proceedings. This situation affected the aim of the Single Market and gave way to "forum shopping" by the parties involved in the insolvency proceedings and a lack of legal certainty. With the adoption on May 29, 2000 of the European Council Regulation on Insolvency Proceedings, the European Union acquires a new instrument for dealing with the cross-border insolvency. The common rules on insolvency proceedings laid down in the Insolvency Regulation constitute an important step forward in the ambit of legal and judicial co-operation within the European Union.

Within this new co-ordinated European context, the policy for a bankruptcy as a new learning opportunity should constitute a stimulating factor of particular interest for all Member States and an incentive for them to build effective bankruptcy systems.

⁶ S. Ramachandran, *"Bankruptcy's Role in Enterprise Restructuring: A Hammer to Turn a Screw?"* in *"Private sector"* n 38, p 1, 1995

1.2. RECENT INITIATIVES

The Lisbon European Council (held on March 23 and 24, 2000) set the European Union a goal of becoming the world's leading economy in the world by 2010. The European Charter for Small Enterprises, endorsed at the Feira European Council in June 2000, considers that "some failure is concomitant with responsible initiative and risk-taking and must be mainly envisaged as a learning opportunity" and called for assessing national bankruptcy laws in the light of good practice.

The European Commission responded to this by undertaking several initiatives to identify issues regarding business restructuring, bankruptcy and a fresh start in the European Union.

In September 2000 the Flash Eurobarometer survey No 83 on 'Entrepreneurial activity' was conducted⁷. The aim of the survey was to measure the general public opinion regarding entrepreneurial attitude within the European Union and the U.S. One of the results of the survey showed that most respondents agree that a second chance should be given to entrepreneurs who have tried but failed.

Another initiative was the seminar on business failure, organised by the Dutch Ministry of Economic and the European Commission, on 10 and 11 May 2001 in Noordwijk aan Zee, the Netherlands⁸. This seminar focused on the relation between business failure and promotion of entrepreneurship. Approximately 130 representatives of private businesses (i.e. lawyers, accountants and entrepreneurs), international organisations, business support organisations, ministries and universities participated in the seminar. Topics such as bankruptcy law, support measures and post failure obstacles for a fresh start were discussed. The seminar concluded that bankrupt entrepreneurs are confronted with legal and financial barriers and stigma, which act as a deterrent to a fresh start. They also concluded that prevention is more efficient than healing, that a quick discharge is necessary and no unnecessary restrictions should be imposed.

1.3. OBJECTIVES OF THE REPORT

In light of the above, the European Commission launched this project '*Bankruptcy and a fresh start: stigma on failure and legal consequences of bankruptcy*'. The objectives of this study were, in summary, to obtain current reliable information on the attitude of the public, the business community and financial institutions to business failure and bankruptcy and to analyse the legal consequences of insolvency.

The results of this study allow a comparison of the situation in Europe and the U.S. and will assist in drawing policy conclusions on business failure and its consequences on entrepreneurship.

⁷ http://europa.eu.int/comm/enterprise/enterprise_policy/survey/eurobarometer83.htm

⁸ <http://www.ez.nl/businessfailure/index.htm>

⁹ http://europa.eu.int/comm/enterprise/enterprise_policy/survey/eurobarometer83.htm

¹⁰ <http://www.ez.nl/businessfailure/index.htm>