RESEARCH ARTICLE

# Natural person ltd.: Towards a unified discharge regime for entrepreneurs and consumers

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## Abstract

Personal insolvency proceedings are increasingly fulfilling an economic function, aimed at the rehabilitation the debtor. The idea of the fresh start and second chance, including an early discharge of residual debts, is an important illustration thereof. Despite the fact that this evolution is noted in all personal insolvency procedures, both with regard to entrepreneurs and consumers, debt discharge used to be easier to justify and more readily granted to entrepreneurs (traders) than to non-entrepreneurs. Clear examples of the discomfort legislators seem to have with discharging unpaid debts of consumers are the EU Member States that differentiate between commercial and consumer insolvency procedures. In addition, the narrative of promoting entrepreneurship is now driving EU insolvency reforms. That (narrow) focus leads Directive 2019/1023/EU to make the same distinction between insolvent individual entrepreneurs and other natural persons, offering the former a full discharge of debt after a reasonable period of time, while providing no mandatory discharge principles for the latter. This means

that not all natural persons are equal when it comes to the possibility of having a second chance, despite compelling evidence that shorter discharge periods lead to more productive individuals. The question therefore arises as to whether EU Member States should run separate discharge systems for entrepreneurs and consumers, and whether this is justified in relation to its purpose. Focusing on natural persons in an insolvency context, this article argues that the objectives of providing a fresh start and second chance, by promoting debt discharge, are as relevant for consumer debtors as they are for entrepreneurs.

Personal Insolvency | Entrepreneurs | Consumers | Discharge | Directive 2019/1023/EU

## INTRODUCTION[1]

Personal[1] over-indebtedness and insolvency[2] is an ongoing concern in the European Union. In 2021, 11.3% of the total EU population had difficulties in making ends meet and 9.1% were in arrears on mortgage, rent, utility bills or hire purchase.[3] Although the number of debtors resorting to insolvency procedures is falling in some Member States,[4] the current cost-of-living crisis is likely to reverse this trend . High energy prices raised the cost of living for the average European household by about 7% in 2022 compared with the beginning of 2021.[5] Meanwhile, rising food prices have become the main driver of inflation in two out of three European countries.[6] These developments threaten to (once again) worsen the over-indebtedness and insolvency figures, which can have a number of negative consequences for individuals and society as a whole.[7]

In addition to the negative social impact,[8] the persistent inability to repay outstanding debts can undermine the initiative that individuals suffering under a debt burden take and, consequently, their productive capacity and the productivity in the wider community.[9] This could have a significant impact on the regular economy through, among other things, reduced entrepreneurship, income earning capacity and consumer spending. The International Monetary Fund has estimated the drag on future GDP growth in the advanced economies from increased private debt during the COVID-19 pandemic at almost 1% over the next 3 years. In addition, economic recovery would be slower in countries with inefficient insolvency procedures.[10]

Where over-indebtedness cannot be avoided, it is important to ensure that natural persons can be relieved from an overwhelming debt burden in order to mitigate the aforementioned negative effects. In particular, personal insolvency procedures (which regulate the insolvency of entrepreneurs and/or consumers) that provide for the possibility of a discharge of debts are one way to do so, as they allow debtors a fresh start11 and thus a second chance. This article focuses on personal insolvency procedures in selected (former) EU Member States.

The vast majority of Member States nowadays provide (some form of) debt relief to natural persons (as part of an insolvency procedure).12 However, there are differences in their approach: insolvent entrepreneurs and consumers are not consistently treated in the same way in different Member States, which is the result of a gradual evolution. Initially, with Member States' and the European Union's policy agenda focussing on encouraging growth, jobs and entrepreneurship,13 discharge provisions applied only to corporate entities and unincorporated entrepreneurs.14 In contrast to English law, bankruptcy proceedings were not open to non-traders in many European jurisdictions when mass household over-indebtedness first emerged in the late 1980s.15 It is only since the 1990s,16 and later in the wake of the global financial crisis, that many Member States have adopted, or reformed, national laws on consumer insolvency, thereby recognising the importance of enabling consumers to be discharged of non-business debts and get a second chance.17

Rather than simply extending the scope of the existing discharge provisions (for entrepreneurs) to non-entrepreneurs, some jurisdictions have introduced specific parallel regimes for consumers.18 Indeed, some Member States distinguish between ‘commercial’ and ‘consumer’ procedures in the design of insolvency proceedings. Both are based on the idea of a fresh start and a second chance, but (can) differ significantly in their legal effects, allowing entrepreneurs to benefit from a more favourable discharge regime, while making discharge strictly conditional on compliance with a repayment plan in debt settlement procedures for consumers.

A similar reticence towards consumer discharge is visible in the EU policy. It has always relied (exclusively) on soft law and best practices to harmonise the treatment of individual over-indebtedness.19 This is also reflected in Directive 2019/1023/EU, which is the focus of this contribution. As regards consumer discharge procedures, the Directive is limited to a recital (strongly) advising Member States to extend the provisions on debt discharge also to natural persons other than entrepreneurs, but (still) leaves it to their discretion whether or not to apply the same regime to entrepreneurs and non-entrepreneurs.

The question of whether Member States should run separate systems of debt discharge for entrepreneurs and consumers, and whether this is justified in relation to the purpose of promoting second chance opportunities (understood as the possibility to benefit from a full

discharge of debt after a maximum period of 3 years, as outlined in Title III of Directive 2019/1023/EU) therefore seems to be a complicated one.[20]

The premise of this article is that maintaining distinct discharge provisions between entrepreneurs and non-entrepreneurs is sub-optimal for the purpose of second chance. Firstly, distinguishing between natural persons on the basis of their business activity, their debts or the business and private consequences of insolvency may lead to arbitrary delineation. Secondly, the economic rehabilitation of debtors is (especially) relevant for both entrepreneurs and non-entrepreneurs who would otherwise be caught in a debt trap. This leads to the need for a unified discharge regime available to all natural persons, which releases the individual debtor from personal liability (in whole or in part).

The remainder of this article is structured as follows: Section 2 provides an overview of Directive 2019/1023/EU. Section 3 gives a categorisation of insolvency procedures that provide the possibility of a debt discharge in selected EU Member States, based on the different procedures prevalent in these jurisdictions (Section 3.1) and the debtor's capacity (Section 3.2). Section 4 makes the case for a unified discharge regime for natural persons. This gives rise to a reconsideration of the objective of second chance policy, which is done in Section 5. Based on this discussion, a general conclusion is drawn in Section 6.

# DIRECTIVE 2019/1023/EU: DISCHARGE OF DEBT FOR ENTREPRENEURS

## Binding minimum provisions for entrepreneurs, optional extension to non-entrepreneurs

Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20, 2019 *on preventive restructuring frameworks*, *on discharge of debt and disqualifications*, *and on measures to increase the efficiency of procedures concerning restructuring*, *insolvency and discharge of debt*, *and amending Directive* (*EU*) *2017/1132* deals with various aspects of restructuring and insolvency.[21] One of the key elements of the Directive is the provisions on second chance (or fresh start) for entrepreneurs.[22] An important part thereof are the rules on procedures leading to the discharge of debts incurred by entrepreneurs, mentioned in Article 1(1)(b) and further regulated in Title III of the Directive. The latter requires Member States to ensure that honest insolvent entrepreneurs have access to a procedure that can lead to an automatic[23] and full discharge of debts[24] after a period not exceeding 3 years.[25][26] Second chance, in the narrow sense on which the EU relies, means ‘the opportunity to start again in terms of *entrepreneurial* activity’.[27] The Directive recognises that entrepreneurs exercising a trade, business, craft or independent, self-employed profession can run the risk of becoming insolvent. Moreover, the effects of insolvency, including the

continual inability to pay off debts, constitute important disincentives for entrepreneurs seeking to set up a business or have a second chance, even though there is evidence that entrepreneurs who have become insolvent are more likely to be successful the next time.28 For this reason, the European Union wishes to take steps to reduce the negative effects of over-indebtedness or insolvency on entrepreneurs. In particular this is done by allowing entrepreneurs a full discharge of debts after a certain period of time.29 Discharging debt after the failure of a business is said to encourage entrepreneurial individuals to take commercial risks for the benefit of society by mitigating the risk involved in entrepreneurship.30 In other words, it would act as a liability safety net to protect entrepreneurs from the potentially devastating consequences of unlimited liability.31 Hence, encouraging entrepreneurship and commercial risk-taking is at the heart of second chance policy, whereby discharge offers the prospect of a debt-free future ensuring that the burden of old debt no longer prohibits the entrepreneur from starting a new business.32 Building on this European approach to business failure and insolvency, one of the main features of the 2017 reform of Belgian insolvency law (introducing a revised debt discharge system), for example, was the promotion of a second chance to encourage entrepreneurship and enable a fresh start to business activity.33

The minimum provisions on debt discharge contained in Title III of the Directive are, in principle, restricted to entrepreneurs. At the same time, however, the Directive explicitly states that Member States may extend the application of the debt discharge procedures to insolvent natural persons who are not entrepreneurs, that is, consumers and, in accordance with national law, managers and directors of companies.[35] Recital 21 acknowledges that consumer over-indebtedness is a matter of great economic and social concern, which is closely linked to the reduction of debt overhang. Therefore, according to the recital, it would be advisable for Member States to extend the Directive's provisions on discharge of debt to consumers at the earliest opportunity. As Ramsay notes, this approach, which encourages generous discharge for entrepreneurs but a more cautious approach to consumers, goes back to the historical trader/non-trader distinction.[36]

This cautious approach towards consumer discharge in Directive 2019/1023/EU is not new in the European Union and soft law already exists in this respect. While the focus has always been only on giving individual entrepreneurs a second chance to restart viable businesses, the Commission's 2014 Recommendation on a new approach to business failure and insolvency opened the door for the first time to considering a discharge extended to individual debtors who are not engaged in business.36 Although consumer over-indebtedness and bankruptcy did not fall within the scope of the Recommendation, Member States were *invited to explore the possibility* of applying the recommendations also to consumers.37 Although such soft law instruments (still) represent a step forward in EU policy on personal insolvency,38 the Recommendation has not succeeded in having

the desired impact of giving natural persons a second chance (as it has only been partially implemented in a significant number of Member States,39 which is intrinsically linked to its lack of binding force). This concern is also relevant to the Directive as it merely acts as a soft law instrument for consumers. Furthermore, the fact that guidelines on consumer discharge have not been codified into binding minimum standards in the same way as for entrepreneurs seems to reflect the lack of a broad European consensus on this issue.40 In this context, it should also be noted that current EU initiatives to harmonise certain aspects of insolvency law are based on a market efficiency approach to support a dynamic business environment and the European Union considers that Member States' national laws are the most appropriate way to deal with consumer insolvency.41

## Side-effect for consumer discharge?

Yet, at first glance, the 2016 Impact Assessment seemed to contain a positive note for consumers. It took into account that 'many Member States [already] treat the discharge and second chance for natural persons in the same way irrespective of whether the indebted person is a consumer or entrepreneur' and'[i]t should also be made possible where it is not currently the case'.42Therefore, given the fact that Member States are required to regulate a discharge procedure for entrepreneurs in line with the minimum requirements of the Directive, it was argued that even non-binding provisions on the extension thereof to consumers 'could have tangible impact on the ground over and above the 2014 Recommendation, particularly in view of the fact that many Member States have common rules for entrepreneurs and consumers and that in practice very often the consumer and business debts of an entrepreneur can hardly be distinguished'.43 In other words, promoting entrepreneurialism by drafting (more) generous discharge rules would cause a side-effect of increased access to discharge (within a reasonable time period) for consumers.

However, the Directive may only provide a sidewind of benefits to consumers in those countries that do not retain (a form of) the trader/non-trader distinction (i.e., where the same personal insolvency procedure is available to both entrepreneurs and non-entrepreneurs).44 As a result, relying on 'unintended' consequences of business insolvency reforms, a 'spill over effect of business reform', or 'consumer insolvency riding on the coat-tails' of EU policy harmonising aspects of individual entrepreneur insolvency45 does not seem to be the most appropriate way to deal with consumer over-indebtedness. Indeed, Directive 2019/1023/EU will not necessarily affect the situation of consumers, even not indirectly.46 This will be especially true in jurisdictions that have separate insolvency and discharge proceedings for entrepreneurs and non-entrepreneurs (see Section 3.2). These Member States would still have to explicitly extend the 3-year discharge norm to non-entrepreneurs before they would be affected.47 As mentioned above, the choice for non-binding, 'soft law', legislation on second chance for

consumers does not ensure that this will be the case. This could lead to Member States having stricter consumer discharge rules than those mandated by Title III of the Directive, with non-entrepreneurs being subject to longer discharge periods and face tougher second chance frameworks than entrepreneurs.48 This is particularly true seeing as the average discharge period in Member States is currently 5 years,49 since (court-imposed) discharge is typically strictly conditioned on the fulfilment of a multi-year repayment plan.50 The Directive only requires to reduce this period to a maximum of 3 years for entrepreneurs.

# CATEGORISATION OF INSOLVENCY PROCEDURES

At this stage, the mere possibility of including consumers in the scope of the discharge mechanism provided for by Directive 2019/1023/EU needs to be considered against existing national insolvency frameworks for natural persons. Most Member States have introduced judicial procedures for dealing with over-indebtedness. However, contrary to what the Impact Assessment seemed to suggest, this section will show that entrepreneurs and consumers are not always treated in the same way within and across different European jurisdictions.

For the purposes of this contribution, a general categorisation of national insolvency procedures leading to discharge for natural persons will first be made. This will be done on the basis of the conditions of access that exist to these procedures. In particular, on the one hand, the availability of various types of proceedings offering the possibility of debt discharge to (one and the same) debtor will be considered (Section 3.1). On the other hand, access restrictions to the various proceedings provided for in a given Member State based on the debtor's capacity will be covered (Section 3.2).51 The latter means that some insolvency procedures are accessible for both unincorporated entrepreneurs and non-entrepreneurs, while others are designed for undertakings only (including sole entrepreneurs), with a separate procedure for consumers.52 This categorisation is then illustrated by examples of insolvency procedures in selected (former) Member States (Section 3.3).

## Types of insolvency procedures

According to the Directive, ‘full discharge of debt’ means that enforcement of outstanding dischargeable debts is precluded or that outstanding dischargeable debts as such are cancelled, as part of an insolvency procedure (Article 2 1[10], Dir 2019/1023/EU). With regard to these proceedings, insolvent natural persons may have access to different procedures within a given jurisdiction that offer the possibility of debt discharge. Moreover, the range of options available to a given debtor varies from one Member State to another.

Directive 2019/1023/EU requires that a discharge of debt is available in procedures that include a realisation of assets (‘bankruptcy’ or ‘liquidation’ procedures), a repayment plan (‘debt settlement’ or ‘restructuring’ procedures) or a combination of both. In implementing those rules, Member States can choose freely among these options. The only requirement the Directive imposes is that, if more than one procedure leading to discharge of debt is available under national law, they should ensure that at least one of those offers the opportunity of having a full discharge within a period that does not exceed 3 years (see also Article 20 1., Dir 2019/1023/EU).53 The difference between the insolvency proceedings that can achieve this goal essentially lies in how quickly or easy discharge will be achieved.54 As explained below, this may involve ‘straight discharge’ within bankruptcy proceedings on the one hand or ‘conditional discharge’ as part of a debt settlement procedure on the other (or a combination of both).

## Bankruptcy proceedings

Straight discharge means that the debtor is unconditionally discharged from his debts as a result of a bankruptcy procedure, without imposing a repayment plan.55 In bankruptcy proceedings, all of the debtor's assets are liquidated and the resulting proceeds distributed to the creditors. Normally, therefore, this legal process culminates in the discharge of the residual debts within a short period of time. This is of immediate benefit to the debtor who (again) becomes a fully functioning economic participant in society, purged of past debts.56 The Directive notes that where the procedural path leading to a discharge of debt entails the realisation of assets, Member States may provide that the request for discharge is treated separately from the realisation of assets.57

## Debt settlement proceedings

Yet, natural persons have proved to have few, if any, assets of (significant) value that are available for liquidation and distribution to creditors. For this reason, in debt settlement procedures discharge is conditional on a partial repayment of the debt, and thus on compliance with a repayment plan. This is defined as a programme of payments of specified amounts on specified dates by an insolvent debtor to creditors, or a periodic transfer to creditors of a certain part of debtors' disposable income during the discharge period (Article 2 1.[11], Dir 2019/1023/EU). Here, the debt is only reduced to such an amount that the debtor can reasonably be expected to pay.[59] The rationale behind these repayment plans is that the debtor ‘earns’ his fresh start, rather than being given an immediate fresh start in bankruptcy proceedings with no contribution or exertion expected from debtors.[60] Accepting that most debtors are unlikely to be able to produce a significant return to creditors, most (European)[61] lawmakers seem to require some contribution from debtors' available future income over a period of time, and this from a moral or educational purpose of inculcating payment responsibility and avoiding moral hazard among

debtors,[62] rather than for economic reasons.[63] This ‘re-education’ model seems to be rooted in the idea of the guilt of the bankrupt individual.[64]

It is clear that while debt settlement procedures also aim to provide debtors some form of debt discharge, they take a more restrictive approach.64 Consequently, repayment plans are sometimes criticised in the literature. Firstly, they can present problems if the scheduled payments are set at too high a level. Problems can also arise if the period set for the plan is too long.65 Repayment plans may thus prevent any meaningful accumulation of wealth and trap the debtor in a low standard of living.66 This in turn may stifle initiative in that the debtor is discouraged from realising his full economic potential unless and until the repayment plan has expired.67

In order to avoid the above-mentioned effects (to some extent), the Directive provides that Member States should ensure that the repayment obligation is based on the individual situation of the debtor and, in particular, proportionate to his or her seizable or disposable income and assets during the discharge period (while also taking into account the equitable interest of creditors) (Article 20 2., Dir 2019/1023/EU). In addition, Member States may provide for the possibility to adjust the repayment obligations when there is a significant change in the debtor's financial situation, regardless of whether it improves or deteriorates. Finally, it is noted that debtors should not be prevented from starting a new activity during the implementation of the repayment plan.68

## Debtor's capacity

All natural persons in a given jurisdiction may have access to insolvency proceedings leading to debt discharge, but access to a particular procedure may depend on whether the debtor is an entrepreneur or a consumer. The observation is that the classification of natural persons in the insolvency framework (based on their capacity) primarily depends on how entrepreneurs are classified, namely:

with all debtors regardless of their legal status;with any other business or undertaking;with any other natural person; oras a separate category on their own.[70]

This in turn affects the classification of consumers in the insolvency framework. As a result, the insolvency proceedings of the different Member States form a continuum, ranging from insolvency proceedings open to any natural person (‘natural person insolvency procedures’), to proceedings designed for undertakings, including entrepreneurs (‘commercial insolvency procedures’), or for non-entrepreneurs (‘consumer insolvency procedures’) (see Table 1). However, (such) outdated classifications of natural persons are an aspect of divergence that may give rise to concern, especially if natural persons do not have access to suitable procedures. The different classifications of natural persons based on their capacity are discussed below and then applied to the national laws of selected jurisdictions.

**TABLE1**Insolvency proceedings according to the debtor's capacity.

| | Type of insolvency procedure | | | |
|---|---|---|---|---|
| | **Natural person insolvency procedures** | **AQ1Consumer insolvency procedures** | **Legal person insolvency procedures** | |
| Consumers | *England and Wales* | *France* | | |
| | *The Netherlands* | *Belgium* | | |
| | | | *Germany* | |
| Entrepreneurs | | **Commercial insolvency procedures** | | **Entrepreneur insolvency procedures** |
| Legal entities | | | | |

*Source*: Author's own.

## Natural person insolvency procedures

On the one hand, entrepreneurs can be grouped together with and treated the same as consumers.70 In this case, the proceedings will be referred to as ‘natural person insolvency procedures’. A 2016 report drafted by the University of Leeds uncovered that in 43% of the Member States, entrepreneurs have access to ‘consumer’ procedures as a natural person, and in 18%, entrepreneurs have access to these procedures yet with some restrictions (based either on the size of the enterprise or type of proceedings available). In jurisdictions with such a system, insolvency proceedings are, in principle, open to any natural person (as long as they fulfil the other criteria). The principle is that there is one single regime for discharging debt, irrespective of whether the debtor is an entrepreneur or a consumer. As a result, there is little difference in treatment between entrepreneurs and non-entrepreneurs.71 As explained below, examples include England and Wales, the Netherlands and Germany. Historically, these (former) Member States have not distinguished between individual entrepreneur and consumer insolvency or have long since abandoned such distinctions.72

## Commercial versus consumer insolvency procedures

The 2016 Impact Assessment accompanying the Directive mentioned that:"[i]n the majority of the [Member States], there is no distinction between consumers and other natural persons and there are not any special procedures or mechanisms for consumer insolvency, since the personal bankruptcy/insolvency proceedings are also available to them".[74]The 2016 Proposal for Directive 2019/1023/EU was more nuanced, stating that:"[a]lthough consumers have largely the same treatment under national insolvency laws, *this is not the case in all Member States*".[75]Some jurisdictions distinguish natural persons on the basis of their economic (or professional) activity (for the purposes of insolvency proceedings). In this case, individual entrepreneurs can be classified with any other undertaking (i.e., legal entities and traders, artisans and self-employed professionals), while other natural persons are excluded from these procedures. Those proceedings are referred to as 'commercial insolvency procedures'. According to the study of the University of Leeds, in 21% of the Member States entrepreneurs have access to insolvency proceedings for both corporate entities and business activities of natural persons.75 In these Member States, therefore, the capacity of the debtor has a significant impact, with difference in the treatment of entrepreneur-debtors and non-entrepreneurs, or between production and consumption debts.76 As Kilborn points out'[t]his kind of mutual exclusivity between bifurcated 'commercial' and 'consumer' insolvency systems is quite common in Europe, though by no means universal.'77This dichotomy can be explained by the fact that (mainly) in the traditional Napoleonic Civil Code group, non-entrepreneurs are (still) excluded from bankruptcy proceedings (since these are only available to undertakings).78 This approach meant that consumers were not entitled to any kind of debt discharge.79 In recent decades, however, countries that did not provide for discharge procedures for non-business debtors have adopted separate 'consumer insolvency procedures', offering previously unavailable debt relief to troubled households.80 That evolution came with the deregulation of countries' consumer credit markets in the late 1970s and early 1980s,81 causing an increase in household debt problems.82 Indeed, a credit-based economy means that individuals take on considerable levels of debt, leading to higher rates of personal over-indebtedness.83 This creates the need for the adoption of a second chance policy in consumer insolvency.

Nevertheless, the historical trader/non-trader distinction still seems to play a role in the treatment of natural persons with regard to debt discharge. While entrepreneurs are offered a quick fresh start (with discharge within a short period of time) consumers generally have no access to discharge other than through a (long-term)84 repayment plan.85 France and Belgium are clear examples of Member States offering more generous discharge provisions for entrepreneurs than for consumers: only entrepreneurs can be declared bankrupt86 and a repayment plan is not part of this commercial insolvency

procedure.87 Consumers, instead, are only discharged when having repaid a portion of outstanding debts over a certain period of time.88

# Illustrations from (former) Member States

## England and Wales, the Netherlands and Germany

It is a principal characteristic of English law that a number of fundamental distinctions are maintained between the insolvency of individuals and the insolvency of legal persons.89 In the case of individuals, as noted above, it is mainly the common law jurisdictions that (traditionally) recognise the ability of non-traders to discharge debts through bankruptcy.90 Specifically in England and Wales, debt discharge was introduced into bankruptcy law in 1705. However, since the 1570 statute 'An Act Touching Orders for Bankrupts', English bankruptcy law had applied only to (insolvent) persons engaged in a trade or business, rather than consumers.91 Thus, even in England and Wales a sharp distinction was made between consumers, who were considered to be solely to blame for their insolvency, and traders (amenable to bankruptcy, and, later, discharge), for whom compassion could be shown.92 The trader-requirement characterised English bankruptcy law for three centuries and denied the benefit of later, more benign, bankruptcy laws to those who did not qualify as traders.93 For the purposes of access to bankruptcy, the trader/non-trader distinction was abolished in 1861.94 By making bankruptcy provisions applicable to all debtors, whether traders or not, the use of bankruptcy could be increased without the need for a separate law for consumer insolvency.95 Automatic discharge was then first introduced in 1976 and the Insolvency Act 1986 reduced the discharge period from 5 to 3 years.96

To encourage responsible risk-taking by entrepreneurs, the Enterprise Act 2002 further reduced this period to (only) 1 year (section 279 (1)).97 This period should somehow be nuanced, as any surplus income over and above the amount set by the trustee is theoretically claimable as after-acquired property. The receipt of this income can be secured by means of an income payments order (section 310) or an agreement (section 310A), which may extend beyond the discharge period – but cannot exceed 3 years (sections 310(6) and 310A(5)).98 Thus, notwithstanding the automatic discharge, the debtor may be required to make further payments from income over a period of time, even after being discharged.

Due to the 'fortuitous fact' that business bankruptcy laws have been open to non-traders since the Bankruptcy Act of 1861, England and Wales have thus a quite generous discharge regime that is available to consumers. As the 2002 reform was in fact not intended as a remedy for consumers, there was opposition to the application of the shortened period to them. There were also attempts to restrict those discharge provisions to business debtors. Ramsay notes that 'if a trader/consumer distinction for bankruptcy discharge had existed in England and Wales in the early 1980s,

then the government would have been very reluctant to introduce a bankruptcy discharge for consumers.'99So even in a 'natural person insolvency procedure'-approach, the idea that only traders, rather than consumers, should have (liberal) access to bankruptcy relief is not moribund.100

The Dutch Bankruptcy Act (*Wet van 30 september 1893 op het faillissement en de suréance van betaling*) has been in force since 1896 and applies to all individuals, thereby removing a previous restriction to trader-debtors. This means that bankruptcy in the Netherlands applies to legal entities as well as natural persons (including individuals not engaged in entrepreneurial activities). Nevertheless, it does not lead to debt discharge. This was remedied by the Act of June 25, 1998 (amending the Bankruptcy Act) on the restructuring of debts of natural persons (*wettelijke schuldsanering*), which made it possible for natural persons to obtain a discharge of their outstanding debts. Thus, since 1998, if it is reasonably foreseeable that a natural person will not be able to continue to pay his debts or if he is in default, he can apply for the opening of a (sort of) debt settlement procedure (Article 284), including a realisation of the assets belonging to the estate (Article 347). The procedure is only opened if it is sufficiently plausible that the debtor will duly fulfil the obligations arising from the proceedings and will endeavour to obtain as much income as possible for the estate, which includes the assets acquired by the debtor during the procedure (Articles 288 and 295). The duration of the debt settlement procedure is 3 years – to be shortened to 1.5 year101 – during which the debtor must repay the creditors as much as possible (Article 349a).102 Once the repayment plan has been duly implemented, the remaining debts are no longer enforceable, thus giving the debtor a fresh start.103

In contrast to the bankruptcy regimes of many European countries, German bankruptcy law has also historically made no distinction between procedures applicable to traders and non-traders. The former German Bankruptcy Code of 1877 (*Konkursordnung*) provided a universal procedure applicable to any legal person (but it was aimed exclusively at corporate insolvencies). Under the Insolvency Code (*Insolvenzordnung*), German insolvency proceedings can (still) be opened for the assets of any natural person or legal entity (§11), with specific, limited differences in proceedings applicable to consumers (i.e., a natural person who is not self-employed) (*Verbraucherinsolvenzverfahren*, §304 ss.).104 As a result, Germany now has standard proceedings for natural persons and slightly different consumer insolvency proceedings. Consumers, for example, have to provide a certificate that an unsuccessful attempt has been made to reach an out-of-court settlement with creditors. Consumer debtors must also submit a repayment plan with their request to open insolvency proceedings (§305) and such proceedings are suspended until a decision is taken on the plan (for a maximum of

3 months, §306).105 Yet, the final stage of German insolvency proceedings, namely the rules on discharge, is identical to any natural person.106

As in the Netherlands, German insolvency law did not offer debtors any kind of discharge until 1999: they remained liable for the debts that were not paid off in the asset liquidation process.107 Then, in 1999, the possibility of residual debt discharge for natural persons was introduced in order to re-integrate debtors into the national economy and give them a fresh start in modern society (*Restschuldbefreiung*, §286 ss.). In order to obtain residual debt discharge, an application should be made by the debtor (joined with the request to open insolvency proceedings) (§287). It is dependent upon a preceding period of good conduct. Here, discharge is granted by the insolvency court at the end of the regular – since the implementation of the Directive – 3-year108 assignment period during which the sizeable part of the debtor's income is transferred to a trustee for distribution to the creditors (§287 and 300).109 In order to be discharged, the debtor must fulfil several obligations in the period between the termination of the insolvency proceedings and the end of the assignment period (such as engaging in appropriate gainful employment, or seeking such employment,§295);Debtors who are self-employed are obliged to make payments to the trustee as if they were in an employment situation (§295a)).

## France and Belgium

France is one example of a jurisdiction that draws a sharp distinction between entrepreneur and consumer insolvency.110 This 'was rooted in the idea that only traders were subject to the vicissitudes of trade and external economic events111'. On the one hand, liquidation proceedings (codified in the Commercial Code) apply to any person engaged in a commercial (Article L.121–1), artisanal or agricultural activity, as well as to any natural person exercising a (civil) independent activity, including a liberal profession, as well as to any legal person under private law (Article L.640–2). Bankruptcy laws have existed in France in one form or another since 1673,112 but the distinction between insolvent traders and non-traders is of more modern origin. The ordonnance of 1676 on commerce was the first to regulate bankruptcy in its entirety, incorporating into French law the main provisions of the former statutes of Italian cities. This legislation applied mainly to merchants, but the state of bankruptcy could also reach non-traders. It was not until the Commercial Code of 1807 (*Code de commerce*) that it became customary to reserve bankruptcy for merchants.113

'Discharge' was introduced into the Commercial Code by the principle that the closure of a (judicial) liquidation due to insufficient (business) assets does not allow creditors to enforce their individual claims against the debtor (Article L.643–11). The observation that a large proportion of liquidation procedures were unprofitable led to the creation in 2014 of the professional recovery procedure without liquidation (*rétablissement professionnel*), which offers a fresh start by means of discharge.114 This procedure is open to

entrepreneur-debtors subject to liquidation proceedings who have ceased making payments and whose rehabilitation is clearly impossible, have not ceased their activities for more than 1 year, have not employed any staff for the last 6 months and whose assets are low of value (Article L.640–2). The termination of the procedure, after 4 months, entails the cancellation of the debt (Article L.645–11).

On the other hand, consumers have access to a separate procedure, governed by a separate set of rules, which was introduced in 1989: 'Treatment of Situations of Over-indebtedness' (*Traitement des situations de surendettement*, codified in the Consumer Code).[116] This 'consumer insolvency procedure' is not available to debtors who are eligible for treatment under the commercial insolvency provisions (i.e., natural persons carrying out an independent professional, civil or commercial activity under Article L.711–3). Over-indebted consumers can initiate these proceedings by filing a petition for relief with one of the *commissions de surendettement*, which will examine the file and decide on its direction.[117]

If the debtor has enough means or realisable assets, and is the owner of a property, the commission may initially draw up a 7-year repayment plan and negotiate its acceptance by the debtor and the main creditors (Article L.732–1-3). If this is not possible, or if the debtor does not own any property, the commission may, at the debtor's request, impose 'ordinary' (including rescheduling the payments, Article L.733–1) or 'extraordinary' measures (such as partial discharge, Article L.733–4) to pay off (a part of) non-business and business debts over a period of 7 years. If the debtor is in an irremediably compromised situation characterised by the manifest impossibility of implementing the aforementioned measures, the commission may offer the debtor an immediate discharge of debts either by imposing a personal recovery (*rétablissement personnel*) without liquidation or by referring the case to the court for the opening of a personal recovery procedure with liquidation of the debtor's non-exempt assets (Articles L.724–1 and 741–2).

It is noted that the Law of February 14, 2022 'in favour of independent professional activity' introduced a unique status for individual entrepreneurs (i.e., a natural person who carries out one or more independent activities in his or her own name). The essential element of the law is the creation of a business estate, which is distinct from the private estate, and any individual entrepreneur is (in principle) only liable for his business debts out of his business assets (Article L.526–22).117 Consequently, the individual entrepreneur's request to open a commercial or consumer insolvency procedure must be made before the commercial court. It must assess whether the conditions for opening commercial insolvency proceedings are met on the basis of the entrepreneur's business assets, and those for opening consumer insolvency proceedings on the basis of the private assets and all the debts that can be recovered from these assets. Firstly, the court may find a state of cessation of payments only in relation to the entrepreneur's business

assets, in which case the commercial proceedings will cover only his business assets. Secondly, the court may find that the conditions for opening commercial and consumer insolvency proceedings are met. In this case, a commercial insolvency procedure is opened, covering the debtor's entire assets (business and private). A third hypothesis is that the entrepreneur has maintained a perfect separation between his two estates, in which case a commercial and consumer insolvency proceeding will coexist (the latter procedure dealing with the debts of the entrepreneur in his private estate). Finally, it may also be that only the conditions for opening a consumer insolvency procedure are met. In this case, the debtor is referred to an over-indebtedness commission (Article L.681–1-2).118

The French consumer insolvency system has strongly influenced the laws of Belgium and Luxembourg.119 Belgian insolvency law is also characterised by a sharp distinction between commercial and consumer insolvency proceedings. In particular, whether or not a natural person qualifies as an ‘undertaking’ determines which insolvency proceedings are available to the debtor. For natural person-undertakings (entrepreneurs, that is, any natural person who independently exercises a professional activity), Belgian commercial insolvency law (codified in the Code of Economic Law) provides an 'advantageous' second chance policy as part of bankruptcy proceedings. This means that, on the one hand, assets received by the bankrupt since the declaration of bankruptcy are excluded from the bankruptcy estate – for example, income from labour acquired after the opening of the bankruptcy proceedings – and, on the other hand, debts that remain unpaid at the end of bankruptcy proceedings are in principle automatically discharged (Articles XX.110 and XX.173). Natural persons who do not qualify as an undertaking only have access to the Collective Debt Arrangement procedure (*collectieve schuldenregeling*, codified in the Judicial Code, Article 1675/2).120

In a Collective Debt Arrangement, the debtor proposes an amicable repayment plan to his creditors (under the supervision of the court and with the assistance of a debt mediator). If no agreement is reached on the plan, the court may impose a judicial repayment plan. The purpose of the repayment plan is to restore the debtor's financial situation. In particular, this is done by enabling the debtor to repay his debts as much as possible, while ensuring that he and his family can lead a decent life (Article 1675/3).121 For the duration of the plan (i.e., 3, 5 or 7 years), all of the debtor's non-exempt income is used to pay off creditors. Outstanding debts at the end of the plan are then discharged. In principle, however, a judicial plan is imposed without a (partial) discharge of debts, and a possible discharge is subject to compliance with strict conditions and modalities.122 Since the legislator wanted to reserve discharge for particularly serious situations of over-indebtedness, the court must find that a 5-year repayment plan without a capital discharge is not feasible. This means that before proceeding to a partial (capital) discharge, the court

must first consider the possibility of deferring payments, by rescheduling of the debt or cancelling or reducing interest and costs (Articles 1675/12 and 1675/13).[123] In addition, in principle, any (partial) discharge of the principal is only possible after the realisation of all non-exempt assets and compliance with any accompanying measures.

The condition of asset liquidation is similar to bankruptcy, except that in the latter this is immediately the main objective of the procedure and that other options do not have to be explored first. Also, bankruptcy proceedings do not impose a repayment plan, while a partial discharge of debts in the Collective Debt Arrangement is conditional on compliance with a repayment plan of up to 5 years.[124] Finally, an immediate (and full) debt discharge in the Collective Debt Arrangement is limited to extreme cases of last resort: it can only be granted if it is immediately clear that no amicable or judicial plan is possible, due to the fact that the debtor has insufficient assets (Article 1675/13bis). In this case, a full discharge is granted without a repayment plan being imposed. It should be noted that such a decision may include accompanying measures, the duration of which may not exceed 5 years.

It is clear that the second chance policy for entrepreneurs differs significantly from the rationale of the Collective Debt Arrangement. Both collective procedures are intended to offer a fresh start to the bankrupt entrepreneur and the over-indebted consumer respectively, but, (even) to date, a different value judgement remains with regard to the insolvency of the entrepreneur and the non-entrepreneur. While an entrepreneur can obtain a discharge of residual debt almost automatically within a short period of time, more is demanded of the consumer.[126]

# THE CASE FOR A UNIFIED DISCHARGE REGIME FOR NATURAL PERSONS

The main thesis of this article is that over-indebted consumers and insolvent entrepreneurs should be subject to the same discharge treatment. In other words, jurisdictions where non-entrepreneurs are treated in the same way as entrepreneurs (for discharge purposes) should be considered as a best practise, at least if the discharge regime is set in line with the minimum provisions of the Directive. This section makes the case for a unified discharge regime or (binding) rules for all natural persons. This is done on the basis of two main reasons. First, the classification of entrepreneurs in ‘commercial insolvency procedures’ and, conversely, of non-entrepreneurs in ‘consumer insolvency procedures’ creates two types of problems of delineation (see Section 4.1). Indeed, it is difficult to distinguish between natural persons on the basis of their (business) activity, their debts or the business and private consequences of insolvency. Today, therefore, it appears that any distinction made between (debts of) natural persons is arbitrary. Second, a unified discharge regime (or rules) for natural persons offers a better opportunity to take

into account the common needs of insolvent individuals , as opposed to legal entities (see Section 4.2). Essentially, the aim of second chance policy is to restore the economic capacity of the debtor who would otherwise be trapped in debt.

# Reason 1 – Problems of delineation

## Entrepreneurs versus non-entrepreneurs?

## *Quid* directors and platform workers?

Directive 2019/1023/EU focuses on regulating the concerns of a natural person in his capacity as an entrepreneur. For the purposes of the Directive, the term ‘entrepreneur’ is defined as a natural person exercising a trade, business, craft or profession (Article 2, 1.[9], Dir 2019/1023/EU). As the Directive focuses on the protection of these entrepreneurs with regard to second chance provisions, this definition should be understood in a broad sense. It could therefore be close to the concept of ‘self-employed persons’. These are persons who are the sole owners, or joint owners, of the unincorporated enterprises in which they work.

Yet, natural persons engage in a wide variety of activities. This raises questions as to the distinction between entrepreneurs and non-entrepreneurs, especially in the context of over-indebtedness.126 More fundamentally, it is even questionable whether this distinction is relevant for the purposes of insolvency law, in particular debt discharge. While distinguishing between natural persons on the basis of their economic activity may have been useful, feasible or effective in the past in a number of legal systems, this dividing line is increasingly blurred in today's economy.127
Accordingly, if the second chance policy of national Member States or the EU aims to promote entrepreneurship through generous discharge rules, this raises the difficulty of defining ‘entrepreneurs’ in order to delineate the scope of this policy.128 That it is becoming increasingly difficult to draw a meaningful distinction between entrepreneurs and non-entrepreneurs (or ‘pure’ consumers) is illustrated by two examples: directors of legal entities and platform workers.
As for company directors, Recital 73 of the Directive provides that the concept of entrepreneur within the meaning of Directive 2019/1023/EU should have no bearing on the position of managers or directors of a company, who should be treated in accordance with national law. Hence, just as in the case of consumers, the Directive does not regulate the insolvency situation of persons who are merely managers or directors of a company. Nevertheless, there is nothing to prevent Member States from allowing them to benefit from the discharge rules provided by the Directive. However, some authors argue that the rules on discharge of debt under Title III of the Directive are not designed for them, but for the small business professionals.129 Yet, the latter argument does not always fully apply when the director is, at the same time, also a small business professional.

Like any other natural person, company directors can also be confronted with over-indebtedness. This may be due to debts arising from the insolvency of the company itself, but also because of private debts. Indeed, for directors of (single-member) companies, there is a strong relationship between private and business 'failure' or insolvency. Although managers or directors may conduct business through a company structure, this can be a single-member company, with low turnover, no or little staff and few assets. The director may at the same time be founder-shareholder and who, but for the availability of 'cheap' limited liability provided by the structure, would otherwise act as sole trader to run the business.130

The blurred dividing line between directors as private persons and the company they run is also reflected in their debt-structure. For example, a director may have given a personal guarantee for a loan to the company or may face a director's liability claim.

These (business) debts may have consequences that go beyond the director's economic activity.131 But, strictly speaking, only the personal guarantee debt, which makes the director personally liable for debts of the company, seems to be related to the company's 'business risk' (and not the director's (private) debts). Since the second chance policy in some jurisdictions is explicitly designed to encourage entrepreneurial risk-taking, the underlying (policy) question is whether the exercise of the directorship of a company involves an entrepreneurial risk in itself, separate from the business risk run by the company. If not, then the second chance policy, and hence debt discharge, should not be applied in this narrow view.132 Clearly, the restrictive adherence to encouraging entrepreneurship and risk for the purposes of second chance policy has its limits.

The reform of Belgian bankruptcy law in 2017 shows that the difficulties in defining the concept of 'entrepreneur' as far as company directors are concerned is not just a theoretical issue. One of main features of the reform was the extension of bankruptcy law to all undertakings, including natural persons exercising a self-employed professional activity ('entrepreneurs'), thereby leaving the trader-restriction. Since the introduction of the new undertaking-concept, there has been an ongoing debate as to whether natural persons exercising the mandate of director in a company can be qualified as such (and thus benefit from the 'generous' Belgian discharge rules). Established case law recognises that natural persons who are company directors can be qualified as an undertaking, provided that certain conditions are met, namely that they are self-employed and exercise a professional activity. For directors, this will normally be the case. However, on March 18, 2022, the *Cour de Cassation* ruled that natural persons are an undertaking only if they constitute an organisation consisting of an arrangement of material, financial or human resources with a view to exercising a professional activity on an independent basis. Thus, a company director who exercises his or her mandate without any organisation would not be an undertaking.133 He cannot therefore be declared bankrupt.

By comparison, in France, the director of a limited liability company is not considered to be a ‘natural person exercising an independent professional activity’ (Article L.631–2) and is therefore not subject to commercial, but to consumer insolvency proceedings. Despite his status as director (or shareholder), he does not carry out his professional activity independently and not on his own account, but on behalf of the company.134 The French Court of Cassation has ruled that the mere fact that a person is the director of a limited liability company, even if the company has been put into liquidation, is not sufficient to qualify for the insolvency proceedings provided for in the Commercial Code.135

Another challenge posed to the entrepreneur-concept is that new ways of organising work have emerged in many sectors of the economy. In particular, one can think of the gig economy or platform work, where the freedom to decide whether and when to work is a typical feature.[137] This raises questions as to the qualification of platform workers as employees (non-entrepreneurs) or self-employed entrepreneurs. Typically, companies operating on a digital platform do not offer the option of an employment contract, despite the intrinsic labour nature of the relationship, and classify people working through them as self-employed.[138] But, in reality, the structure in which they work can make genuinely independent organisation impossible.[139] There are many platform workers who experience subordination to and varying degrees of control by the digital labour platforms through which they operate, for instance in terms of pay levels or working conditions.[140] Heiβl therefore identifies a (cautious) trend in European jurisprudence towards the reclassification of drivers and riders/couriers as employees.[141] Ramsay rightly notes that in the gig economy, the self-employed are little different from employees.[142] As a result, the line between entrepreneurship and salaried work is weakening when self-employed professionals work by themselves for a few clients and each contractual relationship resembles an employment relationship without the benefits of salaried work.[143] In such cases it is therefore difficult to justify that qualifying as an entrepreneur, or as a non-entrepreneur would have far-reaching consequences in the event of insolvency.

## Business debts versus consumer debts?

The previous section has shown that the delineation between natural persons as consumers or as individuals who are involved in business activities (be they traders, entrepreneurs or self-employed persons) is hard to make.143 Besides distinguishing between natural persons as debtors, jurisdictions could also distinguish between a natural person's debts. For instance, access to consumer insolvency proceedings could be restricted to individuals with consumer debts rather than business debts.144 Conversely, jurisdictions could also exclude debts incurred by entrepreneurs outside of their economic activity from commercial insolvency proceedings.145

Yet, individual entrepreneurs will inevitably have business debts and consumer debts. The difficulty here is that it may not always be possible to separate these debts into clear

categories.[147] Indeed, it is often not possible to draw a clear distinction between the personal debts incurred by entrepreneurs in the course of their trade, business, craft or profession ('business debts') and those incurred outside these activities ('consumer debts' or 'private debts').[148] Business debts can also lead to private over-indebtedness.[149] Given the increasing overlap between consumption and production debts, restrictions on access to debtors with only consumer or business debts may thus result in litigation over the nature of these debts.[150]

For this reason, the Directive contains provisions on the consolidation of proceedings concerning business and private debts. In particular, Member States should ensure that, where insolvent entrepreneurs have business debts incurred in the course of their business activity as well as private debts incurred outside those activities, which cannot be reasonably separated, such debts (if dischargeable) are treated in a single procedure for the purposes of obtaining a full discharge (Article 24 Dir 2019/1023/EU).150 Member States such as Belgium traditionally apply this method and do not distinguish between debts, which means that an entrepreneur's private debts can also be discharged in the commercial insolvency proceedings.151 When introducing the Collective Debt Arrangement, the Belgian legislator also deliberately made no distinction between private debts and business debts.152 Kilborn sums this issue up perfectly:"The proper scope of a personal insolvency regime is bounded by the nature of the subjects of such a system – the persons – receiving relief, not the nature of their debts, as 'any debtor's status as a natural person raises unique considerations that are at least equally central, if not more so, to the proper structure and assessment of a system for addressing natural person insolvency' than the nature of the activity giving rise to that person's debts."[154]It worth noting that if all debts, including private debts, can be discharged in a commercial insolvency procedure, this system somewhat undermines its own rationale. After all, discharge liberates the entrepreneur not only from debts arising from the debt burden resulting from business failure (or commercial risk-taking), but also from consumer debts. In the narrow interpretation of the second chance policy advocated by some jurisdictions, it seems inconsistent to include private debts of an entrepreneur (unrelated to business risk ) in a commercial insolvency proceeding, while at the same time providing for consumer insolvency proceedings to discharge private debts of non-entrepreneurs. If (the consumer debts of) non-entrepreneurs are then subject to a different, usually stricter, discharge regime, this leads to unequal treatment.154

## Reason 2 – Entrepreneurs and consumers face the same concerns in an insolvency situation

The aforementioned delineation problems provide support for a discharge regime designed for all natural persons. First, there is no need to distinguish natural persons based on the professional activity they carry out. In addition, it is also not feasible

to have rules on the discharge of business debts of natural persons that differ from those applicable to consumer debts. Here, applying the same discharge provisions for both would ensure the equal and consistent treatment of all debts of a natural person, regardless of their nature.155

The main thesis of this section is that natural persons face shared key issues, whether or not business activity is a part of the context of the insolvency. The World Bank Report on the Treatment of the Insolvency of Natural Persons rightly points out that persons who engage in small-scale business activity in their own name often find themselves in a similar situation to wage-earning debtors who have become insolvent.[157] It states that:"A multi-national corporate conglomerate certainly has relevant similarities with the individual proprietor of a local food stand in terms of regulating the insolvencies of these businesses. However, the shared characteristics are at least as central, if not significantly more so, as between the local food stand owner and a 'pure' consumer with no business activity."[158]Hence, the rationale for applying the same discharge principles to over-indebted consumers and insolvent entrepreneurs (in particular sole traders with no or very few employees and assets) is presumed to be that these debtors suffer similar detriment and vulnerabilities. Moreover, these characteristics are common to their capacity as natural persons, which means that there are important aspects differentiating any natural person's insolvency from the insolvency of a legal entity. For those reasons, it is recommended to group debtors on the basis of their business persona (i.e., natural persons or legal entities) and to apply the same discharge rules to the category of natural persons, whether entrepreneurs or consumers.158

It is argued below that entrepreneurs and non-entrepreneurs find themselves in effect in a similar situation in the event of insolvency. First, both categories of natural persons appear to have few or no assets or income. Moreover, research on the causes of insolvency shows that both entrepreneurs and non-entrepreneurs face risks in modern economic life (which is the economic rationale of discharge).

## NINA- and LILA-debtors

Some authors seem to advocate that consumer insolvency and discharge should be dealt with separately from commercial insolvency.159 The argument put forward is that a consumer insolvency regime may need substantial modification to deal with the special issues presented by these debtors. Particular reference is then made to 'no income-no assets' (NINA)-debtors or 'low income-low assets' (LILA)-debtors.160 In fact, in the majority of consumer debtor cases there are no assets or earnings available for distribution among creditors.161 When introducing the Collective Debt Arrangement in 1998, the Belgian legislator also took the view that the 'ordinary system' of bankruptcy could not be applied to non-merchants, as most over-indebted individuals have no assets to distribute to creditors.162

However, that characteristic is not unique to consumers. Although natural persons engaged in business activities might have business assets to distribute among creditors, also most entrepreneurs (particularly those who are sole traders with no or very few employees) have little or no available asset value by the time enforcement actions have begun to multiply. In some cases, the entrepreneur's assets and (future) income may not even be sufficient to cover the costs of the bankruptcy proceedings.163 Similarly, the 2016 Impact Assessment took into consideration that, in practise, recovery rates in insolvency proceedings for individual entrepreneurs are very low.164 As a result, self-employed debtors' financial circumstances often show little material difference compared with their consumer counterparts.165

The conclusion is therefore that a significant number of individual debtors (consumers or entrepreneurs) has few or no assets to liquidate and limited income to repay their debts (in an insolvency situation), and accordingly fall into the category of NINA-debtors or LILA-debtors.166 The so-called 'specific and unique concerns' of natural person-debtors whose insolvency has little or no connection with business activity are thus actually concerns that are relevant to all natural persons. The fact that they have no additional resources to pass on to their creditors distinguishes natural persons from (most) legal entities. While the latter can be fully liquidated, natural persons need some exempt assets and income.167 Consequently, this creates a conflict with one of the most historic and prominent objectives of an insolvency system, namely producing value for creditors.168 Some authors thus argue that relief of the debtor by means of discharge is not merely an objective of personal insolvency, but rather its principal point.169

## Risk-taking as a cause of insolvency…

Both entrepreneurs and consumers face risks in their professional activity or daily lives, and these risks can lead to a situation of over-indebtedness. 'Failure' or insolvency is a part and one of the possible consequences of taking such risks.170 Here, the role of second chance policy is to mitigate the consequences attached to such risk-taking.

The main triggers of over-indebtedness from an individual's perspective are risks typical of modern societies.171 In general, although it is not always easy to identify a dominant reason,172 research on the causes of over-indebtedness seems to agree that this situation results from an unexpected event or unforeseeable life-changing situation (such as job loss, unemployment, divorce, failure of a business, illness…),173 general economic conditions (such as a rise in interest rates) or other interruption of income or unexpected expenses.174

The traditional hypothesis is that entrepreneurs generally face a higher risk of insolvency as compared with wage earners, because entrepreneurship inherently includes the risk of business failure.175 As regards entrepreneurs, business failure is a significant factor in individual insolvency.176 One of the key reasons for business failure, and thus over-

indebtedness of entrepreneurs, resides in individual entrepreneurs' lower resistance to external economic shocks, given their lower ability to mobilise reserves for the period of economic downturns.177 Consequently, when entrepreneurs (have to) cease their business activity, they commonly carry heavy debt loads. This debt load may derive from a business the entrepreneur-debtor carried out in his own name, or through a form of partnership in which the partners have personal liability for the debts of the legal entity.178 But for consumers, simply participating in modern economic life is also a kind of entrepreneurial risk. First of all, the current economic model encourages individuals to take reasonable risks in smoothing and optimising consumption patterns over time, through credit transactions.179 Traditionally, consumer over-indebtedness has been associated with excessive borrowing or excessive lending by financial institutions.180 It is even said that insolvency is a phenomenon that only occurs in societies in which credit is widespread, and that without credit, there is no insolvency, nor need for an insolvency regime.181 The increased use of credit is also relevant for entrepreneurs, as the availability of credit allows them to involve more stakeholders in their business activities.182 Consumers and entrepreneurs are thus expected to be responsible risk-takers.183

However, personal over-indebtedness is not only related to the financial credit market and it is a broader phenomenon than financial debt.184 Debt has many different origins and while policymakers often focus on mortgage or consumer debt to financial institutions, debt problems are often (also) related to (rising) everyday expenses and non-payment of utility or telephone bills, rent, taxes or fines, debts to friends, or healthcare costs.185 Over-indebtedness is therefore more about individuals experiencing ongoing difficulties in meeting their commitments of any nature, such as secured or unsecured loans or household bills,186 and not just in repaying loans contracted with financial institutions.

## And the role of discharge

The rationale for giving natural persons a second chance includes, additional to social elements, a powerful element of economic concerns for both entrepreneurs and consumers.187

Inefficient second chance frameworks, in particular long discharge periods, can create a significant disincentive to entrepreneurial activity and result in entrepreneurs being locked into debt traps. This could drive them into the black economy, producing revenue that is not available to creditors (and, by extension, to society through taxes)188 or to stop working at all.189 The Directive recognises that facilitating a discharge of debt for entrepreneurs would help to avoid their exclusion from the labour market and enable them to restart entrepreneurial activities, drawing lessons from past experience.190 As a result, effective second chance provisions may stimulate the willingness to opt for self-employment191 and have a positive influence upon entrepreneurship192 and

employment.[193] Overall, allowing honest entrepreneurs to benefit from a second chance after overcoming bankruptcy is crucial for ensuring a dynamic business environment and promoting innovation.[194]

A significant number of over-indebted consumers also creates a debt overhang at the macroeconomic level.[195] Consumers remaining in a debt trap has detrimental consequences both for the debtors themselves and for society as a whole, as these natural persons reduce their consumption, and hence, aggregate demand,[196] withdraw from the labour market[197] and have lower potential for entrepreneurship. Instead of returning to an economically productive life, they may rely on social services support, resulting in increased costs for Member States' social security schemes.[198] Each disengaged citizen is a link in a long chain of lost economic and social potential.[199] All this results into lower economic growth.[200] Here, second chance policy could be said to resolve the tensions between a consumerist-oriented, credit-driven, society and the inevitable problems of non-repayment that this creates for certain individuals.[201] In particular, there is evidence that shorter debt discharge periods have a positive impact on consumers by allowing them to re-enter the consumption cycle more quickly and to return to a normal professional and personal life, which ultimately leads to economic growth. Helping consumers get back into the economic spending cycle is therefore an important part of well-functioning markets and retail financial services.[202] This is also relevant for natural persons-entrepreneurs as they can come back to professional life and previous consumption after taking advantage of the possibility of discharge .[203]

Although the economic rationale for offering entrepreneurs and consumers a second chance appears to differ (slightly) in finality, the underlying basis is essentially the same, namely deleveraging to maximise economic activity. Second chance policy for honest but bankrupt entrepreneurs and consumers is thus an important incentive for individuals to re-enter the jobs market and the productive economy.[205] Discharge within a reasonable time period should reduce the number of natural persons (entrepreneurs and consumers) in a debt trap, so that these natural persons can create new companies and re-integrate into the economic life of a society, and is an important objective of a personal insolvency regime. This leads to a revised view of second chance and discharge.

# RETHINKING THE PREMISE OF SECOND CHANCE POLICY

The fair distribution of assets or income among creditors could traditionally be seen as the primary economic objective of insolvency proceedings. However, as demonstrated above, this objective cannot simply be extended to the insolvency of natural persons. First, the absence of significant assets in many, if not most, natural person insolvencies undermines the traditional objectives of achieving the equitable distribution of assets among

creditors.[206] Second, the need to ensure a high recovery for creditors comes into an apparent conflict with society's interest in bringing individuals back to productive lives and curbing poverty and social exclusion.[207]

Yet, policymakers seem to have been less receptive to the realisation that, following the shift from a producer to a consumer economy, the aforementioned considerations now apply equally, if not more, to non-entrepreneurs than to entrepreneurs.[208] A modern society requires a changed view on the risk of insolvency and the role and function of discharge provisions. The view that only the uncertainties of business justify a second chance, or more generous discharge provisions, is outdated.[209] Limiting second chance policy to offering entrepreneurs the opportunity to start again in terms of entrepreneurial activity is too restrictive.

First of all, there is no guarantee that a bankrupt entrepreneur will actually re-start a business after being discharged. Although this is the premise of the narrow view of second chance, there are hardly any statistics available on how many entrepreneurs have started a new company after bankruptcy, making it difficult to test the effectiveness of the policy.209 It is unclear whether getting into a situation of over-indebtedness mainly because of business debts, and obtaining a discharge of those debts as part of bankruptcy proceedings, guarantees future entrepreneurship. Similarly, it may well be that a non-entrepreneur who has gone bankrupt because of personal debts has potential entrepreneurial aspirations. Since non-entrepreneurs are not targeted by the narrow second chance provisions, the policy would then lose some of its effectiveness. If the prospect of a fresh start of economic activity is encouraging future entrepreneurship, then there is little difference in the economic rationale for offering a second chance to entrepreneurs and consumers, as both could start a new business.

Second, a second chance policy focussing on 'business failure' can be artificial when applied to entrepreneurs. For individual entrepreneurs, there is no legal distinction between the business and them as individuals.210 The consequences of a failed business inherently overlap with the entrepreneurs' capacity as a private individual.211 Accordingly, it is not always easy to distinguish between entrepreneurial and consumer financial difficulties.212 The reasons for over-indebtedness of entrepreneurs and non-entrepreneurs are often the same, so that the situation of an (insolvent) entrepreneur is not, or only slightly, different from that of a consumer debtor facing a problematic debt situation.213

Third, all individuals are faced with managing risk,214 so failure and over-indebtedness are situations that affect all natural persons, whether entrepreneurs or consumers. The activities they undertake are the basis of economic growth and second chance policy should mitigate the effects involved with this responsible risk-taking, for all natural persons and regardless of whether financial difficulties emanate from entrepreneurial risk, macroeconomic risk (economic volatility) or personal circumstances (common dangers of

everyday life). Second chance policy accounts for inevitable miscalculations, spreading the costs of these risks (beyond the debtor's control) across society in exchange for the societal benefits of this approach.215

The impossibility of repayment and too strict conditions for discharge cause both entrepreneurs and consumers to fall in a debt trap. Instead of focusing on the risks that cause insolvency, emphasis should be put on rehabilitation (within a reasonable time) after the risk has occurred. If most or all of their future earnings are destined for creditors, debtors have little incentive to produce income (in the legal circuit). Therefore, if (honest) debtors are not required to hand-over income for an extended period, this increases the incentive to work and contribute to the development of societal wealth. Hence, discharge is a necessary and essential tool in the economic rehabilitation, or economic re-integration, of the debtor.216 As has been stated:"One of the principal purposes of an insolvency system for natural persons is to re-establish the debtor's economic capability, in other words, economic rehabilitation.[218]"Reducing the number of individuals in debt traps should be the very aim of a second chance policy.

With these thoughts in mind, the difference between the risk-taking entrepreneur, for whom the second chance policy would exist, and other natural persons can be questioned. It is argued that, for the purposes of second chance policy, consumers are in fact in a similar situation to entrepreneurs, which makes the rationale of second chance policy equally relevant to all debtors.[219] Since the same arguments for re-integration into the economic life play out for both, there is no need to distinguish between entrepreneurs and consumers in terms of discharge provisions.[220]

# CONCLUSION

One of the fundamental objectives of insolvency proceedings is to extract value for creditors. Historically, such proceedings were also designed to punish business people for mismanagement of business risks, which made bankruptcy proceedings unsuited for individuals.220 Gradually, however, the function and purpose of insolvency law has changed fundamentally. Given the uncertainties of business life, it has been argued that it is responsible to give individual entrepreneurs a second chance to restart entrepreneurial activities, without being hindered by the old debt burden. Indeed, personal insolvency proceedings increasingly fulfil an economic function, aimed at rehabilitating the debtor. The idea of the fresh start and second chance, including an early discharge of residual debts, is an important illustration thereof.

Although almost all Member States nowadays provide insolvency proceedings for individual debtors, and the aforementioned trend towards a more economic approach can be observed in all personal insolvency proceedings , the capacity of a natural person (i.e. entrepreneur or consumer) still plays an important role in certain jurisdictions. It has been observed that, at least in the past, discharge of debts was considered easier to

justify and more readily granted to entrepreneurs (traders) than to non-entrepreneurs, who were said to be at fault for their insolvency.221 This is still reflected in stricter timeframes and conditions for debt discharge for consumers, compared with entrepreneurs.

EU Member States making a distinction between commercial and consumer insolvency proceedings are clear examples of the discomfort legislators seem to have with discharging unpaid debts of consumers.222 This can be seen, for example, in Belgium, where the entrepreneurial argument has been used to open up bankruptcy to all natural persons carrying out a self-employed professional activity. Entrepreneurs can obtain a quasi-automatic and quick discharge of residual debts. However, non-entrepreneurs do not have access to bankruptcy proceedings and can only obtain a (partial) discharge of their debts through a debt settlement procedure with a 5-year repayment plan.223

The same narrative of promoting entrepreneurship is now driving EU insolvency reforms,[225] with several recommendations from the last decade recently translated into Directive 2019/1023/EU on restructuring and insolvency. This narrow focus leads the Directive to distinguish between insolvent individual entrepreneurs and other natural persons, offering honest insolvent or over-indebted entrepreneurs a full discharge of debts after a reasonable period of time, while providing no mandatory discharge principles for non-entrepreneurs.[226] Where Member States set forth a period during which the debtor's economic life is regulated by a multi-year repayment plan,[227] they will thus be forced to reduce that period to a maximum of 3 years only for entrepreneurs.

The fact that not all natural persons are treated equally when it comes to the possibility of having a second chance, despite compelling evidence that shorter discharge periods lead to more productive individuals,[228] made me address the question in this article whether EU Member States should run separate systems of discharge of debts for entrepreneurs and consumers, and whether this is justified in relation to the purpose of second chance policy.[229]

Reducing the discharge period only for entrepreneurs, relying on the argument of promoting entrepreneurship, may result in consumer debtors missing out. By focusing on entrepreneurship alone, the Directive seems to reinforce – or at least not to remove – this bifurcated approach, where the options available to natural person-debtors are different, and potentially less favourable to consumer debtors.[230] Ramsay rightly states that a legitimacy issue exists for any attempt to provide differential treatment for traders and consumers:"Facilitating restructuring and a swift fresh start for entrepreneurs in an era of increasing inequality and austerity may be harder to justify if ordinary consumers must struggle with longer repayment periods or greater hurdles to a fresh start."[231] I argued that, in the light of the purpose of second chance policy, there is no convincing public policy rationale for treating entrepreneurs and non-entrepreneurs differently in terms of discharge.231 'It seems to be justified only by a formalistic

adherence to the artificial distinction between ‘commercial’ and ‘civil’ law.’232 As Tribe states:“it is one thing to try to enhance entrepreneurial activity by making more liberal bankruptcy laws, but if in so doing you waste legislative time because you have not catered for another section of debtors that also need relief (consumer debtors), then you are not fulfilling your wider general policy function to ensure there is a personal insolvency law structure for all”.[234]Natural persons cannot be liquidated or dissolved,234 so in principle they remain personally and unlimitedly liable for residual debts that remain unpaid after the closure of insolvency proceedings. Limiting the scope of application of (generous) discharge provisions to entrepreneurs excludes other natural persons who face unlimited liability for debts.235 This creates the need for a unified discharge regime (or rules) available to all natural persons, which releases the individual debtor (totally or partly) from personal liability. It is precisely because of their unlimited personal liability that individual entrepreneurs and consumers face similar issues, in many respects, as natural persons. In today's radically changed legal, social and economic environment, where the European Commission is pushing for a 3-year maximum discharge period, there is no apparent reason why entrepreneurs should have a different discharge regime than consumers: in both cases what is at stake is the personal liability of the debtor, and thus the rehabilitation of the debtor.236 Indeed, in a situation of over-indebtedness or insolvency, there is often little difference between an over-indebted self-employed entrepreneur and an over-indebted wage earner. Insolvency and second chance policy should thus not be affected by the individual's capacity, nor by the nature of an individual's debt.237 As Niemi points out, this is a new challenge for insolvency law, which is traditionally divided into business and consumer sections.238 The difficulty of separating entrepreneurs from consumers creates potential for further reforms.239

Although it could be argued that, historically, discharge provisions were designed to rehabilitate the once owner of a failed and liquidated business,[241] it is now time to broaden the concept of second chance policy beyond the (mere) possibility for entrepreneurs to restart in terms of entrepreneurial activities. Not only entrepreneurs are exposed to the risks of modern economic life and thus to over-indebtedness. To avoid individuals being locked into debt traps or driven to the black economy, the ‘new’ second chance model, which aims to deleverage honest but unfortunate over-indebted individuals by means of a timely discharge of debts,[242] would then be based on the concept of limited debtor liability and on the need to return the debtor as quickly as possible to (productive) economic activity, either as entrepreneurs or as consumers, and to consumption.[243]

## ENDNOTES

1

In this paper, the term ‘personal insolvency’ covers entrepreneur and consumer insolvency.

2

A person is considered to be ‘insolvent’ if he or she is structurally unable to pay his or her debts on time. At EU level there have been several attempts over the years to define ‘over-indebtedness’, for which see Federico Ferretti and Daniela Vandone, *Personal Debt in Europe*: *The EU Financial Market and Consumer Insolvency* (Cambridge University Press, 2019), 52–55. The concept of insolvency could take the form of over-indebtedness (see Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20, 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 [2019] OJ L172/18, Recital (73)). See also Insolvency and Creditor/Debtor Regimes Task Force, *Report on the Treatment of the Insolvency of Natural Persons* (World Bank, 2014) (‘Task Force Report’), 13, <www.openknowledge.worldbank.org/handle/10986/17606>. In this article, both ‘insolvency’ and ‘over-indebtedness’ will be used synonymously. See also Jan-Ocko Heuer, ‘Consumer Insolvency Proceedings in Europe: An Introduction to Consumer Over-Indebtedness and Debt Relief’, in Thomas Kadner Graziano, Juris Böjars and Veronika Sajadova (eds), *A Guide to Consumer Insolvency Proceedings in Europe* (Edward Elgar, 2019), 4, nr. 1.04.

3

Eurostat, ‘European Union Statistics on Income and Living Conditions’, <www.ec.europa.eu/eurostat/en/>.

4

Statistiek Vlaanderen, ‘Betalingsachterstand en Collectieve Schuldenregeling’ (9 February 2022), <www.vlaanderen.be/statistiek-vlaanderen/inkomen-en-armoede/betalingsachterstand-en-collectieve-schuldenregeling>.

5

Anil Ari et al., ‘Surging Energy Prices in Europe in the Aftermath of the War: How to Support the Vulnerable and Speed up the Transition Away from Fossil Fuels’ (2022) IMF Working Papers WP/22/152, <www.imf.org/en/Publications/WP/Issues/July28,2022/Surging-Energy-Prices-in-Europe-in-the-Aftermath-of-the-War-How-to-Support-the-Vulnerable-521,457>.

6

Olaf Verhaeghe and Pieter Lambrecht, ‘Duur voedsel vuurt inflatie in Europa meer aan dan dure energie’ (*De Tijd*, 19 January 2023), <www.tijd.be/politiek-economie/europa/economie/duur-voedsel-vuurt-inflatie-in-europa-meer-aan-dan-dure-energie/10441327.html>.

7
See also International Monetary Fund, ‘World Economic Outlook: Countering the Cost-of-Living Crisis’ (October 2022), <www.imf.org/en/Publications/WEO/Issues/2022/10/11/world-economic-outlook-october-2022>.
8
For the purposes of this article, the focus will be on the economic rather than social dimension of insolvency relief (on the latter, see Recommendation Council of Europe CM/Rec(2007)8 of the Committee of Ministers to member states on legal solutions to debt problems [2007]).
9
Task Force Report (n 2), 127–128. See also Hans Dubois et al., *Addressing Household Over-Indebtedness* (Eurofound, 2020), <www.eurofound.link/ef19044>; Elaine Kempson, Stephen McKay and Maxine Willitts, *Characteristics of Families in Debt and the Nature of Indebtedness* (Personal Finance Research Centre, Department for Work and Pensions, 2004), <www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc0402.pdf> (indicating strong links between being in arrears and leaving paid work for those with jobs).
10
See also International Monetary Fund, ‘World Economic Outlook: War Sets Back the Global Recovery’ (April 2022), <www.imf.org/en/Publications/WEO/Issues/2022/04/19/world-economic-outlook-april-2022>.
11
The fresh start concept typically involves three elements: (i) debt discharge, (ii) exempt assets and (iii) non-discrimination against ex-bankrupts (see also Nick Huls, ‘American Influences on European Consumer Bankruptcy Law’ (1992) 15 J Consum Policy 125, 127). The remainder of this article will focus on court-imposed discharge (as opposed to discharge offered in an out-of-court negotiated plan, that is, voluntary remission of debt by creditors).
12
Judith Dahlgreen et al., *Study on a New Approach to Business Failure and Insolvency*: *Comparative Legal Analysis of the Member States’ Relevant Provisions and Practices* (2016) 301–323, <data.europa.eu/doi/10.2838/8751>.
13
See also Iain Ramsay, ‘Between Neo-Liberalism and the Social Market: Approaches to Debt Adjustment And Consumer Insolvency in the EU’ (2012) 35 J Consum Policy 421, 426 and 435; Commission, ‘Overcoming the stigma of business failure – for a second chance policy’ (Communication) COM (2007) 584

final; Paul Wymenga et al., *Bankruptcy and Second Chance for Honest Bankrupt Entrepreneurs Final Report* (Ecorys, 2014), <www.op.europa.eu/s/woP4>.

14

See also Iain Ramsay, 'Towards An International Paradigm Of Personal Insolvency Law? A Critical View' (2017) 17 QUT Law Review 15, 18.

15

Joseph Spooner, *Bankruptcy*: *The Case for Relief in an Economy of Debt* (Cambridge University Press, 2019), 70.

16

Task Force Report (n 2), 51. See also Johanna Niemi-Kiesiläinen, 'Consumer Bankruptcy in Comparison: Do we cure a market failure or a social problem?' (1999) 37 Osgoode Hall Law J 473, 473; Johanna Niemi, 'Consumer Insolvency in the European Legal Context' (2012) 35 J Consum Policy 443, 445; Jason Kilborn, 'Two Decades, Three Key Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion, and Sacrifice', in Johanna Niemi, Iain Ramsay and William Whitford (eds), *Consumer Credit*, *Debt and Bankruptcy* (Hart Publishing, 2009), 307.

17

Federico Ferretti and Daniela Vandone, *Personal Debt in Europe*: *The EU Financial Market and Consumer Insolvency* (Cambridge University Press, 2019), 212. See also Opinion 2022/C 149/01 of the Economic and Social Committee on 'Household over-indebtedness' [2002] OJ C 149/1; Opinion 2008/C 44/19 of the European Economic and Social Committee on 'Credit and social exclusion in an affluent society' [2008] OJ C 44/74; Opinion 2014/C 311/06 of the European Economic and Social Committee on 'Consumer protection and appropriate treatment of over-indebtedness to prevent social exclusion' [2014] OJ C 311/38.

18

Dahlgreen et al. (n 12), 319.

19

See Iain Ramsay, 'A Tale of Two Debtors: Responding to the Shock of Over-Indebtedness in France and England – a Story from the Trente Piteuses' [2012] 75(2) Mod Law Rev 212, 214.

20

See also Tomáš Richter, 'Art. 24', in Christoph Paulus and Reinhard Dammann (eds), *European Preventive Restructuring. Article-by-Article Commentary* (Beck, 2021), 270, nr. 2.

21

The objective of the Directive is to contribute to the proper functioning of the internal market and to remove obstacles to the exercise of fundamental freedoms (resulting from differences between national laws and procedures on restructuring

and insolvency), such as the free movement of capital and freedom of establishment. This will be achieved through increased (minimum) harmonisation of insolvency law and practice across the EU.

22

It was found that national rules giving entrepreneurs a second chance, in particular by granting them discharge from debts incurred in the course of their business, vary considerably between Member States in respect of the length of the discharge period (i.e., the period after which the debtor is released from his debt obligations) and the conditions for granting such discharge. Moreover, in many Member States it takes/took more than 3 years for insolvent but honest entrepreneurs to be discharged from their debts and make a fresh start. See Recitals (4), (5) and (72), Dir 2019/1023/EU.

23

Ibid., Article 21, 2.

24

Ibid., Article 2, 1., (10). See also Commission staff working document, 'Impact assessment accompanying the document, Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU' SWD(2016)357 final 154.

25

Ibid., Article 23 allows Member States to make derogations from these principles in a number of circumstances. See also Recital (78).

26

Ibid., Recital (1). See also Commission, 'Entrepreneurship 2020 Action Plan' COM(2012) 795 final.

27

SWD(2016)357 final (n 24), 4 and 11.

28

See Recital (72), Dir 2019/1023/EU. See also SWD(2016)357 final (n 24), 200–201.

29

Ibid., Recital (73).

30

Jason Kilborn, 'Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy' (2003) 64 Ohio State Law J. 855–864.

31

Rafael Efrat, 'Global Trends in Personal Bankruptcy' (2002) 76 Am. Bankr. L.J. 81–98.

32
Ulrik Rammeskow, ‘Art. 22’, in Paulus and Dammann (eds) (n 20), 47, nr. 43; Gerard McCormack, *The European Restructuring Directive* (Edward Elgar, 2021), 223, 7.56. See also Ramsay, ‘Trente Piteuses’ (n 19), 240.
33
Wetsontwerp houdende invoeging van het Boek XX ‘Insolventie van ondernemingen’, in het Wetboek van economisch recht, en houdende invoeging van de definities eigen aan boek XX, en van de rechtshandhavingsbepalingen eigen aan boek XX, in boek I van het Wetboek van economisch recht, *Parl.St*. Kamer 2016–17, nr. 54–2407/001.
34
Article 1(4), Dir 2019/1023/EU.
35
Iain Ramsay, *Personal Insolvency in the 21st Century* (Hart Publishing, 2017), 9.
36
Jason Kilborn, ‘The Personal Side of Harmonizing European Insolvency Law’ (2016), 5, <www.ssrn.com/abstract=2,816,618>.
37
Recital (15), Recomm 2014/135/EU.
38
See Ferretti and Vandone (n 17), 208.
39
SWD(2016)357 final (n 24), 208.
40
Sylvain Bouyon and Roberto Musmeci, ‘Two Dimensions of Combating Over-Indebtedness’ (2016) ECRI Research Report No. October 18, 2016, 4, <www.ceps.eu/ceps-publications/two-dimensions-combating-over-indebtedness-consumer-protection-and-financial-stability/>.
41
See SWD(2016)357 final (n 24), 46 and 86. See also Commission staff working document, ‘Impact assessment accompanying the document, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law’ SWD(2022)396 final, 7.

Whether the subsidiarity argument is justified could be the subject of further research on EU competence in personal insolvency law. See also F. Javier Arias Varona, Johanna Niemi and Tuomas Hupli, ‘Discharge and Entrepreneurship in the Preventive Restructuring Directive’ (2020) 29 Int Insolv Rev 8, 9.
42
SWD(2016)357 final (n 24), 55 and 100.

43
Ibid., 85.
44
See also Ramsay, ‘Trente Piteuses’ (n 19), 212–215 and 240.
45
Ramsay, ‘Personal Insolvency’ (n 35), 69, 153 and 185.
46
See also Heuer, ‘Consumer Insolvency Proceedings in Europe’ (n 2), 7, nr. 1.09.
47
Ramsay, ‘Personal Insolvency’ (n 35), 192.
48
See also Richter (n 20), 270, nr. 2.
49
The Netherlands: 3 years; Germany: 3 years; Greece: 3 years; Italy: up-to 4 years; Belgium: up-to 5 years; Scandinavia: up-to 5 years; France: up-to 7 years; Luxembourg: up-to 7 years. See Jason Kilborn, ‘Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984–2010’ (2010), 36, <ssrn.com/abstract=1,663,108>; Paul Fox, Peter Norwood and Emily Glantz, *From Debtor Prisons to Being Prisoners of Debt* (Finance Watch, 2022), <www.finance-watch.org/publication/from-debtor-prisons-to-being-prisoners-of-debt/>.
50
Veronika Sajadova, ‘Consumer Insolvency Proceedings: Comparative Legal Aspects’, in Kadner Graziano, Böjars and Sajadova (eds) (n 2), 35, nr. 2.089.
51
Ibid., 21, nr. 2.033.
52
Dubois et al. (n 9), 31.
53
See Recital (75), Dir 2019/1023/EU.
54
Dahlgreen et al. (n 12), 310.
55
See also Iain Ramsay, ‘Models of Consumer Bankruptcy: Implications for Research and Policy’ (1997) 20 J Consum Policy 269–287.
56
McCormack (n 32), 209, 7.19.
57
See Recital (77), Dir 2019/1023/EU.
58

Task Force Report (n 2), 117 and 142.
59
Dahlgreen et al. (n 12), 284–285 and 310.
60
See Niemi-Kiesiläinen, ‘Consumer Bankruptcy in Comparison’ (n 16), 482 and 503; Jason Kilborn, ‘Continuity, Change and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg’ (2006) 14 ABI Law Rev 69–93; Johanna Niemi-Kiesiläinen, ‘Changing Directions in Consumer Bankruptcy Law and Practise in Europe and USA’ (1997) 20 J Consum Policy 133–135; Jason Kilborn, ‘Expert Recommendations’ (n 49), 32. See also McCormack (n 32), 210–211, nr. 7.21–7.23 (noting that that common law systems do not fit the paradigm of a preference for repayment plans, given the historical role of straight bankruptcy and that individuals were generally allowed to choose their insolvency solution. However, common law systems have witnessed the rise of formal repayment alternatives. In the US, since the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, access to Chapter 7 bankruptcy has been restricted by financial screening); Jason Kilborn, ‘The Hidden Life of Consumer Bankruptcy Reform’ (2006) 39 Vanderbilt Law Rev 77–117.
61
Task Force Report (n 2), 85–89. See also Kilborn, ‘Expert Recommendations’ (n 49), 34.
62
See also Niemi-Kiesiläinen, ‘Consumer Bankruptcy in Comparison’ (n 16), 475.
63
Opinion 2008/C 44/19 of the European Economic and Social Committee on ‘Credit and social Exclusion in an Affluent Society’ [2008] OJ C 44/74.
64
McCormack (n 32), 209–210, nr. 7.20.
65
See also Task Force Report (n 2), 85; Jason Kilborn, ‘La Responsabilisation De L'Economie: What the United States Can Learn from the New French Law on Consumer Overindebtedness’ (2005) 26 Mich J Int Law 619, 641–642.
66
Dahlgreen et al. (n 12), 304.
67
McCormack (n 32), 211, 7.26.
68
See Recital (74), Dir 2019/1023/EU. In practice, the latter is also related to the fact that a distinction is sometimes being made between assets that a debtor has at the commencement of the proceeding, which are available for distribution to creditors,

and assets that the debtor obtains during or after the (end of) the proceeding, which usually remain with the debtor. See also Task Force Report (n 2), 84.
69
See also Dahlgreen et al. (n 12), 289 and 300.
70
This is also the case in ‘legal person insolvency procedures’, which are open to all debtors, regardless of their legal status (i.e., any legal entity or natural person, including natural persons who have become indebted in their private, non-business capacity).
71
Dahlgreen et al. (n 12), 340.
72
Ramsay, ‘Trente Piteuses’ (n 19), 215. See also Sajadova (n 50), 20, nr. 2.031.
73
SWD(2016)357 final (n 24), 208.
74
Commission, ‘Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, November 22, 2016’ COM(2016)723 final, 4.
75
By comparison, in 11% of the Member States entrepreneurs have access to separately defined procedures for entrepreneurs, or light-touch business insolvency proceedings (i.e., there are low cost/fast track procedures available for entrepreneurs). See Dahlgreen et al. (n 12), 286–287.
76
See also Ramsay, ‘Personal Insolvency’ (n 35), 185; José Garrido, ‘The Role Of Personal Insolvency Law in Economic Development’ (2014) 111 *WBLR* 111, 116–118; John Armour and Douglas Cumming, ‘Bankruptcy Law And Entrepreneurship’ [2018] 10 (2) Am Law Econ Rev 303–307.
77
Kilborn, ‘The Personal Side of Harmonizing European Insolvency Law’ (n 37), 11.
78
Phillip Wood, *Principles of International Insolvency* (2nd ed.) (Sweet & Maxwell, 2007), 793, nr. 26–002.
79
Efrat (n 31), 83–84; Ferretti and Vandone (n 17), 181.
80

Jan-Ocko Heuer, ‘Social Inclusion and Exclusion in European Consumer Bankruptcy Systems’ (2013), 2, <www.socium.uni-bremen.de/publications/publications-database/and/?publ=8544>.

81
Spooner (n 15), 42 and 70.

82
See also Heuer (n 80).

83
Garrido (n 76), 113.

84
See also Kilborn, ‘La Responsabilisation De L'Economie’ (n 65), 622.

85
See also Niemi, ‘Consumer Insolvency in the European Legal Context’ (n 16), 445; Dahlgreen et al. (n 12), 360.

86
See also Huls (n 11), 126.

87
Wymenga et al. (n 13), 44 (noting that only Belgium, Cyprus, France, Norway and Poland do not impose a repayment plan on entrepreneurs, while, for example, Germany, Greece, Italy, Luxembourg, the Netherlands and Spain do).

88
See also Niemi, ‘Consumer Insolvency in the European Legal Context’ (n 16), 445; Dahlgreen et al. (n 12), 360.

89
Ian Fletcher, *The Law of Insolvency* (4th edn) (Sweet & Maxwell, 2009), 7, nr. 1–015.

90
Ferretti and Vandone (n 17), 181.

91
See also Fletcher (n 89), 9–10, nr. 1–018-19. A trader was considered to be a person engaged in the manufacturing, or buying or selling of goods on a self-employed basis. Non-traders would therefore be any person in employment, or engaged in a recognised profession, or occupying the position of a landowner or farmer.

92
Arian Walters, ‘Personal Insolvency Law After the Enterprise Act: An Appraisal’ (2005) 5 J Corp Law Stud 65, 72. See also Spooner (n 15), 67; Roy Goode, *Principles of Corporate Insolvency Law* (4th ed.) (Sweet & Maxwell, 2011), 10, nr. 1–10.

93

Andrew J. Duncan, ‘From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law’ (1995) 100 Com LJ 191–195.
94
Ramsay (n 35), 12; Joseph Spooner, ‘Fresh Start or Stalemate? European Consumer Insolvency Law Reform and the Politics of Household Debt’ (2013) 3 Eur Rev Priv Law 747–756. See also Niemi-Kiesiläinen, ‘Consumer Bankruptcy in Comparison’ (n 16), 479, footnote 18; John Tribe, ‘Consumer Protection Problems Created by the Structure of English Personal Insolvency Law’, in Federico Ferretti (ed), *Comparative Perspectives of Consumer Over-Indebtedness. A View from the UK*, *Germany*, *Greece*, *and Italy* (Eleven International Publishing, 2016), 134–136.
95
Ramsay, ‘Trente Piteuses’ (n 19), 215.
96
Fletcher (n 89), 363, 11–006.
97
See Donna McKenzie and Adrian Walters, ‘Consumer Bankruptcy Law Reform in Great Britain’ (2006) Am Bankr L J 477–484. See also Ramsay, ‘Trente Piteuses’ (n 19), 212–215 and 237–240; Spooner, ‘Fresh Start or Stalemate?’ (n 94), 786; Nicola Howell, ‘Reducing the Duration of Bankruptcy: Relying on an Entrepreneurship and Innovation Lens to Achieve Consumer Bankruptcy Reform’ (2019) 3 Insolvency Intelligence 109.
98
Fletcher (n 89), 243–246, 8–041-47.
99
Ramsay, ‘Trente Piteuses’ (n 19), 244 and 248.
100
Ramsay, ‘Between Neo-Liberalism and the Social Market’ (n 13), 427.
101
*Voorstel van wet tot wijziging van de Faillissementswet ter verbetering van de doorstroom van de gemeentelijke schuldhulpverlening naar de wettelijke schuldsaneringsregeling natuurlijke personen*, Eerste Kamer der Staten-Generaal 2022–23, nr. 35–915. Another notable change is that the amicable stage can be skipped if there is insufficient room for repayment.
102
Nadja Jungmann and Tamara Madern, ‘The Netherlands’, in Kadner Graziano, Böjars and Sajadova (eds) (n 2).
103
Bob Wessels, *Schuldsaneringsregeling natuurlijke personen* (5th ed.) (Wolters Kluwer, 2021).
104

See also Patrick Keinert and Heinz Vallender, ‘Germany’, in Kadner Graziano, Böjars and Sajadova (eds) (n 2), 508, nr. 14.010. See also §304.
105
After hearing the debtor, the court orders the continuation of the proceedings regarding the request to open proceedings if, in accordance with its freely-formed conviction, the debt settlement plan is likely not to be accepted.
106
Keinert and Vallender (n 104).
107
See Huls (n 11), 126; Jason Kilborn, ‘The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States’ (2004) 24 Nw J Int'l L & Bus 257–262; Holger Sutschet, ‘An Analysis of the German Legal Framework and the (Limited) Influence of EU Law’, in Ferretti (ed) (n 94), 209.
108
The *Gesetz zur weiteren Verkürzung des Restschuldbefreiungsverfahrens und zur Anpassung pandemiebedingter Vorschriften im Gesellschafts-, Genossenschafts-, Vereins- und Stiftungsrecht sowie im Miet- und Pachtrecht* of December 22, 2020 reduced this period from 6 to 3 years. The same Act extended the ‘blocking’ period for obtaining a second discharge from 10 to 11 years (see §287a). The second procedure is also subject to an assignment period of 5 years (see §287).
Section 3 of the Act provides that the Federal Government shall submit a report by June 30, 2024 on the possible effects of the shortening of the procedure on the application, payment and economic behaviour of consumers. On the basis thereof, it would be decided whether consumer proceedings should be subject to different regulations than entrepreneurs, in particular with regard to the duration of proceedings.
109
Keinert and Vallender (n 104).
110
Ramsay, ‘Trente Piteuses’ (n 19), 214.
111
112
Kilborn, ‘La Responsabilisation De L'Economie’ (n 65), 627–628.
113
Bernard Soinne, ‘Evolution historique de la législation’ in Michel Menjucq, Bernard Saintournes and Bernard Soinne (eds), *Traité des Procedures Collectives* (3rd ed.) (LexisNexis, 2021).
114

Francine Macorig-Venier, ‘Le rétablissement professionnel’, in Menjucq, Saintournes and Soinne (eds) (n 113).
115
Pascal Rubbellin and Christopher Booth, ‘France’, in Kadner Graziano, Böjars and Sajadova (eds) (n 2).
116
Francine Macorig-Venier, ‘Les particuliers’, in Menjucq, Saintournes and Soinne (eds) (n 113).
117
Since the Law of 14 February 2022, the criterion of manifest impossibility of meeting all debts has been extended to business debts, whereas it previously concerned only non-business debts (see Article L.711–1). However, the provisions on consumer insolvency apply only to the private assets of the individual entrepreneur (see Article L.711–9). See also Jean-Luc Vallens, ‘L'entrepreneur individuel en difficulté et ses patrimoines’ (2022) Recueil Dalloz 1269.
118
Véronique Legrand, ‘Les procédures de surendettement accessibles aux entrepreneurs individuels’ (2022) Recueil Dalloz 1275.
119
Jason Kilborn, ‘Continuity, Change and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg’ (2006) 14 ABI Law Review 69, 70–72.
120
Former entrepreneurs who have ceased activities 6 months before the application are also entitled to access.
121
See also Jason Kilborn, *Comparative Consumer Bankruptcy* (Carolina Academic Press, 2007), 12 and 70.
122
Wetsontwerp betreffende de collective schuldenregeling en de mogelijkheid van verkoop uit de hand van de in beslag genomen goederen, *Parl.St*. Kamer, nr. 1073/1.
123
See Kilborn, ‘Continuity, Change and Innovation’ (n 119), 85.
124
See also Kilborn, ‘Comparative Consumer Bankruptcy’ (n 121), 70–72. See also Niels Appermont, ‘De vennootschapsbestuurder als ondernemingsrechtelijke twistappel. Rechtspraak en beleidsmatige overwegingen’ (2020) 6 RDC-TBH 756, 759–760.
125

See also Eric Dirix, ‘Historische verkenningen in het faillissementsrecht’ (2005–06) 6 RW 215.

126
Task Force Report (n 2), 10.

127
Compare Garrido (n 76), 117.

128
McCormack (n 32), 205, nr. 7.09.

129
Christoph Paulus, ‘Art. 2’, in Paulus and Dammann (eds) (n 20), 74, nr. 53.

130
See also David Morrison and Colin Anderson, ‘Is Corporate Rescue a Realistic Ideal? Business as Usual in Australia and the United Kingdom’ (2015) 3 NIBLeJ 417.

131
See also SWD(2016)357 final (n 24), 11.

132
Joeri Vananroye, ‘De onderneming in formele en in functionele zin’, in Joeri Vananroye and Dirk Van Gerven (eds), *Leerstukken ondernemingsrecht* (Intersentia, 2020), 16–18.

133
Cass. March 18, 2022, C.21.0006.F.

134
Jean Bruttin, ‘L'emprunteur associé d'une SCI bénéficie du surendettement’ (2022) *RDI* 285.

135
Cass. July 1, 2021, n° 20–13.306.

136
Task Force Report (n 2), 16.

137
See Commission, ‘Proposal for a Directive on Improving Conditions in Platform Work’ COM(2021)762 final, 2.

138
Christina Hießl, ‘The Classification of Platform Workers in Case Law: A Cross-European Comparative Analysis’ (2021), 20–21, <www.ssrn.com/abstract=3,982,738>.

139
COM(2021) 762 final (n 137), 2.

140
Hießl (n 138).

141
Ramsay, ‘Towards An International Paradigm Of Personal Insolvency Law?’ (n 14), 21.
142
Arias Varona, Niemi and Hupli (n 41), 14–15.
143
Imke Lammers, ‘Debt, Risk and Forgiveness: Behavioural Approaches to Personal Insolvency Law’ (PhD Thesis, Queensland University of Technology, 2022), 29.
144
See Dahlgreen et al. (n 12), 286 and 340 (noting that there are examples of jurisdictions where debts owed by an individual restrict the procedures available. In Italy, if a debtor qualifies for over-indebtedness procedures for natural persons, but has business debts, he or she can only access those procedures that are not reserved for consumers). See also Diana Cerini, ‘Consumer Over-Indebtedness and Interference with Credit Contracts: An Italian Perspective’, in Ferretti (ed) (n 94), 350.
145
See also Reinhard Dammann, ‘Art. 1’, in Paulus and Dammann (eds) (n 20), 47–48, nr. 43.
146
Jason Kilborn, ‘Elaborating UNCITRAL's Legislative Guide on Insolvency Law: Principles for Natural Persons’ (2016), 2, <www.ssrn.com/abstract=3,015,418>.
147
Recital (21), Dir 2019/1023/EU.
148
Fox, Norwood and Glantz (n 49).
149
Task Force Report (n 2), 69.
150
Member States may provide that, where business debts and personal debts can be separated, those debts are to be treated, for the purposes of obtaining a full discharge of debt, either in separate but coordinated procedures or in the same procedure.
151
COM(2016)723 final (n 74), 13–14 and 20.
152
Wetsontwerp betreffende de collective schuldenregeling en de mogelijkheid van verkoop uit de hand van de in beslag genomen goederen, *Parl.St*. Kamer, nr. 1073/1.
153

Kilborn, ‘The Personal Side of Harmonizing European Insolvency Law’ (n 36), 25.
154
See also Kilborn, ‘Elaborating UNCITRAL's Legislative Guide on Insolvency Law’ (n 146), 2.
155
Idem.
156
For example, if the main source of debt is a housing loan or a guarantee for another person's loan, there is little difference between wage earners and debtors who earn their living by providing services to a small number of different clients. See Task Force Report (n 2), 16.
157
Ibid., 15.
158
See also Dahlgreen et al. (n 12), 286 and 301.
159
See also Richter (n 20), 270, nr. 2 (noting that debts originating out of failures in entrepreneurship should be treated differently in terms of discharge possibilities from debts arising out of failures in consumption).
160
McCormack (n 32), 218, 7.46.
161
Heuer, ‘Consumer insolvency proceedings in Europe’ (n 2), 9, nr. 1.14. See also Kilborn, ‘The Innovative German Approach to Consumer Debt Relief’ (n 107), 293.
162
Wetsontwerp betreffende de collective schuldenregeling en de mogelijkheid van verkoop uit de hand van de in beslag genomen goederen, *Parl.St*. Kamer, nr. 1073/1.
163
Task Force Report (n 2), 22. See also Wetsontwerp tot wijziging van de faillissementswet van 8 augustus 1997, het Gerechtelijk Wetboek en het Wetboek van vennootschappen, *Parl.St*. Senaat 2001–02, nr. 2–877/8, 14 (according to Belgian figures, 58% of bankruptcies are closed due to insufficient assets).
164
SWD(2016)357 final (n 24), 80.
165
Spooner (n 15), 26.
166
Task Force Report (n 2), 54.
167

Heuer, ‘Consumer insolvency proceedings in Europe’ (n 2), 9, nr. 1.14.
168
In Belgium, the Constitutional Court ruled that extending relief only to debtors who could pay some portion of their debt violated the constitutional equality principle. See GwH December 22, 2011, nr. 196/2011.
169
See Task Force Report (n 2), 99–100 and 139–140; Heuer, ‘Social Inclusion and Exclusion in European Consumer Bankruptcy Systems’ (n 80), 21; Sajadova (n 50), 18, nr. 2.021; Kilborn, ‘Two Decades, Three Key Questions’ (n 16), 317; Kilborn, ‘Expert Recommendations’ (n 49), 33; Kilborn, ‘The Personal Side of Harmonizing European Insolvency Law’ (n 37), 24–27.
170
Morrison and Anderson (n 130).
171
Heuer, ‘Social Inclusion and Exclusion’ (n 80), 6. It should be noted that determining the reason for over-indebtedness is not a simple exercise. In many cases there will be a combination of contributing circumstances. See Ramsay, ‘Trente Piteuses’ (n 19), 225. See also Iain Ramsay, ‘Comparative Consumer Bankruptcy’ (2007) 1 Univ Ill Law Rev 241–243; Ramsay, ‘Between Neo-Liberalism and the Social Market’ (n 13), 421.
172
See Ramsay, ‘Between Neo-Liberalism and the Social Market’ (n 13), 425.
173
COM(2016)723 final (n 74), 4; Dahlgreen et al. (n 12), 307–308 and 358. See also Heuer, ‘Consumer Insolvency Proceedings in Europe’ (n 2), 5, nr. 1.06; Ramsay, ‘Towards An International Paradigm Of Personal Insolvency Law?’ (n 14), 15, 18; Katharina Moser, ‘Making Sense of the Numbers: The Shift from Non-Consensual to Consensual Debt Relief and the Construction of the Consumer Debtor’ [2019] 46 J L & Soc 240.
174
Task Force Report (n 2), 13.
175
Efrat (n 31), 81. See also Recital (72), Dir 2019/1023/EU; Heuer, ‘Consumer Insolvency Proceedings in Europe’ (n 2), 10, 1.17. See also SWD(2016)357 final (n 24), 40.
176
Ramsay, ‘Between Neo-Liberalism and the Social Market’ (n 13), 426.
177
SWD(2016)357 final (n 23), 81.
178

Task Force Report (n 2), 16 and 69.

179

Ibid., 39–40. See also Spooner (n 15), 52; Ferretti and Vandone (n 17), 1.

180

Federico Ferretti, ‘The Over-Indebtedness of European Consumers: Time for a ‘Fresh-Start’ of the EU Policy and Legal Agenda?’ (2015) 11 ERCL 346–348. See also Heuer, ‘Social Inclusion and Exclusion’ (n 80), 6.

181

Efrat (n 31), 92. See also Kilborn, ‘La Responsabilisation De L'Economie’ (n 65), 623.

182

Morrison and Anderson (n 130).

183

Ramsay (n 35), 177. See also Ramsay, ‘Towards An International Paradigm Of Personal Insolvency Law?’ (n 14), 21; Niemi-Kiesiläinen, ‘Consumer Bankruptcy in Comparison’ (n 16), 476.

184

See Council Resolution 2001/C 364/01 on consumer credit and indebtedness [2001] OJ C 364/1; Ferretti and Vandone (n 17), 55–57.

185

Dubois et al. (n 9), 1.

186

Civic Consulting of the Consumer Policy Evaluation Consortium, *The Over-Indebtedness of European Households*: *Updated Mapping of the Situation*, *Nature and Causes*, *Effects and Initiatives for Alleviating its Impact – Part 1*: *Synthesis of Findings* (2013), <www.ec.europa.eu/info/sites/default/files/final-report-on-over-indebtedness-of-european-households-synthesis-of-findings_december2013_en.pdf>.

187

Task Force Report (n 2), 17. See also Garrido (n 76), 117.

188

Ibid., 22–23 and 37–39.

189

Christoph Paulus, ‘Art. 20’, in Paulus and Dammann (eds) (n 20), 250, nr. 2; McCormack (n 32), 209, 7.18.

190

See Recital (17), Dir 2019/1023/EU.

191

Arias Varona, Niemi and Hupli (n 41), 15.

192

Making it easier for entrepreneurs to have second chance (shorter discharge periods) would lead to higher self-employment rates in the Member States. See Recomm 2014/135/EU Recital (12) and Commission staff working document, 'Impact assessment accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency' SWD(2014)61 final, 21. See also Armour and Cumming (n 76), 303–304; Arias Varona, Niemi and Hupli (n 41), 15; Task Force Report (n 2), 38.

193
SWD(2016)357 final (n 24), 168.

194
See also Ramsay, 'Personal Insolvency' (n 35), 28.

195
See Ramsay, 'Towards An International Paradigm Of Personal Insolvency Law?' (n 14), 19.

196
See also Luc Laeven and Thomas Laryea, 'Principles of Household Debt Restructuring' (2009) IMF Staff Position Note, <www.imf.org/external/pubs/ft/spn/2009/spn0915.pdf>.

197
Spooner (n 15), 88.

198
See also Niemi-Kiesiläinen, 'Consumer Bankruptcy in Comparison' (n 16), 480.

199
Task Force Report (n 2), 39.

200
SWD(2016)357 final (n 24), 27. See also Task Force Report (n 2), 13.

201
McCormack (n 32), 219–220, 7.49. See also Kilborn, 'Mercy, Rehabilitation, and Quid Pro Quo' (n 30), 885.

202
COM(2016)723 final (n 74), 4 and 14.

203
SWD(2016)357 final (n 24), 97.

204
Ibid., 167.

205
Task Force Report (n 2), 37–38 and 136.

206
SWD(2016)357 final (n 24), 4.

207

Spooner (n 15), 89.
208
See also Herman Cousy, ‘Paradigmawijzigingen in het insolventierecht?’ in Instituut Financieel Recht (ed), *Van alle markten: liber amicorum Eddy Wymeersch* (Intersentia, 2008), 286.
209
See Wymenga et al. (n 13), 63. Limited statistics were available for Belgium. Between January 1995 and April 2011, 31,123 Flemish entrepreneurs had gone bankrupt. Of these, 5,631 had restarted and were still active in November 2011.
210
Kilborn, ‘The Personal Side of Harmonizing European Insolvency Law’ (n 36), 25.
211
Ramsay, ‘Between Neo-Liberalism and the Social Market’ (n 13), 426.
212
See also Dahlgreen et al. (n 12), 314.
213
INSOL International, *Consumer Debt Report II* (2011), 19.
214
Ramsay, ‘Personal Insolvency’ (n 35), 28.
215
Task Force Report (n 2), 39–40.
216
Dahlgreen et al. (n 12), 38 and 281.
217
Task Force Report (n 2), 25 and 142.
218
See also Dahlgreen et al. (n 12), 286.
219
SWD(2016)357 final (n 24), 83.
220
Kilborn, ‘The Personal Side of Harmonizing European Insolvency Law’ (n 36), 25; Kilborn, ‘Expert Recommendations’ (n 49), 23. See also Garrido (n 76), 111; Nick Huls, ‘Consumer Bankruptcy: A Third Way Between Autonomy and Paternalism in Private Law’ (2010) 3 Erasmus Law Rev 7–10.
221
Cousy (n 208), 283–286. See also Ramsay, ‘Models of Consumer Bankruptcy’ (n 55), 274; Ramsay, ‘Trente Piteuses’ (n 20), 244; Herman Cousy, ‘Naar een nieuwe visie op het insolventierecht?’ in Herman Braeckmans et al. (eds), *Curatoren en vereffenaars: actuele ontwikkelingen II* (Intersentia, 2010).
222

See also Kilborn, ‘Continuity, Change and Innovation’ (n 60), 85.
223
See also Howell (n 97).
224
Ramsay, ‘Personal Insolvency’ (n 35), 189 and 192.
225
McCormack (n 32), 217, nr. 7.42.
226
See also Niemi-Kiesiläinen, ‘Consumer Bankruptcy in Comparison’ (n 16), 475. See also Kilborn, ‘The Personal Side of Harmonizing European Insolvency Law’ (n 36), 15–31 and 31.
227
European Commission, ‘Insolvency Law in Europe – Giving people and businesses a second chance’ (23 April 2015), <www.archive-it.org/home/euwebarchive>.
228
See also Richter (n 20), 270, nr. 2.
229
See also Howell (n 97).
230
Ramsay, ‘Personal Insolvency’ (n 35), 185.
231
See also SWD(2016)357 final (n 24) 147.
232
Kilborn, ‘The Personal Side of Harmonizing European Insolvency Law’ (n 36), 25.
233
Tribe (n 94), 148.
234
Furthermore, in the case of consumer over-indebtedness there is no reorganisation, but only a rearrangement of the debts needed, by means of a total or partial discharge of debts (immediate, or as part of a repayment plan). Tuula Linna, ‘Consumers, Entrepreneurs and Insolvency Proceedings’, in Paul Omar and Jennifer Gant (eds), *Research Handbook on Corporate Restructuring* (Edward Elgar, 2021), 204.
235
See also Arias Varona, Niemi and Hupli (n 41), 10.
236
SWD(2016)357 final (n 24), 55.
237
Kilborn, ‘Mercy, Rehabilitation, and Quid Pro Quo’ (n 30).
238

Johanna Niemi, ‘Personal Insolvency’ in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar, 2018), 364–365.

239
Ramsay, ‘Personal Insolvency’ (n 35), 188.

240
McCormack (n 32), 222, 7.55.

241
Task Force Report (n 2), 92.

242
See also Opinion 2008/C 44/19 of the European Economic and Social Committee on ‘Credit and social exclusion in an affluent society’ [2008] OJ C 44/74, 5.2.1; Kilborn, ‘The Personal Side of Harmonizing European Insolvency Law’ (n 36), 8.