

Position Paper

UEAPME¹ position on the Public Consultation on a new European approach to business failure and insolvency

1. Introduction

UEAPME welcomes the Public Consultation on a new European approach to business failure and insolvency and the possibility to comment on it regarding the experience that was gained by the SMEs in the various Member States.

Unfortunately, the number of insolvencies is increasing, especially in times of crisis. Therefore, eliminating stigma of insolvencies and giving honest entrepreneurs a real second chance is becoming more and more important.

As with all procedures and laws, the reduction of administrative burdens and costs is important for companies and of outmost importance for SMEs.

2. Opinion on the proposal

Second chance for entrepreneurs

The most efficient measure in order to reinforce a second chance for honest entrepreneurs would be to frame and apply “fast track” liquidation proceedings for honest bankruptcy by taking the interests of both the creditor and the debtor into account. Of course, eliminating bankruptcy stigma and reducing discrimination of failed entrepreneurs as well as developing and expanding programs to mentor, train, advise and support second starters is also important but this can only be done in strong cooperation with the national business organisations. It needs to be noted that a clear definition of honest bankruptcy does not exist yet.

UEAPME supports a debt discharge period for honest entrepreneurs not exceeding three years². However, honest entrepreneurs must have the opportunity to continue business activities even if the debt discharge period has not expired yet.

Conditions for opening insolvency proceedings

Most of our member organisations have not received complaints that the differences in national law for the opening of insolvency proceedings are creating problems for businesses operating cross-border in the European Union. Generally, it is obvious which is the applicable law for the cross-border insolvency proceedings. However, debtors who are located in another Member States, than the one in which the proceedings taking place, very often do not know how to correctly file their claims, even if they know the correct applicable law.

¹ UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

² WKÖ disagrees.

National legal frameworks for restructuring plans

Our national members rarely report on problems arising from the divergences of national rules regulating restructuring plans.

Special arrangements for SMEs

Insolvency proceedings need to be more efficient and effective. For SMEs, it is important to reduce the costs of procedures. It is further necessary to improve the efficiency and effectiveness of the insolvency practitioners and the efficiency and effectiveness of the courts and the interactions between courts and the parties. The effectiveness of the judicial procedures could also be improved by introducing a mediation/ conciliation procedure. Such a mediator/ conciliator should have experiences with SMEs and ideally be chosen by the SMEs. Many SMEs also complain that they receive too little information both as debtor and creditor. Therefore awareness raising needs to be intensified. For SMEs costs are always crucial; thus, the costs for the administrators and other liquidation officials should be reduced.

In cross-border insolvency proceedings, the powers of the liquidator are not always clear. A European wide catalogue including the powers of the liquidator and its scope would be helpful.

Directors' duties and liability

Problems with the enforcement of liability claims against the directors of insolvent companies exist in some Member States of the European Union. In practice there are very few liability claims against directors because it is considered too time consuming and it is difficult to estimate the financial means of the directors. In some countries, administrative hurdles or expensive court fee enhance those difficulties.

There is further a need to take action at European Union level in view of preventing disqualified directors from heading companies in another Member State.³ This can either be done by ensuring that relevant information is available to the responsible authorities in other Member States or by insuring a disqualification order issued in one Member State is recognised in all other Member States. This however must not undermine the right to a second chance of any honest business person.

Avoidance actions

The divergence within the EU of the conditions under which a detrimental act can be avoided created problems in practice in the various Member States, especially as the rules for avoidance are very strict in some countries and much more relaxed in others. Therefore, a unitary system on EU level for cases of avoidance would be very helpful.

Publication of insolvency proceedings

Creditors located in another Member State very often do not know that an insolvency proceeding is going on. UEAPME sees the need to improve the situation on the publication of the decision opening insolvency proceedings. We would support a solution where Member States are required to register the opening judgment in an insolvency register based on a common set of entries to facilitate cross-border searches and the interconnection of national insolvency registers. An EU wide register, in form of an electronic portal which brings together the various national registers containing information in this respect, would be an appropriate mean.

3. Conclusion

Many SMEs in particular tend to be heavily dependent on one or on a small number of larger customers, so when that larger customer becomes insolvent it is common for the insolvency to trigger a chain effect on its

³ WKÖ disagrees.

supplier businesses. While it is reasonable to pursue policies which aim to give entrepreneurs a second chance, it should, at the same time, be borne in mind that a more lax regulatory attitude towards business owners could be abused. A sensitive balance needs to be found to give honest entrepreneurs who failed a second chance, by preventing dishonest entrepreneurs to produce further insolvencies by keeping the interests of all participants into account.

Therefore, any reforms which are introduced, that aspire to encouraging a more rescue-orientated legal framework and culture should be accompanied by safeguards to ensure that the responsibility of directors and entrepreneurs is controlled, and that legal remedies are available to deal with those that take advantage of more lenient rules to the detriment of creditors. In this context there should be co-operation at the EU level to ensure that those convicted of insolvency related offences and disqualified from managing businesses in any one state are not able to do so in others.

Brussels, December 2013

For further information on this position paper, please contact:

Sabine Erkens, ll.m.

Legal advisor

s.erkens@ueapme.com