

Business Ethics and Crisis Management: Circumstances for a Second Chance

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Abstract: Discourse regarding ethics and corporate responsibility arose in the last years linked with an increasing number of accounting fraud scandals. The recent financial crisis has had a lasting negative influence on corporate profits. Companies have had to satisfy the interests of several stakeholders, such as its employees, banks, customers and the community, and at the same time successfully manage the consequences of the crisis. An empirical qualitative study which was conducted in Austria in 2008 is presented in this paper aimed at investigating business ethics and crisis management. The stakeholder theory will be used as a reference framework. This paper concludes with lessons that can be learned and political recommendations and policies put forth to grant failed businesses a second chance.

Keywords: corporate responsibility, corporate restructuring, enterprise crisis, bankruptcy

JEL Classification: M14

Introduction

In the past few years, an increasing number of fraud cases and accounting scandals is linked to fierce discourse with respect to ethics and corporate accountability. Business ethics has likewise become a current research subject in science (Homan/Lütge, 2005; VHB, 2008). Discussions concerning corporate responsibility can be examined from different standpoints such as theological, philosophical or economical perspectives, and moreover it is examined in diverse cultural contexts, for instance in the USA and Europe.

Business ethics and social responsibility of companies are both issues of great significance; especially linked to global competition (Enderle, 2005) in combination with increased instability of companies (Kantner, 2009). The recent financial crisis has had a lasting negative impact on corporate profits. Companies must satisfy the

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interests of several stakeholders, such as employees, banks, customers and the community, and at the same time strive to successfully contend with the consequences of the crisis.

The European community is concurrently working to provide legal conditions for corporate restructuring for failed or at risk corporations with the aim of sustaining these improvements for all corporations and business people confronted with crisis management (European Commission, 2003, 2007).

The purpose of this article is to define ethical principles of corporate restructuring and concentrate on the stakeholders' interests to ensure that only conscientious entrepreneurs can be afforded a second chance.

These concepts are presented in the following thesis:

- Entrepreneurs are in need of external consulting services during the restructuring of their company. Their personal state of affairs is more important than the interests of the external stakeholders. If the entrepreneur's morality wanes, fraudulent behavior may result.
- The legal structure has to be made more flexible and the authorities must gain more influence to improve the preconditions determined for facilitating a "second chance".

Stakeholder Theory as a Reference Framework

Evolution of the Stakeholder Theory

The stakeholder theory is based both on the behavioral theory, and the theory of coalition (Cyert/March, 1964). According to these concepts, the company is a coalition of different organizational entities and the company is seen as a coalition of diverse people with wide-ranging interests who the company depends on to exist. The main task of the company is to persuade the coalition partners to support the cooperation. A coalition is always characterized by a clash of parties with different goals and trade-offs. Freeman (1984) developed the theory of coalition into a comprehensive concept of strategy in stakeholder management. In the original sense, the stakeholder theory is a management theory model which establishes a connection between the operational organization and the social environment. In the past years, the approach by Freeman was enhanced and reviewed so often that it is no longer a theory specific to persons but has rather become a school of thought (Freeman 1991). Of all the scientists who contend with the stakeholder theory, Weiss (2003) should be noted for transforming the original theory of Freeman into a business ethical concept. Today the stakeholder theory is split into many different approaches, depending on

the aims to be achieved and in accordance with the definition of who exactly constitutes a company stakeholder (Donaldson/Preston, 1995).

Business science distinguishes between a strategic, normative and empirical/descriptive approach. The normative stakeholder management as a business ethical concept states that stakeholders are simply those who have legitimate entitlement to a claim against the company. On the other hand, the strategic approach only accepts the stakeholder theory on an instrumental basis and is used for safeguarding corporations. The descriptive/empirical approach of the stakeholder theory helps to describe the constellation of the environment or rather explains the empirical analysis of stakeholder management.

Ethical Foundation of the Stakeholder Theory

As the stakeholder theory was originally used as a strategic management concept, the application of a normative approach needs to have an ethical foundation. This process of classification by basic positions on ethics mainly describes how ethical standards of normative stakeholder management can be generated and constituted. As a result, the question arises as to why the stakeholders' interests are more important than the shareholders' interests and what basic ethical concept substantiates this orientation of management.

Weiss (2003) states that not only one ethically basic concept forms the basis of the stakeholder theory, but rather a series of different ethical principles can be used to solve the ethical dilemma, especially when conflicts of interest arise among stakeholders. Freeman/Gilbert (1991) highlight Kant's principles on the respect of human beings as a metaphysical well-founded concept of ethical conviction. Therefore, the ethical awareness of a company has to be reflected in its corporate strategy which consequently demonstrates the justification for stakeholder management.

The stakeholder theory may also compare the company to a collective entity which is based on voluntary agreement and which helps to achieve the personal goals and ideals of these individuals. The voluntary agreement is documented by contracts and administers the claims of members who participate in the business process. In this context, the ethical contractual foundation, grounded by an association of voluntary contractual agreements, forms the basis of the stakeholder theory.

However Ulrich (1999) accomplishes an ethical discourse of the stakeholder approach and sees the answer of the stakeholder conflict in a stakeholder dialogue. Driven by a moral conviction and the interest in a true entrepreneurial profit, management faces an implicit stakeholder-discourse. Practically speaking, this approach means that it is almost impossible to include all parties involved in a

relevant decision-making process. Otherwise the decision-making process will drag on inevitably and delay the process. Due to the fact that companies deal with many different stakeholders who have different interests within the entity, it is unfeasible to solve the conflict together and among the parties through personal dialogue.

Assuming that entrepreneurs and business managers are measured by the results of their actions and held accountable for the consequences faced by the stakeholders, it is clear that the stakeholder theory is also based on accountable ethical considerations. Therefore entrepreneurs are obligated to assure the basis and livelihood of the society by rational and prudential actions (Brink 2002). According to this, the aim of entrepreneurial actions and their consequences are not inconsistent with true claims of stakeholders like the social call for environmental protection. But corporate responsibility is not only based on a natural responsibility for the stakeholders. In fact there are also contractual agreements existing which compliance always consists of an ethical component apart from the legal counterpart. In the present case the paper follows the concept of the consequentialism (Jonas, 1979; Rawls, 1990) as a classification of the stakeholder theory.

Ethical Principles for Restructuring

Overview

Entrepreneurs are very dependent on contributions from their stakeholders, especially during the reorganization of their company. In order to analyze and manage the relations to those stakeholders, the stakeholder theory can be used. In regards to content, it is necessary to predefine basic ethical principles to ensure a legitimately ethical corporate restructuring process. These predefined principles are valid throughout the entire course of corporate reorganization. Thus, the question is posed as to how far corporate restructuring reconciles with moral perception/beliefs of society and under which terms the actions taken during restructuring can be designated as fair from an ethical standpoint. Fair actions imply that the decision makers act in a responsible way and also consider the consequences of their actions.

In this regard, corporate restructuring takes the following basic ethical/normative basic positions and corporate-ethical requirements as a basis. These three principles were defined on the basis of consequentialism and in observance of aspects which are relevant to reorganization. During the entire process, the aim was to place a general, but high priority on basic ethical positions which are found in diverse ethical concepts.

- Accountability

- Equal and Fair Treatment
- Solidarity

Accountability

The basic ethical accountability of corporations and senior management, both responsible for their own actions and consequences, can be derived from the arrangement of the stakeholder theory as a concept of consequentialism. Thus, fair actions presuppose that the outcome of these operations be assessed. Responsibility is thereby based on the aspect that corporate managers, who are accountable to their corporations (Göbel, 2005, p. 99) must not only be economically viable, but must also optimally satisfy their stakeholders and special interest groups and the society, all of the entities to whom they are accountable. This accountability must also be assumed during corporate restructuring. Yet, in a crisis, the actions of corporations tend to orient themselves almost exclusively to the goal of reorganization in order to overcome the crisis and re-establish sustained economic viability. In this context, a series of very substantial decisions must be met. Ethical actions, however, always presuppose that the outcome of actions be weighed in advance. Corporate management must be able to accurately estimate the outcome of their actions, even when faced with psychological stress and or fear of loss and lack of information, as the process of corporate restructuring should not be implemented without considering the external effects and outcome of those actions.

Therefore, from a business ethics standpoint, the following questions need to be answered by corporate management and all responsible bodies involved in the reorganization planning process:

- Whom do the planned actions effect and what are the side effects?
- Which (short term) negative effects need to be endured to meet the reorganizational goals?
- Does the general framework and circumstances of action justify the negative effects of the outcome or should corporate reorganization be rejected as unethical in respect to the dimension of accountability?
- Which measures could keep total damage and negative outcomes to a minimum?

During corporate restructuring, accountability vis-a-vis the stakeholder will ideally be integrated into the target system of the corporation. The effect of corporate restructuring and a principle accountability vis-à-vis stakeholders should also be

incorporated into the restructuring development planning and or the strategic restructuring plan.

Equal and Fair Treatment

During the reorganization process, all stakeholders are requested to contribute to this process, and that is why it appears to be legitimate to also insist on equal treatment of these groups. Therefore, from a consequentialist viewpoint, short term negative effects should be distributed evenly among all stakeholders. This equal treatment is, for instance, part of the legal provisions in Austria and it applies to judicial proceedings as well as to restructuring without legal proceedings. Thus, from an ethical standpoint, fair treatment of creditors must be an aim of corporate restructuring as well as distribution of negative consequences among all those involved. Reorganization of a corporation must therefore effect corporate management and the owners and not simply apply to individual stakeholders, such as coworkers or suppliers. Corporate management has quite a bit of leeway in taking action and sharing information in regard to the relationship of trust, as blatant dissymmetry of information between creditors can lead to advantages and disadvantages for individual stakeholders and creditors. Thus, stakeholders who are well informed have completely different possibilities of securing their claims – even before proceedings are started – than those who are confronted with the crisis once the bankruptcy proceedings are underway. Suppliers could then retrieve their goods which were supplied under conditional sales contracts or banks would have the chance to gradually limit the line of financing and thus minimize the risk of default. From a corporate ethical standpoint, all parties involved in the restructuring process should provide equal treatment to all stakeholders and interest groups in terms of the restructuring provisions and information provided.

Solidarity

Solidarity refers to mutual interests and reciprocal dependency among people and its aim is to support authoritative cohabitation, protect individuals and uphold the plurality of society (Schasching, 1988). This principle is also based on maintaining consequentialism: in an acute corporate crisis, the continuance of a corporation is endangered. Since the stakeholders are also responsible for their actions, and due to the fact that corporations are dependent upon restructuring contributions from third parties in the form of renouncement of claims, demanding support from the stakeholders appears legitimate in regard to equal treatment of debtors and

corresponding sustainable reorganization prospects. In addition, solidarity represents an essential principle of Christian social doctrine, in which the “social question” is always posed as an issue of justice and solidarity.

From an economic perspective, solidarity is at odds with the principle of competitive rivalry. The markets however are based on co-operation and solidarity. In a corporate crisis, however, it is exactly this process which is disturbed or endangered. During restructuring, corporate management is dependent on the support of third parties. Solidarity, which is usually demanded from those who are financially better off, must in this case, also apply to the entrepreneur and all those who have an advantage during corporate restructuring. These parties all rely on the reorganization contributions of others, but could also profit from them. Usually this entails the corporation which is reorganized and its owner. Since the reorganization contributions of the stakeholder can be regarded as solidarity support, it also appears legitimate to demand such solidarity contributions from the corporation. The contribution of corporate management and/or the owner could thereby range from earnings and dividend payment reductions on capital increases and even include contribution of private assets to stabilize net equity and/or equity investments.

Corporate management’s actions, which imply primarily monetary reorganization contributions, thus correspond to the stipulation of solidarity and are therefore regarded as ethically legitimate in reorganization of corporate structure. On the other hand, corporate reorganization which is exclusively at the expense of stakeholders and/or creditors is rejected as ethically illegitimate. In addition to external stakeholders, claims to solidarity treatment must also apply to co-workers who have also extensively contributed to the development of the enterprise before the crisis.

Empirical Study

Design

In order to answer the research questions, an empirical qualitative study supported by a case study and several expert interviews was carried out in Austria in 2008. A broad spectrum of interview partners was questioned with the aim of gaining comprehensive insight about restructuring practices. Twenty-five interviews were carried out among moral philosophers, legal scientists, insolvency practitioners, entrepreneurs, and stakeholders as creditors.

Even if the investigation was primarily oriented to the Austrian legal situation, an attempt was made to keep questions as general as possible and thus derive recommendations, which do not only focus on the situation in Austria, but are also

relevant internationally, like for instance in the European Union. Apart from answering research questions, the goal of the investigation was to obtain comprehensive accounts of practices in corporate restructuring in Austria from an ethical standpoint. Thereby, throughout the entire process, very diverse viewpoints from those involved in restructuring were attained and an attempt was made to extract essential statements and recommendations about corporate practices. Before the actual interviews took place, three pre-tests were carried out. All interviews were conducted face-to-face with the interview partners. In order to answer the research questions, the investigation was oriented on the behaviour of entrepreneurs during an enterprise crisis. Since the personal state of affairs is very important to the entrepreneurs, the role and influence of the several stakeholders is an important field of research in this context. The interview partners were asked to describe in detail their experience in corporate restructuring.

After the transcription of the interviews, an analytical evaluation was completed with the help of codes. In the course of encoding and evaluation, the individual interviews were analyzed several times and relevant information was assigned respectively to content of categories and furthermore examined for differences and/or conformity.

Results

Answering the Research Questions

Thesis 1: Entrepreneurs are in need of external advice during the restructuring of their company. The personal state of affairs is more important than the interests of the external stakeholders. If the entrepreneur's morality wanes, fraudulent behavior may result.

No clear confirmation of this thesis can be identified. Only the legal experts interviewed were of the opinion that moral decline is frequently encountered due to the fact that corporate leaders focus on their personal interests and state of affairs. From other interview partners' viewpoints, a value shift is possible; however it does not constitute the rule in reorganization processes. Personal welfare, for instance safeguarding private possession and avoidance of personal liability is indeed very important to corporate managers. However, fair leaders usually behave fairly during a crisis. The fact that corporate management concentrates on their own personal interests is also understandable from the viewpoint of stakeholder. As a general rule, fraudulent actions have usually already been planned and carried out before the corporation faces a crisis.

Thesis 2: The legal structure has to be made more flexible and the authorities must gain more influence to improve the preconditions determined for facilitating a “second chance”.

Thesis 2 can be explicitly confirmed by the investigation. All interview partners confirmed the existing ethical scope of discretion and considered intensified control of the procedure by the authorities as important except for stakeholders and corporate managers, who expressed partial doubts about the independence of the liquidators and bankruptcy lawyers. The authoritative organs provide for transparency during the insolvency procedure and therefore carry significant ethical responsibility vis-à-vis all who take part in the reorganization. Responsible behavior is however not just demanded of corporate management and the authoritative organs, but by all those who participate in the reorganization.

Basic Ethical Principles in Corporate Reorganization

In regard to the top principles of corporate reorganization, high consensus was reached among the interview partners. With regard to the ethical principle of accountability, it was determined that each corporate manager must cultivate their actions and be personally accountable from a legal and ethical standpoint. Since being a corporate manager requires certain abilities, which not everybody exhibits, the stakeholders must also have a say in the decision to possibly refuse reorganization. Equal treatment, a basic legal and ethical value is keenly realized. It corresponds to the democratic principle and is embodied in Austrian insolvency law. According to the assessment of a majority of interview partners, equal treatment in out-of-court settlements is hardly ever bestowed and/or is difficult to provide, due to a lack of transparency and publicity regulations.

Solidarity and/or a solidarity contribution from corporate management/the entrepreneur for reorganization purposes cannot not be legally regulated in detail and depends on the respective legal form or the legal framework for insolvency law which prevails in the respective country: thus sole proprietors or certain partners of an unincorporated company (private company) are personally liable with their complete fortune is at stake, which is then used for paying off the creditors. In contrast corporations regulate the solidarity liability of managing directors or partners on an individual basis. The quota principle, which is for instance implemented in legal proceeding in Austria, is only partly realized. According to the interview partners, openness of corporate management and its representatives should furthermore play a big part as well as transparency throughout reorganization process.

Institutions Facilitating Compliance with Ethical Principles

Lawyers aim to avoid prosecution of the entrepreneur and aim to attain optimal design for the reorganization (or liquidation). By taking a holistic view of the crisis situation, the lawyer can reduce conflicts with the stakeholders when conducting negotiations. Management consultants can, however, influence the ethical behavior of the entrepreneur, for instance by balancing the various interests of the creditors as well as pointing out alternative plans of action from a holistic viewpoint.

The insolvency judge supervises the execution of the procedure and exercises a revision function to protect against partial actions, which can lead to disadvantages for particular individuals. The insolvency practitioner in contrast, is undisputedly the most important person in the insolvency procedure from an ethical standpoint. They use a variety of actions and make discretionary decisions. Their personal assessment of the state of affairs is very significant for the course taken in the procedure. They can thereby provide for an ethically legitimate reorganization.

Integration of Ethics in the Reorganization Process

It was ascertained that there is generally no valid flow chart for enterprise reorganizations in correlation to the embodiment of the reorganization process. In fact, each reorganization is rather resolved according to the circumstances and basic framework of the individual case. During the reorganization process, special attention is placed on the following steps from ethical standpoint:

- Early Detection of Crisis and Comprehensive Analysis of the Causes.

If consequential analyses in respect to the causes of the crisis are carried out with concurrent acknowledgement of the crisis status, the stakeholders tend to lend their support. In addition, the mistakes of the past must be consistently and convincingly processed and rectified.

- Reorganization Assessment and the Issue of Sustainable Recovery after the Corporate Crisis

As corporate reorganization should only be an option for fair entrepreneurs, reorganization assessment should be carried out from an ethical viewpoint. Sustainable reorganization should be the main aim, which accordingly incorporates co-workers in the process. In a comparison of reorganization processes, a judicial reorganization is clearly preferred over an out of court settlement, due to regulated operations and high transparency

- Consistent Implementation of Reorganization Measures with Inclusion of Employees

In many cases, the employees are the most important resources in the corporation and they serve as “mirrors” to management in their perception of the crisis. They also have crucial interest in the implementation of reorganization measures.

Best Procedure Project on Restructuring, Bankruptcy and a Fresh Start

In 2002, the European Commission published “Bankruptcy and a Fresh Start”, a collection of data on the legal and social consequences of business failure (European Commission, 2003). This study was the starting point for the Best Procedure Project on Restructuring, Bankruptcy and a Fresh Start, launched in 2002. The Best Procedure responds to the European Council’s call for an open method of coordination, designed to help member states to develop their own policies. This method consists of fixing European guidelines for achieving specific goals within a specified timeframe: guidelines are then to be translated into national and regional policies by setting specific targets and adapting measures to local conditions. In broad terms, a Best Procedure project is a benchmarking exercise in areas that are particularly important for sustainability of a company. The member states are increasingly drawing inspiration from measures developed in other countries to improve their domestic business environment.

Under the Best Procedure Project on Restructuring, Bankruptcy and a Fresh Start, the Commission worked together with experts from the European Union, Norway and some candidate countries with the prospect of identifying a set of indicators, good practice examples and a strategy for improvement of early warning mechanisms for foundering businesses, legal systems and insolvency procedures, fresh starts and social attitudes towards business failure.

The European Commission welcomed the final report published in September 2003, which assesses the extent to which national bankruptcy laws act as a deterrent to business survival and a fresh start, as well as the effects of social stigma on the aptitude for failed entrepreneurs to try again. Aimed at giving fresh impetus to the process of law revision in Europe, the report lists key factors for saving businesses from bankruptcy and/or for motivating fresh starts.

The main results of the Best Procedure Project are the following (European Commission, 2007): It is vital to create the right framework which, while protecting all parties’ interests appropriately, recognizes the possibility for an entrepreneur to fail and start again. Bankruptcy law should include a clear distinction between the legal treatment for non-fraudulent and fraudulent bankruptcy cases. Entrepreneurs who go bankrupt through no fault of their own should be entitled to receive a formal

court decision declaring them non-fraudulent and pardonable. The decision should be publicly accessible.

Early discharge from remaining debts should be provided for in insolvency law if subject to certain criteria. Legal restrictions, disqualifications or prohibitions should be reduced.

Legal proceedings should be made simpler and faster, thus maximizing the value of the assets in a bankruptcy estate when reallocating resources. Proceedings should typically last a maximum of one year.

Comparison of the Results

When comparing the two studies, two central similarities are ascertained.

- Early Crisis Detection and the Significance of External Consultation

Early detection of the corporate crisis is crucial for successful corporate reorganization. Crisis repression by the entrepreneur and/or manager is a phenomenon which can frequently be observed. Consultation services offered by external entities are therefore extremely important. External consultants, such as auditors or management consultants and even also authorities and public organizations can help the entrepreneur/manager to analyze the situation more objectively. Prompt and necessary reorganization measures can thus be implemented. Early warning instruments that inform the entrepreneur/manager of impending difficulties should be made available to all entrepreneurs/managers.

- Destigmatizing the effect of bankruptcy

The public's attitude towards bankruptcy must be improved. Entrepreneurs/managers who fail, are still stigmatized, which hampers their possibility of a new start/restarting their business. In this respect, clear differentiation must be made between fraudulent bankruptcy and "honest failure". Moreover, some legal systems issue automatic restrictions or losses of rights/privileges in the case of bankruptcy. Such regulations harm the reputation of fair entrepreneurs/managers, who failed for instance, due to an economic crisis or due to illness. Candid entrepreneurs should therefore be exempted from a loss of privileges as quickly as possible after bankruptcy. The discretion of insolvency entities, such as the insolvency judge and the insolvency practitioner, play a crucial role in this process. More severe and stricter legal regulations should apply to fraudulent debtors in bankruptcy.

Lessons to be Learned/Summary and Policy Recommendations

The following recommendations for entrepreneurial codes of conduct can be made on the basis of the empirical findings.

- All stakeholders have to have raised awareness about business ethics in corporate crisis, the stigma of failure has to be reduced.

Ethics always requires reflection. It is therefore necessary that all participants are conscious of this reflection, in order to differentiate between fair and fraudulent debtors. If possible, dishonest debtors should be refused financial restructuring. As a rule, the public and consumers only have limited knowledge about corporate restructuring and its far-reaching consequences, and they are by far more critical in opposed to other business partners. A well-directed information campaign provides valuable information about the goals and options during the insolvency procedures and contributes to destigmatizing such a process. As by example of the ReTurn association in Austria, for instance, it is clear that associations and organizations can also raise consciousness of all entities involved in the reorganization process.

- The insolvency law in Austria and throughout Europe should first and foremost offer support to the creditors and not the debtors.

From an ethical viewpoint, it is not the position of the debtor, but rather that of the body of creditors which should be strengthened. Restrictions, losses of rights or bans can be placed on the debtor, which could be tied to the evaluation of their behavior. If a debtor behaves fairly, then more flexible procedures and concessions can be made that ensure a suitable reorganization process. As the evaluation of their behavior cannot be achieved on a purely objective basis, it reinforces the evaluation and discretion of the authorities, such as insolvency judges and insolvency practitioners. At the same time, international standardization and simplification of insolvency law should be developed in addition to removal of unnecessary clauses.

- Entrepreneurs have to be informed about responsible actions and restructuring possibilities when business problems arise and be on the lookout for early warning signs.

The entrepreneur as common debtor is usually intensely affected by the crisis from a financial viewpoint. Repression of the corporate crisis makes the reorganization efforts more difficult. In order to avoid crisis repression, entrepreneurs must be well informed about legal reorganization options. Since communication with the stakeholders is of major significance, entrepreneurs should be informed about how to professionally master crises.

- The advantages of ethical educational programs for future business people and executives must be reinforced.

In addition to technical skills, universities, universities of applied sciences and professional training facilities should also include corporate-ethical subject matter to their programs. Apart from the basics of ethics which promotes ethical competence, explicit discourse about ethical conflicts which come up daily in management should comprise educational content. Reflection on ethical questions can increase the values and stakeholder orientation of future entrepreneurs and corporate managers. If ethical behavior is indeed practiced by these entrepreneurs, then it can be assumed that the values and principles of an entrepreneur also definitely affect their behavior in a corporate crisis.

- Selective information from the media improves the image of the company

The media can play a role in dissociating bankruptcy and fraud and disseminating the benefits of renewed entrepreneurship, thus improving the image of business re-starters among the public at large and placing value on their experience. Bankruptcy of major entrepreneurs or those with significant regional impact are bound to make the headlines. An objective report stating the causes of the corporate crisis can clearly improve the public's knowledge and understanding.

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