

8. RECOMMENDATIONS

In this section we developed possible recommendations to improve the situation of entrepreneurs facing failure and previously failed entrepreneurs who wish to make a fresh start on the following levels:

- *General public, business and financial community*
- *National authorities*
- *The European Union*

8.1. STIGMA

8.1.1 General public, business and financial community

- ***General knowledge of bankruptcy / insolvency***

The general public, the business and financial communities have different level of knowledge of the concepts of bankruptcy / insolvency and its consequences. The general public has limited awareness on the matter whereas the business and financial communities have a more in-depth knowledge of these concepts.

Developing informational and education programs on bankruptcy / insolvency could help reduce the stigma surrounding business failure, for example, by defining the difference between fraudulent and non-fraudulent bankrupts.

- ***Dealing with bankrupt businesses***

A business in financial difficulties usually encounters a resistance from its business partners, financiers, creditors (who typically require guarantees) and the general public (who prefer to buy from another company) in continuing to do business.

This mentality and negative reaction against businesses in distress should be changed into a more positive perception of the situation, since the continued support from business partners, financiers, creditors and consumers could contribute in a company avoiding bankruptcy.

8.1.2. National authorities

- ***Information on business failure***

The information on business failure influences the public's notion and attitude towards bankruptcy. National authorities should provide for clearer, more in-depth information to the general public who usually receives this information from the media, which may lack objectivity.

- ***Promotion of fresh start***

The national authorities should promote the fresh start of previously failed businesses, by enabling and empowering them to begin new activities without being hindered by restrictions. However, this should not apply to fraudulent bankruptcies.

- ***External control***

National legislation should provide for a greater control over the business activities of an entrepreneur facing difficulties or previously involved in bankruptcy. This control would reassure customers and the business and financial community. It could be either of a judicial or administrative nature, or the entrepreneur's creditors or an external manager could carry it out (preferably).

8.1.3. The European Union

The European Union should assist the national authorities to promote the informing and education of the general public and, to a lesser extent, the business and financial communities, on knowledge of bankruptcy, insolvency, the consequences, and the difference between fraudulent and non-fraudulent bankruptcies.

8.2. EARLY WARNING

8.2.1 General public, business and financial community

- ***Earlier recognition:***

Entrepreneurs, who sometimes have difficulties to admit that their business is in financial difficulty, should be “pushed” by external advice (accountant, detection authority, etc.) to initiate recovery measures. This external advice would assist the business to analyse the situation more objectively and should intervene at an early stage in order to allow the widest range of possibilities of recovery measures.

- ***Information:***

Not only should this external body intervene and provide advice at an early stage, but should also provide the debtors with a clear understanding of the various options available to him and with sufficient information regarding these options.

8.2.2. National authorities

- ***Formal detection proceedings***

Special detection procedures should be implemented, whereby neutral organisations or institutions (e.g. special division of the court) have the task to systematically screen and monitor warning lights to detect businesses in financial difficulties. Such businesses should be informed of their position and be encouraged or obliged to take appropriate steps.

The fact that entrepreneurs would be confronted with an external third party was monitoring the company might have a positive effect in rescuing the company.

- ***Information with regard to the legal possibilities to rescue businesses***

Entrepreneurs should be better informed of all legal possibilities offered by the legislation to enterprises in distress. Informed entrepreneurs would then be able to take the necessary steps at an earlier stage. We believe the national authorities should implement programs in order to promote reorganisation through a chamber of commerce and/or a trade register, thus providing information on the financial status of entrepreneurs.

8.2.3. The European Union

The European Union should provide the national authorities with an impetus to organise coherent and efficient detection measures, by way of uniform legislative requirements. It should also promote a control of these detection measures in order to ensure that these goals are satisfied.

8.3. BUSINESS SURVIVAL

8.3.1. General public, business and financial community

From our surveys, it became apparent that financial institutions require the appointment of a ‘crisis-manager’ to assist the enterprise in distress. According to the French experience, crisis-managers or “mandataires ad hoc” and could be appointed either by the court or the involved financial institution. An independent crisis-manager could act as a neutral party between creditors and the debtor.

The business and general communities indicated that a crisis-manager should be a third party or external expert under the control of the judiciary authorities, whereas the financial community indicated that this third party should be independent. According to the interviews, the financial community believes that the appointing a third party should be done in the strictest confidentiality, in order to avoid all potential stigmas.

A solution could be to promote the intervention of the crisis-managers or mandataires ad hoc under the control of a judiciary body operating under confidentiality. This intervention would protect not only the interest of creditors, but also the right of the entrepreneur.

8.3.2. National authorities

- ***Promotion of entrepreneurial culture according to European trends***

National authorities should set-up special programmes in order to promote the entrepreneurial culture at a national level in accordance with and supported by the European authorities.

- ***Enterprises should be obliged to take action in a timely manner.***

An obligation to take action in a timely manner may substantially increase the chances of rescuing an enterprise in financial difficulties. The law could therefore impose on the debtor the obligation to petition for an insolvency procedure if it can reasonably foresee that it will no longer be able to pay its debts. With regard to debtors that have

reasonable doubt as to the question of whether or not they will be able to continue paying their debts, the law could stipulate the obligation to consult with an external accountant.

- ***Simplification of existing proceedings***

Recovery proceedings can be very complex and external specialised advice is usually required to guide the enterprises towards and through the process. To make this kind of proceedings more successful and popular, the proceedings should be simplified.

- ***Lower requirements for entry***

Certain Member States could lower their thresholds for entry to recovery proceedings. The condition of insolvency and a possibility of recovery should be enough and could lead to more accessible proceedings.

- ***Confidentiality***

Confidentiality of the proceedings could benefit the potential survival of the company. This would avoid stakeholders customers being influenced by negative and unnecessary publications in official gazettes, newspapers etc. Court hearings should only be accessible to directly involved parties (creditors, administrator etc.).

- ***Costs***

The cost of recovery proceedings is sometimes an obstacle in initiating the rehabilitation process and costs should therefore be reduced.

- ***Control of information to disclose***

During the reorganisation process, a debtor has to provide a lot of information (e.g. rescue plan). Control of this information by a neutral third party could increase the confidence of the creditors in their debtor.

- ***New deliveries***

Once a company is in financial difficulties and is in a process of reorganisation, the company should be allowed to identify those suppliers that are critical to the business operations and continue to pay those suppliers with available cash. At the same time a plan is being formulated to rescue the company and to repay debt incurred before starting the reorganisation.

- ***Specialised insolvency sections of courts***

All insolvency matters should be assigned to specialised insolvency sections of a restricted number of courts (and courts of appeal), rather than charging all courts and courts of appeal with issues relating to insolvency law. Judges specialised in insolvency issues should preside over the bankruptcy court.

- ***Preferential creditors should not be kept completely out of proceedings***

A major reason for the lack of successful rehabilitation proceedings is that the procedure is sometimes only binding on unsecured creditors. We believe that there is insufficient ground for such restriction. A regulation of the scheme of arrangement should obviously take into account the difference between common unsecured creditors and preferential creditors, in the sense that the percentage to be spent on preferential creditors could exceed the percentage to be spent on common unsecured creditors. But there is insufficient reason to keep preferential creditors completely out of the scheme of arrangement.

8.3.3. The European Union

At the European Union, the promotion of the information to entrepreneurs of the existing possibilities for businesses in temporary distress could have an encouraging effect towards entrepreneurial activity and business survivals.

Since the various existing proceeding seem to be very complex and for that reason unpopular and unsuccessful, harmonisation of the legislation should be a long term objective.

8.4. FRESH START

8.4.1. General public, business and financial community

According to the results of the survey, there is an evident stigma affecting entrepreneurs in difficulty (namely within the general community) and entrepreneurs previously bankrupt. Therefore, even if the legislator at European and at domestic level adopts legal measures in order to promote the fresh start, there is a need to introduce a European cultural campaign promoting the fresh start and a new entrepreneurship. In Latin countries, the word “faillite” (“fallimento”, “quiebra”...) holds a very negative connotation. It seems that these cultural elements would also require a sound reflection in order to involve the three communities.

8.4.2. National authorities

- ***Reducing stigmatising effects of bankruptcy: distinction between fraudulent and non-fraudulent debtors***

Some legislators create stigmatising effects by imposing various automatic restrictions, disqualifications or prohibitions for debtors. These kinds of measures can unnecessarily harm the image of an honest entrepreneur who failed due to, for example, an economic crisis or an illness. A clear distinction should be made between measures or regulations that apply to non-fraudulent bankruptcies and those that apply to fraudulent bankruptcies. By creating such a distinction, the attitude of third parties towards the debtor could change. Non-fraudulent debtors would not be stigmatised through association with fraudulent ones.

Furthermore, it is necessary to adopt legislation aimed at forcing the information provider (media or other) to give a clear description of the status of the entrepreneur. If the entrepreneur has previously failed, the information provider should be obliged to distinguish between fraudulent bankruptcy and non-fraudulent bankruptcy. The legislator should be capable to define the minimum threshold of information that the information provider must respect. This legislation should be conceived in order to promote information that adds value to the existing content.

Early discharge for non-fraudulent debtors

Early and automatic discharge from remaining debts is mandatory to promote fresh starts and entrepreneurial activity. However, tougher and more restrictive legislation should be applied to fraudulent debtors.

8.4.3. The European Union

At a European level, information towards entrepreneurs and the public could be provided in order to persuade people of the ‘positive’ effects a bankruptcy experience can have. Potential entrepreneurs should be informed of the discharge possibilities in order to promote entrepreneurial activity.