



**Asia-Pacific
Economic Cooperation**

2019/SOM1/FDM/019
Agenda Item: 8.1

Essential Elements of an Effective Personal Insolvency Regime

Purpose: Consideration
Submitted by: ABAC



**Finance and Central Bank Deputies' Meeting
Santiago, Chile
7-8 March 2019**



Essential Elements of an Effective **Personal Insolvency Regime**



FINANCING ASIA-PACIFIC INTEGRATION IN THE DIGITAL AGE

2018 PROGRESS REPORT
ON THE WORK OF THE
ASIA-PACIFIC FINANCIAL FORUM (APFF)
ASIA-PACIFIC FINANCIAL INCLUSION FORUM (APFIF)
ASIA-PACIFIC INFRASTRUCTURE PARTNERSHIP (APIP)

ATTACHMENT C
Essential Elements of an Effective Personal
Insolvency Regime

An Undertaking of the
Asia-Pacific Financial Forum (APFF)

TO IMPLEMENT THE CEBU ACTION PLAN'S INITIATIVE 1A

DELIVERABLE
REFORM AND DEVELOP SECURED TRANSACTIONS SYSTEMS AND INSOLVENCY
FRAMEWORKS

In 2018, ABAC submitted the draft of *Essential Elements of an Effective Personal Insolvency Regime* to the APEC Finance Ministers (as an attachment to its 2018 Report)

International Symposium on Personal Insolvency Legislation and Business Environment

15 June 2018, Beijing, People's Republic of China

Co-organizers: ABAC, APFF, IFC/WBG, China Banking Law Society, Tiantong & Partners, China Council for the Promotion of International Trade

Participants from:

- ABAC
- APFF
- Beijing Foreign Studies University Law School
- Capital Equity Legal Group
- China Banking Law Society
- China Council for the Promotion of International Trade
- China University of Political Science and Law
- Dentons
- Doshisha University
- Guangdong Province High People's Court
- IFC/WBG
- John Marshall Law School
- King & Wood Mallesons
- Nine Stone Building Barristers' Chamber, UK
- Osaka University
- People's Bank of China
- Queensland University of Technology
- Renmin University Law School
- Rui'an People's Court
- Shandong Province High People's Court
- Shanghai University of Political Science and Law
- Shenzhen Intermediate People's Court
- Supreme People's Court of China
- Tiantong & Partners
- University of Nottingham
- Xiamen Intermediate People's Court
- Zhejiang Province High People's Court



In their Joint Ministerial Statement, the APEC Finance Ministers called for advancing this work in 2019.

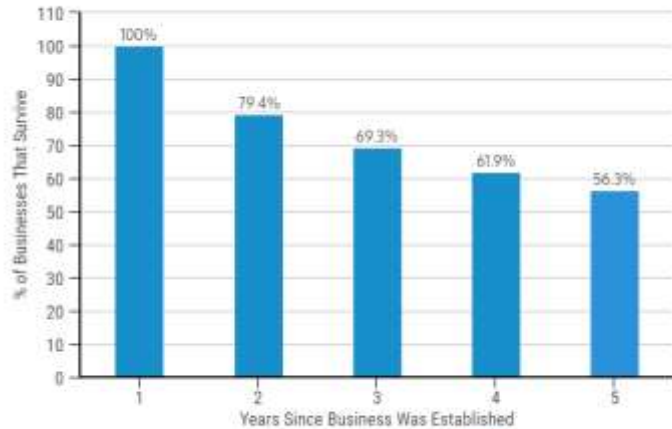




Background

Half of all business start-ups fail within 5 years after establishment

Bureau of Labor Statistics Business Survival Rates

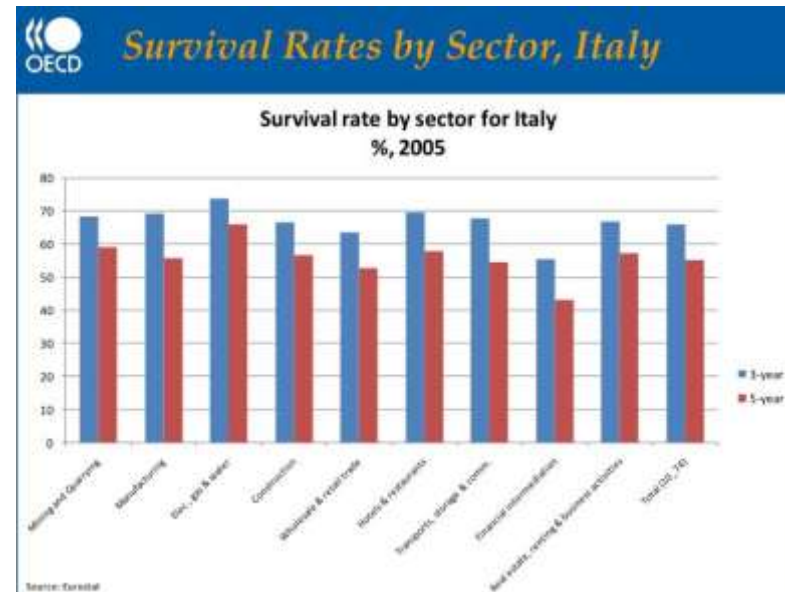
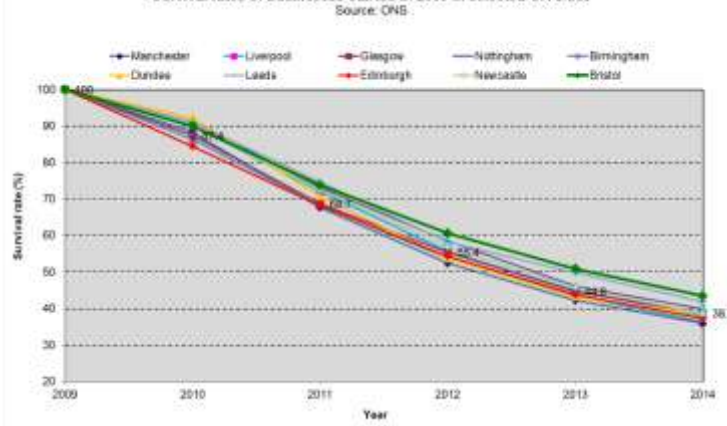


Source: Bureau of Labor Statistics' Business Employment Dynamics, 2011

Chart by FitSmallBusiness
Call Your Business Into Shape

Survival rates of businesses started in 2009 in selected UK cities

Source: ONS



- ▶ Where personal insolvency regimes are **ineffective and inefficient**, many entrepreneurs who fail in their first attempt are prevented from making a fresh start for many years. People are discouraged from starting enterprises
- ▶ Where personal insolvency regimes are **effective and efficient**, many entrepreneurs who fail on their first try are able to re-start and become successful. More people are encouraged to start new enterprises.

Sources

- ▶ Experiences of various jurisdictions
- ▶ Well-established principles acknowledged by leading insolvency experts around the world

Essential Elements

Balancing interests of creditor, debtor *and society*

- ▶ Balance between:
 - ▶ Rewarding honesty, integrity and hard work
 - ▶ Mitigating moral hazard
 - ▶ Recognizing that business failure is a normal reality; facilitating a fresh start for entrepreneurs to promote a dynamic economy and inclusive growth
- ▶ Balance must be reflected in:
 - ▶ Allocation of costs of failure between creditors and debtors
 - ▶ Design of law and enforcement mechanisms (strive for efficiency, reducing transaction and administrative costs and risks)
- ▶ Requires consultation with broad range of stakeholders and experts in each economy

Role of trustees

- ▶ Trustees should be give larger role in dealing with insolvent debtors
 - ▶ Examples: Australia, Hong Kong, Canada
- ▶ Should be given sufficient powers to investigate debtors and access information on debtor's assets
- ▶ Should be invested with broad responsibilities
- ▶ Important to avoid overloading the courts with bankruptcy proceedings

Commencement of insolvency proceedings

- ▶ Standards should be clear, transparent and reasonable
- ▶ Avoid entry barriers that are prohibitive under existing conditions in the jurisdiction
 - ▶ E.g., excessive hurdles for proving distress, overly stringent criteria for accepting applications for relief, high thresholds for amount of debt/proportion to debtor's income and assets, high fees for filing for bankruptcy
- ▶ Address moral hazard not through entry barriers, but through infrastructure that can provide transparency on debtors and through the criminal and civil law regimes

Discharge relief

- ▶ Should be expedited to enable a fresh start within a short period of time (unless debtor guilty of inappropriate behavior or if there is objection from trustee or creditors)
 - ▶ USA: Chapter 7 – discharge possible after 4 months
 - ▶ Canada: automatic discharge after as early as 9 months
 - ▶ Australia: 3-year period being reduced to 1 year
- ▶ Amend laws and regulations that hinder discharged debtors from resuming business and professional activities

Dischargeable and non-dischargeable debt

- ▶ Should be defined to balance the interests of debtor, creditor and society.
 - ▶ USA: Discharge limited to debtor's personal liability, but excludes collateral pledged for loans; non-dischargeable debt includes spousal or child support, certain taxes, government funded or guarantee student loans, debts for malicious injuries to persons or property.
- ▶ Should take into account prevailing conditions in each economy

Exempt property vs property of the estate

- ▶ Property of the estate: automatically transferred from debtor to estate upon commencement of the case
- ▶ Exempt property: kept by the debtor
 - ▶ Should include property that can enable the insolvent debtor to move forward into productive work e.g., ordinary vehicles, tools of the trade, basic housing
- ▶ Standards and guidelines should be based on various factors (including inflation) and developed through robust studies and consultations

Information infrastructure

- ▶ Infrastructure for obtaining sufficient information about debtors' assets and financial conditions
- ▶ Regulatory agencies responsible for operations of the personal insolvency regime
- ▶ Comprehensive and easily searchable registries of assets, collateral registries, credit information systems
- ▶ Collection of data on bankruptcies and bankruptcy applications and shared with credit bureaus

Enforcement mechanisms

- ▶ Regulatory frameworks and industry standards to ensure fairness and effectiveness of debt collection agencies and their practices
- ▶ Criminal and civil laws
- ▶ Effective judicial procedures based on unified standards across the jurisdiction to punish and deter abuse of the system and mitigate moral hazard

Develop personal insolvency regimes for the future

- ▶ Coordination across jurisdictions to facilitate cross-border business
 - ▶ Mechanisms for orderly liquidation and resolution of cross-border debt
 - ▶ Encourage MSMEs' participation in international business activities

Develop the ecosystem

- ▶ Economic policy environment that helps businesses avoid insolvency
 - ▶ Sound macroeconomic and monetary policies
 - ▶ Policy and regulatory environment that rewards and encourages responsible risk taking and management
 - ▶ Facilitating expansion of insurance coverage
 - ▶ Promoting healthy lifestyles
- ▶ Financial education

Need more information?

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