

9. CONCLUSIONS

Legal Consequences of Bankruptcy and a Fresh Start

Early intervention is a key component to business preservation. It is important that national bankruptcy-related legislation supports procedures that aim at detecting and warning businesses with difficulties at an early stage. The implementation and imposition of tools to detect businesses in distress would increase the chances of success in business recoveries. For example, independent organisations or departments within commercial courts could systematically screen companies and warn these entities at any first indications of financial difficulties. These groups should initially encourage and eventually obligate businessmen to take the appropriate steps to recover their businesses.

The European organisations that participated in this study typically mentioned late recognition of businesses in distress as the underlying causes of business failure. In the past, this has meant that once financial difficulties are recognised in a company and appropriate action is taken to remedy those, the company is beyond stages of recovery. In the event of late detection of a business in distress, in which case a business might be forced to enter bankruptcy proceedings, these proceedings should still aim at rehabilitation of the business.

It appears that most EU Member States do have legal procedures aimed at rehabilitation of distressed businesses. However, they appear to be unsuccessful and unpopular within the business community. Their unpopularity and unsuccessfulness could be attributed to the following:

- Negative Publicity. Businesses generally regard them as unnecessarily harming their reputation.
- Procedures are complex and high in cost.
- Creditors are highly protected.
- Thresholds for entry are high.
- Lack of awareness. A lot of companies seem to not be aware of all legal possibilities available to them in situations of distress.
- Slow adaptation. By the time many companies take the initiative to consult an expert, they are often beyond the stage of recovery.

In addition, there is a general sentiment among EU Member States that certain obstacles prevent a business or businessman from starting fresh once it has been previously bankrupt. Automatic restrictions and long discharge periods after bankruptcy were the main obstacles cited throughout this study. Restrictions, disqualification and prohibitions have an adverse effect on entrepreneurial activity. Most Member States believe that an early discharge for non-fraudulent debtors could stimulate the possibilities for a fresh start. For fraudulent debtors, there should be more severe restrictions placed on such businesses and individuals before they can benefit from a discharge. However, most Member States agreed that restrictions should only be placed on fraudulent debtors.

Stigma

Regarding the stigma associated with bankruptcy, there was a clear difference in opinion between the various types of organisations that participated in this study.

A strong stigma seems to exist within the general community, or the consumer public. The public is generally not aware about the specific concepts, the technical aspects and the legal system of bankruptcy, including the notions of cessation of payments and restructuring tools to assist in turnaround of distressed businesses. Consumer awareness about bankruptcy seems generally to be limited to individual and consumer bankruptcy cases, for which the stigma is high. However, consumer protection organisations interviewed for this study and that represent the general public also seem to have no link to the entrepreneurial culture, as their perception of business reality is filtered through the protection of consumers.

Stigma associated with bankruptcy seems to be divided within the business community. Non-fraudulent bankruptcies seem to carry very little stigma and are regarded more or less as “accidents” and the honest debtor is more or less a victim of circumstances. On the other hand, a strong stigma is associated with the fraudulent bankruptcy and the dishonest debtor.

Nevertheless, there appears to be a strong reluctance in both the business and the financial communities to dealing with a business facing difficulties. However, the business community is much more tolerant towards a business that has recovered from such difficulties.

It is possible that the stigma associated with bankrupt businesses and individuals could be diffused through availability of good and transparent information to the public. As of now, there exists a huge amount of information on the financial and legal status of entrepreneurs. However, often this information does not specify the cause of the difficulties or the bankruptcy. These reports are not very clear in helping the general community to really understand what the situation is and how to be involved within the business context. Lastly, the information is usually quite expensive, which is possibly a deterrent in providing consumers and the general public access to such information.

The organisations that participated in this study expressed a clear need for increasing external control aimed at preventing business failures. The control could be carried either by crisis managers or by judicial authorities, but without the interference of national authorities.