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The Personal Side of Harmonizing European Insolvency Law

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It was only a matter of time. When European authorities turned their attention to coordinating jurisdiction over cross-border insolvency cases in 2000, they were destined to want more. Substantive collisions between starkly varying European insolvency laws continued to frustrate creditors, hamstring reorganization efforts, and arguably slow recovery from economic crisis, especially the Great Recession of the late 2000s. After years of struggling with "soft" coordination of insolvency proceedings, the European Commission set out on a mission of more probing, substantive harmonization of these laws. That mission is now approaching its objective.

The Commission has set itself the task of formulating a legal instrument to be presented for discussion and adoption by European authorities by October 26, 2016.[1] In the course of deliberations over this initiative, the mission has gradually expanded to encompass not only business restructuring, but personal insolvency[2] regimes, as well. The process thus far, however, has involved relatively little discussion or consideration of the most salient issues implicated in personal—as opposed to business—insolvency cases. This article seeks to fill that void.

Part I lays out the course of the Commission's insolvency initiative, focusing on the gradual enlargement of the intended scope to encompass personal insolvency in general. Part II then extracts the key issues and illustrates the problem by surveying in detail the most critical divergences in law and practice among existing personal insolvency regimes in European Member States. Finally, Part III offers several detailed proposals for harmonizing these divergent practices. It makes specific, detailed proposals for what the personal insolvency provisions of the Commission's legal instrument might look like—and *should* look like—in light of consistent international best practice recommendations, the goals the Commission has set for this initiative, and the goals of modern personal insolvency regimes in general.

I. The Incremental Process From Coordination to Harmonization, Business to Personal

Already in the 1780s, U.S. policymakers identified the vital link between uniform insolvency law and healthy commerce in a federal-state power-

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sharing system. James Madison wrote "[t]he power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce . . . that the expediency of it seems not likely to be drawn into question."[3] One commentator characterizes Madison's aim as "to safeguard the nation's interest in establishing and maintaining a single market for the extension of credit without interference from parochial or otherwise obstreperous action on the part of the states."[4] The Framers of the U.S. Constitution agreed, and so for over 200 years, the federal government has had the explicit power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[5]

European lawmakers for decades have also been keenly interested in creating a vibrant single market for the extension of credit, but the "subsidiarity and proportionality" that characterize federal-state power sharing in Europe is markedly different from the "federalism" by which the U.S. states ceded broad power to the U.S. federal government in regulating commerce.[6] Outside a discrete area of exclusive Union competency,[7] subsidiarity and proportionality require Union-level action to be supported by a conclusion that "the objectives of the proposed action cannot be sufficiently achieved by the Member States" and should therefore be pursued at the federal, Union level, though only to a degree that "shall not exceed what is necessary."[8] Thus, while the U.S. Constitution allocates explicit authority to the federal government to enact uniform bankruptcy laws, EU authorities can legislate in the area of insolvency only if their identified objectives cannot be achieved by Member State legislation.

EU authorities began to legislate on insolvency only in 2000, in the area that most clearly implicated its international coordination role and that most concerned James Madison in the 1780s. Madison was most concerned with the power of uniform, federal bankruptcy laws to "prevent so many frauds where the parties or their property may lie or be removed into different States."[9] Likewise, as the European internal market developed, and commerce had "more and more cross-border effects,"[10] EU authorities concluded that Member States were not able sufficiently effectively to coordinate national insolvency proceedings with international effects and avoid incentives for forum shopping;[11] that is, as Madison described it, "the parties or their property may lie or be removed into different States."

Thus, the first European Insolvency Regulation treaded rather lightly, imposing only a few essential procedural rules for coordinating national judicial authority over insolvency cases with parties and property in more than one Member State, and ensuring that decisions taken by the competent national judicial authority would be fully recognized and effective in other Member States.[12] Taking this first, hesitant step into the insolvency regulation arena, EU authorities not only avoided imposing uniform rules on the Member States, they even acknowledged that national laws differed so widely, especially with respect to creditor priorities, that no one Member State's rules could apply uniformly throughout the Union: "it is not practical to introduce insolvency proceedings with universal scope in the entire

Community."[13]

When the financial crisis exploded onto the European stage beginning in 2008, it revealed weaknesses in national insolvency laws that prompted EU authorities to consider deeper intervention in the substance of insolvency legislation. From its origins in Roman law, bankruptcy legislation in Europe had historically focused on creditor rights, creditor control, and creditor satisfaction.[14] As one prominent commentary puts it, "the classical reaction to insolvency ('bankruptcy') was punishment of the debtor and comprehensive liquidation and distribution of the debtor's property among the creditors."[15] This began to change in Europe only around the turn of the 21st century, and even then only to a limited degree.[16] The notion of bankruptcy as a forum for allowing the financially distressed debtor to reorganize, rescue, and rehabilitate a failing business (or failed personal finances) was not taken up widely or particularly vigorously in Europe, and especially the notion of allowing an individual debtor to receive a discharge of unpaid debt, a "fresh start" or "second chance," remained anathema in many if not most Member States.[17]

From 2009-11, the EU witnessed an average of 200,000 business bankruptcy filings per year, leading to an annual loss of 1.7 million jobs. The historical European approach of creditor-controlled liquidation of these firms, and consequent lifelong liability for many of their entrepreneur owners, was not viewed as consistent with a new European focus on "sustainable growth and prosperity."[18] In December 2012, the European Commission released an official Communication implicitly calling for an abandonment of the historical, punitive approach to financial failure and the adoption of "a new European approach to business failure and insolvency."[19] The Commission asserted that "[m]odern insolvency law in the Member States should help sound companies to survive and encourage entrepreneurs to get a second chance," in part by ensuring "that procedures are speedy and efficient, in the interest of both debtors and creditors."[20] In particular, the Commission highlighted the need to provide a second chance to individual debtors through timely discharge of unpaid debt and a minimum of restrictions on post-discharge activity.[21]

In light of subsidiarity and proportionality concerns,[22] one would not expect EU authorities to propose a single, uniform Regulation directly supplanting long-standing Member State legislation. Rather, the Commission identified policy areas where differences in national laws posed the greatest threat to legal certainty and a business-friendly environment, and it offered some preliminary thoughts on measures to address these topics.

The Commission's primary concentration remained on offering debtors a second chance through a timely discharge, as the renewed focus on insolvency represented "a first step towards an EU 'rescue and recovery' culture in cases of companies and individuals in financial distress more generally."[23] An effective second chance is undermined by "lengthy and costly bankruptcy procedures," the Commission observed, and by imposing the same restrictions during and after such proceedings on honest and dishonest debtors alike. The Commission endorsed drawing a meaningful distinction between honest and dishonest debtors, making available "fast-track liquidation proceedings for honest bankruptcy."[24] It emphasized a notion that has lain at the foundation of U.S. business and bankruptcy policy for centuries: "those that attempt to re-start, learn from their mistakes and usually experience faster growth than newly established companies."[25] For honest debtors, the Commission cautioned that "[i]t is crucial that entrepreneurship does not end up as a 'life sentence' if things go wrong," and it established that "a three-year discharge and debt settlement period should be a reasonable upper limit for an honest entrepreneur and as automatic as possible."[26] This simple provision, the Commission suggested, "could be a first step towards a wider approximation of national bankruptcy law."[27]

The Commission followed up on its Communication by launching a public consultation, an open solicitation of the views of interested parties on the Commission's observations.[28] These public views seem to have confirmed the Commission's initial sense, though with two important developments. Proceeding in its characteristic incremental fashion, in March 2014, the Commission repackaged its Communication now as a Recommendation.[29] It continued to exhort Member States to "put in place a framework that enables the efficient restructuring of viable enterprises in financial difficulty and give honest entrepreneurs a second chance."[30]

The first notable development in the Recommendation is a much greater and more detailed focus on what was (and is now) called a "preventive restructuring framework." The Recommendation laid out some two dozen sections with detailed minimum standards for national insolvency legislation relating to out-of-court and court-confirmed restructuring plans.[31] It accentuated such provisions as (i) early access to an informal but court-supported workout process, (ii) non-mandatory appointment of a mediator or supervisor, only if necessary to support the workout negotiations or protect creditors' interests, (iii) a court-imposed stay of claims enforcement activity, not exceeding 12 months, (iv) rules for creditor-majorities (properly classified) to adopt, and courts to confirm, restructuring plans binding on absent and dissenting creditors, and (v) facilitation and protection of new financing and debt-for-equity swaps. Because this article focuses on personal insolvency, no further analysis will be offered of these business restructuring recommendations.[32]

The second development concerns an expansion of the second-chance and discharge recommendations beyond entrepreneurs. The substance of the proposals on second chance remained largely unchanged from the earlier Communication. The importance of a discharge after no later than three years without the need to reapply for such relief was reiterated, along with the possibility of deviating from this relief for debtors who have acted "dishonestly or in bad faith" or who fail to meet the requirements of a repayment plan.[33]

The novelty appeared in the recitals preceding the Recommendation. For the first time, in a process that had for over a decade discussed only entrepreneurs and businesses, the Commission opened the door to consideration of relief extended to individual debtors *not* engaged in business. "Although consumer over-indebtedness and consumer bankruptcy are also not covered by the scope of this Recommendation," the Commission invited Member States to "explore the possibility of applying these recommendations also to consumers, since some of the principles following in this Recommendation may also be relevant for them."[34] It promised to assess the degree to which Member States had embraced the suggestions in its Recommendation within 18 months, and also to analyze its "interplay with other insolvency procedures in other areas such as discharge periods for natural persons not exercising a trade, business, craft or professional activity."[35]

The 18-month follow-up review was not particularly satisfying. The review noted several recent or discussed reforms in personal insolvency regimes, but many of these and existing provisions either did not offer a discharge at all or did not provide an automatic discharge after three years or less.[36] The review concluded that the Recommendation "has not succeeded in having the desired impact in facilitating the rescue of businesses in financial difficulty and in giving a second chance for entrepreneurs because of its only partial implementation in a significant number of Member States."[37] Consequently, the Commission continued to explore a broader insolvency harmonization initiative, expanding its scope to numerous areas in both business reorganization and the treatment of personal overindebtedness.

In the Commission's subsequent work on this initiative, the second-chance portion seems to have been fully expanded to a consideration of timely discharge for *all* natural persons, including those with no business-related debt. This seems to have been driven in part by pressure from the European Economic and Social Committee (EESC), an official EU advisory body.[38] In April 2014, the EESC adopted an opinion on the prevention and treatment of general personal overindebtedness.[39] It noted that measures for addressing overindebtedness had been put in place in a number of Member States, "but they are different," including variations in conditions on access to such procedures and the nature of the debts affected.[40] The EESC called for the Commission to propose a binding directive to compel "an appropriate, uniform procedure" for treating overindebtedness across Europe.[41] Specifically, the EESC advocated for a series of fundamental principles to which national systems should adhere, including (i) the procedure being quick and free of charge, (ii) the suspension of proceedings when a treatment procedure has been opened, (iii) verification of claims, (iv) keeping the main residence, (v) equal treatment of ordinary creditors, (vi) the possibility of cancelling debts in the most burdensome situations (discharge), and (vii) the obligation to leave an overindebted person enough "to live on decently day to day, the aim being to reintegrate the consumer into economic and social life quickly."[42]

At a Commission-sponsored conference in Latvia in April 2015,[43] the EU Commissioner for Justice, Consumers and General Equality clearly signaled that she had heard the EESC's and others' calls for an expansion of the insolvency initiative to encompass all personal overindebtedness, including both business and non-business debt. In her opening comments, Commissioner Jourová emphasized the need to use "all available tools to boost economic recovery," and she noted that offering a second chance to "entrepreneurs and consumers" was one such tool.[44] She noted with particular interest the U.S. system: "As for natural persons, in the U.S. the average debt discharge period is less than one year, while in most EU countries it's between five and seven years."[45] The strength of this reduced discharge period, the Commissioner noted, was that "[t]here is evidence which shows that shorter discharge periods allowed U.S. households to recover more quickly from the crisis."[46] Commissioner Jourová once again decried the fact that "in some EU countries consumers don't have access to personal insolvency proceedings at all so they never obtain a discharge," creating inequality for European individual debtors "despite compelling evidence that shorter discharge periods lead to more productive individuals."[47]

The Commission signaled its serious pursuit of a broad legislative initiative, including personal insolvency, in a March 2016 announcement of the inception of an impact assessment.[48] It noted that "inefficient insolvency proceedings for companies and natural persons leads [sic] to a high amount of accumulated private debt," which continued to rise in the post-crisis EU, while easing in the U.S. and Japan.[49] It expressed concern that this continuing "debt overhang and high level of non-performing loans hurt the EU economy" by constraining the availability of credit, reducing economic investment as debtors use available resources to service old debts, and increasing vulnerability to financial shocks.[50] "Fostering of write-offs of non-performing loans can free up considerable capacity for new lending," the Commission explained, as "insolvency law also plays an important role in a post-crisis deleveraging process and the efficient reallocation of capital in the European economy."[51] The Commission concluded that "lengthy, inefficient, and costly insolvency proceedings in Europe are often deemed by analysts to be one of the root causes of insufficient post-crisis deleveraging in the private sector," in particular contrast with the U.S., "which has a uniform bankruptcy regime regulated as the federal level."[52] Moreover, lifelong liability, or at least protracted bankruptcy proceedings, "is what Europeans fear most about setting up a new business."[53] Easing the fear of failure by harmonizing and liberalizing personal insolvency regimes would, it was hoped, encourage greater entrepreneurialism.

The Commission also specifically recognized the economic impact of non-business, household debt overhang, "which has a negative impact on household spending and hence aggregate demand."[54] In addition, the heterogeneity of existing personal overindebtedness regimes presents an additional risk for businesses who extend cross-border credit to consumers, as such lenders are "unable to assess and quantify the outcomes of insolvency proceedings."[55] This latest initiative thus expressly pursues an objective of reducing household debt overhang to "facilitate the economic recovery by easing consumption and promoting retail investment."[56]

The Commission thus announced its intention to develop at least a "minimum harmonisation directive focusing on specific aspects of insolvency based on broad common principles and rules which would reduce the differences between national insolvency regimes while strengthening weaker regimes."[57] With respect specifically to "insolvency of natural persons," such a directive might encompass provisions such as "on the availability of insolvency procedures, both debt restructuring and liquidation" as well as the second-chance topic of the Commission's earlier Recommendation, "on the discharge of debt of natural persons other than entrepreneurs after a reasonable period of time (no more than 3 years, as for entrepreneurs).[58]

As part of its data gathering for this initiative, the Commission awarded a contract to the School of Law at the University of Leeds to produce a detailed, analytical study of a wide variety of topics on substantive insolvency law across the EU, as specifically contrasted with the treatment of such topics in U.S. law.[59] The call for tender specifically requested an examination of regimes for treating consumer overindebtedness,[60] and the final study thus included an entire 80-page chapter (over one-fifth of the entire report) on personal overindebtedness treatment regimes.[61] This report confirmed "a clear move towards increased Discharge for Consumer debtors, and providing for Debt Settlement Procedures as a means of rehabilitating and prompting fresh start,"[62] but it noted significant differences among existing systems on virtually every aspect of these procedures, including access, administrative structure, cost, and perhaps most importantly the requirements for and timing of obtaining a discharge.[63] In particular, few Member States offer an automatic discharge in three years or less time.[64]

II. Key Points of Divergence . . . and Potential Harmonization in Personal Insolvency

These pervasive variations go to the very heart of the provisions most essential to efficient and effective regimes for deleveraging overindebted individuals and reintegrating them into economic society, either as entrepreneurs or consumers. The differing provisions can be grouped into two categories that correspond to the Commission's suggested focus for minimum harmonization of personal insolvency law: availability of insolvency procedures, and the second-chance discharge.[65] The Commission is rightly focused on precisely these two areas, where major variations pose the greatest danger of undermining the goals of personal insolvency law and where harmonization might be most appropriate and fruitful.

A. Availability and Access

First the good news. While only a handful of Member States offered any sort of legal relief from overindebtedness twenty years ago,[66] nearly all have adopted such relief systems today.[67] After Croatia finally enacted a new Consumer Bankruptcy Act (applicable to both consumers and small entrepreneurs) in January 2016,[68] only Bulgaria and Malta remain without such legislation. At the very least, a new directive should provide the impetus for these last two stragglers to join the rest of Europe in offering a second chance to consumers and entrepreneurs.

Now the not-so-good news. The "availability" of an insolvency procedure is not simply a matter of adopting a legal structure; that structure must be accessible to those who need the relief it offers. From the beginning, Member States have differed dramatically in the degree to which they limit or condition, both formally and practically, individual access to personal insolvency relief. If a relief system is either formally or practically inaccessible to large numbers of overindebted individuals, it can hardly be said to be "available," and at the very least, as the Leeds study observed, a regime with overly restricted access is "not providing adequate assistance to the relevant population."[69] Some access restrictions are more problematic than others, and they come in a variety of forms.

1. Degree of Distress and Type of Debt

An obvious prerequisite to any treatment regimen is manifestation of the disease to be treated. In this context, the disease is "insolvency" or "overindebtedness" or some similar phrase indicating a durable inability to properly service debt burdens while also providing for a dignified family existence. Definitions and measures of this condition vary somewhat across Member States, but all share the basic idea that one must demonstrate serious financial distress to obtain access to the extraordinary relief of a discharge.[70]

A few regimes once did or still do require much more compelling evidence of the debtor's hopeless financial ruin. Europe's first consumer insolvency law appeared in Denmark in 1984.[71] Passage into the Danish debt adjustment system is guarded by two rather hefty locks. First, debtors must establish their "qualified insolvency," which might as well be called hopeless financial collapse. The concept envisions a total and doubt-free impossibility that the debtor might maximally economize and somehow return to sound financial health within about five years. Debtors can be barred relief at this stage if, for example, they spend more on their standard of living than what the court in its unfettered discretion considers "reasonable," and relief can be denied if the debtor's current and future financial situation is "uncertain."[72] Before a reform in 2005, this criterion all but excluded small business operators from qualifying for relief, as fluctuating business income rendered the debtor's financial future too unclear to establish "qualified insolvency,"[73] but even after the reform, temporary unemployment or a potential inheritance from an elderly (though still living) relative might still undermine the "certainty" of the debtor's distress.[74] Second, the court must be convinced that offering relief is appropriate in light of the debtor's "behavior and circumstances otherwise," such as the debtor's sustained efforts to regain solvency without legal intervention and the presence (preferably absence) of fines, penalties, and "irresponsible" debts, such as "luxury" purchases on credit.[75] Originally, the Danish law directed courts to presume that relief was *in*appropriate, but a 2005 reform reversed the presumption, offering relief unless some specific circumstance "suggests decisively against" extending relief.[76] Nonetheless, even since this reform, the percentage of cases closed with a grant of relief has never exceeded 35%.[77] Other Scandinavian regimes apply similar access criteria and have broadly similar rejection rates.[78]

Another salient example of a system that, until recently, severely limited access appears in Poland. Effective since March 31, 2009, the Polish consumer insolvency law originally allowed access only to debtors whose financial distress was caused by exceptional circumstances entirely beyond their control.[79] In the two-and-a-half years between the law's effective date and the end of 2012, debtors submitted 2161 applications for relief, but the courts admitted only 60 as meeting the stringent entry requirement.[80] Polish policymakers characterized this 2.78% admission rate as "truly insignificant"[81] and, effective December 31, 2014,[82] the law was amended to permit access to debtors whose insolvency was not caused intentionally or through gross negligence.[83]

The new Hungarian law contains a unique Goldilocks provision on the required debt level, along with a panoply of restrictions. To be admitted into the "debt management for natural persons" procedure, effective September 1, 2015, Hungarian debtors must be not too solvent, but also not too insolvent; that is, they must have at least 2 million forints in debt (about $7000) but no more than 60 million forints (about $200,000), and this debt must exceed the value of all of the debtor's assets and expected available income over the ensuing five years, but it must be less than twice that value.[84] Beyond this, Hungarian debtors are prohibited from accessing the procedure altogether if they are subject to any claim based outside of Hungary, they are subject to enforcement proceedings by any creditor with a claim of 200,000 forints or more (about $700), or they have any outstanding debt for fines or any other public law debt (excluding public debts for housing, student loans, or overpayment of minor state subsidies).[85] In addition, to control the expected onslaught of petitions, the procedure is available for its first year only to debtors facing foreclosure on their residence, with the process opening to all eligible debtors on October 1, 2016.[86]

A final, incidental qualification that has doubtless prevented some individuals from receiving the scope of relief they need relates to the types of debts (and perhaps debtors) subject to the two families of insolvency systems. A significant number of these regimes were specifically developed for, and therefore apply only with respect to, consumers and non-business debt. For example, the longstanding French system of "individual overindebtedness" is expressly limited to addressing "non-professional debts."[87] It is not available to debtors who qualify for treatment under the business insolvency provisions in Book VI of the Commercial Code.[88] Similarly, the Polish regime just mentioned is contained in title V of part Three of the Law on Bankruptcy and Insolvency, under the heading "Bankruptcy of individuals not engaged in economic activity," and it also excludes active entrepreneurs.[89] This kind of mutual exclusivity between bifurcated "commercial" and "consumer" insolvency systems is quite common in Europe, though by no means universal.

2. Debtor Behavior and "Good Faith"

The desire to differentiate between "honest" and "dishonest" business debtors[90] manifests itself in the personal/consumer context, as well. While most European personal insolvency laws simply deny relief to those who have acted in a notably culpable manner,[91] a few Member States require debtors to demonstrate their "good faith" in the onset of their overindebtedness and/or in their effort to obtain relief from that debt. An explicit requirement of "good faith" appears in the laws in France, Greece, and Cyprus,[92] the Czech law requires an absence of "dishonest intent," and the Slovak law compels the debtor to express "honest" intent to make reasonable payment to creditors.[93] While these provisions have not reportedly presented serious obstacles to many debtor seeking relief, rigorous application of the explicit requirement of good faith in Dutch law has barred the door to more and more debtors (more than 10%), especially after a 2008 amendment specifically designed to reduce the numbers of new debt adjustment cases.[94]

3. Payment Capacity

Ironically, some European laws designed to provide relief to seriously financially distressed people actually deny relief to some debtors based on that very financial distress. A few regimes require debtors to either pay or provide assurance of future payment of the administrative fees of the process; otherwise, their cases are dismissed. Given the inefficiencies in some of these systems, they are consequently too expensive for many debtors to access, creating an underclass of debtors who are too financially distressed to obtain relief from their financial distress. In Slovakia, for example, barely 150 cases were opened in the first three-and-a-half years after implementation of the new consumer discharge provisions in that country, very likely as a result of debtors' inability to finance administration fees.[95] Similar problems initially plagued the nascent procedures in Germany and Poland, but both of these countries settled on a similar solution: In Germany since 2001, and Poland since 2015, court costs and trustee fees are initially covered by the state treasury, and either practically in Germany, or formally in Poland, fees that remain unpaid at the conclusion of the debtor's payment plan are permanently satisfied from State coffers.[96]

Worse yet, the Czech law calls for dismissal of cases in which the court is not satisfied that general creditors will ultimately receive a minimum dividend of 30% of their claims.[97] Similarly, the Austrian law requires an anticipated 10% dividend, explicitly in addition to full coverage of administrative costs and fees.[98] Both of these laws allow the court to grant a hardship discharge to admitted debtors who are unsuccessful in producing the 30% or 10% dividend, but by imposing an access hurdle of convincing the court of the likelihood of such a dividend, these unique systems can prevent debtors even from making the attempt.

4. Pre-Filing Negotiation

Many of the consumer debt adjustment laws adopted before the turn of the

21st century impose one final access requirement designed to avoid debtors' accessing the formal relief system altogether. Debtors in these systems must have attempted to work out a voluntary debt adjustment with their creditors before seeking coercive relief (or have a qualified counseling agency certify that such an attempt would be futile).[99] Unfortunately, the results of this kabuki dance are all but predetermined, as the overwhelming majority of debtors are unable to secure voluntary concessions from their creditors. In Greece, for example, of some 22,000 pre-insolvency conciliation attempts in the first years of the new consumer debt relief system, only five produced voluntary workout plans.[100] Though Denmark had considered and expressly rejected the idea of forcing consumer debtors to negotiate with creditors first,[101] Sweden did mandate a pre-filing conciliation stage. Predictably, Swedish debtors experienced similar disappointing results with these negotiations, which even creditor representatives characterized as "nearly meaningless" and which imposed very significant burdens, distractions, and delays on the ordinary consumer credit counseling system.[102] As a result, both Sweden and Greece formally abandoned their mandatory conciliation prerequisite,[103] though it remains in a few other early-adopter countries; *e.g.,* Germany and the Netherlands. Given the influence of the German model in Eastern Europe in particular, it is not surprising to see the newest personal insolvency regimes adopting an out-of-court negotiation as a prerequisite to a formal relief procedure. Both Hungary[104] and, most recently, Croatia[105] have renewed this approach.

B. Second-Chance Discharge

Just as European consumer insolvency regimes show wide variations with respect to getting *into* the relief procedure, they also reflect significant differences in the requirements for getting *out* with the desired discharge. While several rounds of reform have narrowed the gaps among these systems somewhat, they remain far apart in several critical respects.

1. Time to Discharge

In favoring a discharge after no more than a three-year process, the Commission has set a rather aggressive goal. Only a handful of Member States provide a discharge this quickly, and even then often only in theory. The Netherlands was the first Member State to implement a standard three-year payment-plan-and-discharge period. The original 1998 Dutch law left the discharge period to judge discretion, though a three-year term quickly emerged as the *de facto* result[106] and ultimately was adopted as the *de jure* norm ten years later.[107] Lawmakers from the beginning favored the three-year term in light of parallel experience with debt counselling and workout practice, which had revealed that longer payment plans often led to failure. Dutch legislators concluded that relegating debtors to subsistence budgets longer than three years would be "from a social point of view not responsible."[108]

Other European legislators did not share this perspective, though the last decade has witnessed some migration in the Dutch direction. The discharge period under the Latvian law began at seven years in 2008, though it was reduced in 2010 to a unique sliding scale that provides a discharge after as little as one year, with a maximum (probably applicable in most cases) of three-and-one-half years.[109] The Irish reform of 2013 is particularly notable in the degree of movement toward the three-year norm. Traditionally, Irish debtors were relegated to 12 years of relinquishing non-exempt property and income, after which they *might* earn a discharge only if the court found such a result "reasonable and proper."[110] After the reform, Irish debtors are now entitled to an automatic, non-discretionary discharge on the third anniversary of the date of the order opening their bankruptcy case.[111] Another reform in 2013, in Poland, also ushered in a standard three-year discharge plan period (reduced from five in the original law), though this one can be extended up to an additional 18 months to allow the debtor to meet the payment requirements laid down in the court-imposed plan.[112]

Other regimes have made much less progress, if any. The enormously complex French regime limited court-imposed payment plans to five years for the first decade of its existence, then eight years from 1999–2003, then ten years until 2010, then back to eight years until 2016, when an ordinance reduced the maximum plan period to seven years.[113] The regime in Luxembourg has recently conformed to the French model in adopting a procedure for immediate discharge in some cases, though payment plans in that system may still extend up to seven years.[114] In both Germany and Austria, a Deuteronomic term of seven years was the original choice, which has been challenged as overly long from the very beginning.[115] Indeed, in the particularly demanding Austrian regime, for debtors who are unable to pay court costs and produce a mandatory 10% dividend for unsecured creditors within this period, the court can (and usually does) extend the payment term up to a maximum of ten years.[116] The German discharge period was reduced to six years in 2001,[117] and in 2013, it underwent further modification, allowing a discharge after five years for the generally some-20% of debtors who are able to pay the administrative costs of the procedure, and three years for the few fortunate debtors who manage to both cover court costs and produce a 35% dividend for unsecured creditors.[118] The Austrian system has always also offered an "early" discharge after three years, but again only to the choice few debtors (about 10%) able to pay administrative costs and offer creditors a 50% dividend.[119] The new Romanian system includes a sliding scale of early discharge, as well: One year for a 50% dividend, three years for 40%, and five years if less than 40%.[120]

In the remaining Member States, a five-year payment plan is standard, with the exception of Greece and Italy, which impose four-year discharge periods.[121] Belgian legislators considered a seven-year period but reduced it to five at the last minute, without explanation.[122] In all of Scandinavia, five-year plans predominate,[123] though under a very recent Swedish reform, effective November 1, 2016, entrepreneurs will be subject to a standard three-year plan, and non-entrepreneurs will have payment holidays in June and December of each of the five years of their plans (effectively reducing the payment period to 4 years and 2 months).[124]

2. Quid pro Quo? Liquidation or Payment Plan

Implicit in the preference for a discharge in three years is an expectation that debtors will be offering creditors value during this period. The classical European treatment for overindebtedness is often contrasted with the U.S. approach. While the U.S. approach allows most debtors to seek an immediate "fresh start" after a liquidation of their (usually non-existent) non-exempt assets, the European model is often characterized as an "earned start," because it requires debtors to submit to a multi-year payment plan (often in addition to relinquishing non-exempt assets, if any).[125]

Even this basic contrast is not completely accurate with respect to all European regimes. First, a great many European "payment" plans produce nothing of the sort; that is, the debtors have no non-exempt income to distribute to creditors over the plan period, yet they receive their discharge nonetheless.[126] The reformed Polish law goes one step further, allowing the court to confer a discharge immediately if the debtor's circumstances make it clear that no distribution to creditors can reasonably be expected.[127]

Second, a few Member States have essentially adopted the U.S. approach, though with a case administrator making the decision to dispose with the payment plan. In Ireland, for example, the court has the power to decide whether or not to demand any future income payment from debtors via a "bankruptcy payment order."[128] In France and Luxembourg, the relevant case adjudicator can route low-income debtors to a "personal rehabilitation" procedure, in which an immediate discharge follows a brief period of evaluation and possible liquidation of the debtor's non-exempt assets.[129] Especially in France, this procedure has been invoked quite frequently, in more than 37% of cases in 2015 and more than 40% of cases in the first half of 2016.[130]

3. Debtor Budgeting and Payment Requirements for Discharge

In most cases, however, debtors are expected to undergo a rehabilitation period during which they turn over their "excess" income as a predicate to receiving a discharge. From a debtor's perspective, the most important aspect of the discharge requirement is not necessarily how long this period will last, but how much income the debtor must relinquish during this period. In other words, how much of the debtor's income will be reserved for family support, with the remaining "disposable" income distributed to creditors. On this crucial issue, European practices diverge widely, though convergence over time is again evident to a degree.

Lawmakers have struggled to strike the right balance between maximizing returns on creditors' legitimate claims while preserving the human dignity of debtors and their families. When that balancing act has been delegated to judges or other case administrators, the results have been generally unsatisfying. The commissions in charge of the regime in France were originally given wide latitude to strike compromise arrangements with creditors, but they often did so at the expense of rational budgeting for debtors' household needs. After commentators criticized these "scandalously low budgets," French lawmakers adopted the general income exemptions from civil enforcement law as a baseline minimum for "one part of the resources necessary for ongoing expenses," suggesting that proper budgets might well cede even more than this to debtors.[131] In Sweden, the general income exemptions were originally characterized as "guiding" in the determination of debtors' insolvency budgets, though they later became the *de jure* rule after having been the *de facto* choice of system administrators for years.[132] Like in France, however, the system administrators in Sweden regard the standard exemption as a starting point, often topping up the debtor's budgetary allowance with a "buffer" for unanticipated expenses.[133] The Danish regime faced difficulties similar to those in France, especially as courts in different parts of the country lent widely differing interpretations to the vague "modest lifestyle" standard. In Denmark, too, justice authorities ultimately adopted and imposed a uniform scheme for income exemption and "reasonable" household expenses, which greatly increased the budgets left most debtors.[134]

Despite these lessons in the weaknesses of open discretion, several Member States still leave it to the courts to define proper household budgets. The Greek law, even after numerous amendments over the past few years, still relegates debtors' budgets to unguided judicial discretion,[135] as do the amended laws in Poland,[136] Luxembourg,[137] Slovakia,[138] and Italy.[139] The more recent reform in Spain reverts to the general income exemption scheme.[140]

Even when a standard is adopted by legislation, general income exemptions—and their precise use—vary quite widely across Europe. German lawmakers discovered that these exemptions quickly fall behind current needs if not revisited periodically. After realizing that the insolvency law was being undermined by general income exemptions that had not kept pace with inflation, the German legislature amended that parallel law, increasing exemption levels substantially and mandating biennial indexing for inflation.[141] The Dutch system combined a different standard with judicial discretion, and both were effectively rejected by system actors. Dutch debtors are officially expected to scrape by on 90% of the basic social assistance minimum income[142] (the equivalent of the poverty line in the U.S.) for three years, but judges are allowed to deviate upward from that standard. Dutch judges coordinated to develop a complex side-standard for determining these upward deviations, which has become the "real" uniform law in both insolvency and general debt collection cases.[143]

The recent Irish reform took a unique route to establishing budgetary standards. The revised bankruptcy law rather vaguely directs that courts "shall have regard for the reasonable living expenses of the bankrupt and his or her dependents" when imposing payment orders, but it immediately suggests that courts consider "any guidelines on reasonable living expenses issued by" the new Insolvency Service.[144] These impressively sensitive guidelines were developed in consultation with a wide variety of sources, including twelve years of extensive research by the Vincentian Partnership for Social Justice.[145] The Insolvency Service conducted a "consensual budgeting" project using focus groups to identify appropriate categories and amounts of expenditures for a minimum standard of living for various household types.[146] The result is a budget guideline, updated annually, that "is neither a survival standard nor a standard for people in poverty; rather it is a standard of living that should allow for people to engage in activities that are considered the norm for Irish society."[147]

Finally, even if a uniform exemption is applied as the budgetary baseline, in at least two Member States, that tells only part of the story. In Austria and the Czech Republic, debtors must not only endure years of subsistence on minimal income, they must somehow squeeze out payment of 10% or even 30%, respectively, of their creditors' claims, in addition to covering the administrative costs of these multi-year processes, in order to obtain a discharge.[148] These minimum-payment requirements are aberrational not only in contrast to general practice in Europe, but in the world.[149] They exemplify the variety of ways in which seemingly similar systems for treating personal overindebtedness can and do diverge quite fundamentally as a result of one simple provision that jeopardizes the entire structure of the relief procedure.

III. Optimal Harmonization of EU Personal Insolvency Law

In the face of such a dizzying array of approaches, how might the Commission bring some order to this chaos? How *should* the Commission proceed to harmonize these discordant regimes in light of the Commission's goals for facilitating greater personal deleveraging, the general purposes of personal insolvency systems, and the unique subsidiarity and proportionality constraints of European lawmaking? Given the Commission's focused articulation of its initiative, a coherent yet responsibly limited harmonization effort can be constructed around the twin guideposts of availability (access) and second chance (discharge within three years)[150] by evaluating which practices described above advance systemic goals and comport with internationally recognized standards for better, if not best, practices.

A. Goals of Personal Insolvency

To assess which provisions and approaches are most central to effective personal insolvency regimes, account must be taken of the goals of such regimes. In its March 2016 Impact Assessment inception announcement for the insolvency initiative, the Commission identified two goals of offering a second chance to all overindebted natural persons: "easing consumption" by freeing up future income for present consumption and "promoting retail investment" by making it easier for cross-border lenders to "assess and quantify the outcomes of insolvency proceedings."[151]

In addition, in its March 2014 Recommendation,[152] the Commission had earlier identified several other goals of its new approach to business restructuring that apply at least obliquely to personal insolvency and second chance policy.[153] It proposed that effective restructuring frameworks might (1) prevent business collapse and therefore maximize total value available for creditors,[154] (2) improve access to credit by ensuring creditors greater, uniform, predictable recovery in all Member States,[155] (3) increase rates of self-employment by averting the fear of lifelong liability,[156] (4) minimize the economic and social costs involved in the deleveraging process,[157] (5) benefit SMEs with insufficient resources for "high restructuring costs" and "more efficient restructuring procedures in some Member States,"[158] and (6) promote efficiency and reduce delays by limiting court formalities.[159]

Very similar benefits, among others, were catalogued as the motivating benefits of personal insolvency regimes in the World Bank's *Report on the Treatment of the Insolvency of Natural Persons*.[160] Effective personal insolvency regimes benefit creditors by preventing the collapse (social and financial exclusion) of individual debtors, offering debtors an incentive to be economically active and productive, to reveal and maximize their asset and income value, and therefore to maximize to the extent reasonable the returns on all creditors' claims.[161] These compelling welfare-enhancing effects of an effective personal insolvency system were quantified in a fascinating 2013 paper that concluded that the U.S. debt adjustment regime (Chapter 13) benefitted debtors by increasing annual earnings by 25%, increasing employment by more than eight percent, and reducing five-year mortality by 30%, as compared to debtors not admitted into the relief system.[162]

Such regimes also facilitate access to credit and general macroeconomic stability by ensuring predictable pressure-release from excessive leverage, a safety valve for regulating and smoothing financial market activity through highs and lows.[163] Certainly debtors and their families benefit directly from relief from overwhelming debts, avoiding a wide variety of psychic and even physical ailments, especially on the families and children of overindebted heads of households.[164] In addition, however, by minimizing the economic and social costs of personal deleveraging, effective insolvency systems produce widely shared benefits for society, including reducing the private and public costs of wasteful, fruitless, formalistic debt collections activity, reducing the many costs of illness, crime, unemployment, and other problems related to deactivated and overburdened individuals, and increasing tax revenue and general economic vitality by reintegrating debtors into active employment, entrepreneurship, and individual consumption.[165]

Not mentioned in the Commission's discussion of this topic are several additional benefits identified by the World Bank associated with disciplining creditors and the market economy. One major benefit of an effective personal deleveraging process is encouraging responsible lending by concentrating the costs of poor underwriting decisions (or overly aggressive credit marketing) on the very creditors who made those decisions.[166] Creditors are no longer able to impose the negative externalities of their risky financial behavior onto debtors, their families, and society by stubbornly refusing to accept the reality of debtors' financial distress and the sorts of reasonable compromises that effective insolvency systems impose on them. Similarly, creditors are compelled to share the risks inherent in our modern, volatile, complex society, and to bring to bear their generally far superior risk assessment capabilities when making lending decisions, along with their generally far greater capacity for absorbing and fairly spreading the downsides of the risks from which they directly profit.[167] Finally, a well-functioning personal insolvency regime forces institutional creditors to apply proper, honest valuations to their accounts receivable, rather than assuming that uncollectible consumer accounts are worth their full face value, which should prompt creditors to dispose of their non-performing loan portfolio more expeditiously, reducing pressure for capital buffers and time- and labor-intensive NPL management.[168] Echoing this last benefit and one of the Commission's principle goals, analysts at the International Monetary Fund have repeatedly emphasized the macroeconomic benefits of a personal insolvency regime's reducing NPLs and removing legacy impediments to future consumption.[169]

B. Recommended Best Practices

Over the past three decades, numerous international organizations have endorsed a fairly consistent set of preferred practices for personal insolvency regimes that seek to achieve the goals outlined above: Make available a low-cost, widely accessible procedure for discharging personal indebtedness following a reasonably limited period of debt repayment from the debtor's available resources.[170] The Commission's initiative for available (accessible) second-chance discharge in three or fewer years fits quite comfortably within these proposed best practices.

Three points of additional, useful detail emerge from a particularly compelling statement of preferred practices from Europe's official human rights organ. The Council of Europe's Committee of Ministers tasked its European Committee on Legal Co-operation with producing recommendations for the best approaches to solutions to the growing personal debt problem in Europe, and the result of that project was adopted by the Council as its 2007 Recommendation on legal solutions to debt problems.[171] Three points are especially worth highlighting. First, the Council urged member states to enact personal insolvency laws "ensuring that debtors have effective access to impartial advice and to debt adjustment."[172] In this regard, the final activity report preceding the Recommendation had explicitly excluded a "good faith" access criterion, at least in part due to problems with identifying reasonable core criteria for "good faith."[173] Second, the Council advocated "ensuring that payment plans in debt adjustment are reasonable, in accordance with national practices, both in repayment obligations and in duration."[174] Reference to "national practices" seems to imply that reasonable expectations might vary from state to state, and the Explanatory Memorandum confirmed this intended meaning, though it insisted that plans "not deprive the debtor and/or his/her family of the ability to satisfy their basic needs with due regard to their human dignity."[175] Finally, within each member state, the Council stressed the importance of "ensuring uniformity of such policies";[176] that is, "that all policy decisions relating to debt management and treatment of over-indebted individuals and families are uniform and conform to an established country-wide standard, with a view to guaranteeing their equal treatment."[177]

C. Toward a European Personal Insolvency Directive

With these principles and recommendations in mind, a fairly clear picture of a minimal harmonization instrument comes into focus. In the EU context, the word "minimal" seems to be legally required in light of the subsidiarity and proportionality principles.[178] Like coordinating cross-border insolvency jurisdiction, coordinating the convergence of personal insolvency provisions toward a set of common best practices cannot be a achieved at the Member State level, as the past 30 years of chaotic development in Europe has shown. That being said, the natural laboratory of more than two dozen Member States engaging in a constant process of trial and error (law reform and re-reform) has produced some very useful empirical insights into the nature of best practices in treating personal insolvency. The Commission's policy preferences should thus most likely be embodied not in a regulation, but in a directive,[179] though one that combines guiding principles with a few hard-and-fast rules.[180] A Personal Insolvency Directive might again be structured around the two pillars of availability/access and second chance/discharge.

1. Availability/Access

Principle 1. Provide open access with the single criterion of overindebtedness

To facilitate maximal deleveraging and administrative efficiency, a personal insolvency regime should offer relief to as many afflicted debtors as possible, and it should be available to anyone who manifests the symptoms of the disease the system is designed to cure. Most of the goals of these regimes can be achieved only if relief is delivered on a large-scale basis, as the positive effects are largely macroeconomic. Fears of "moral hazard" of too many individuals opportunistically evading their debts seem to be based on emotion rather than empirical observation, and a properly formulated and applied entry criterion of "overindebtedness" has proven to be both a sufficient sieving mechanism and a workable standard. As the World Bank observed, "[s]ome danger of moral hazard . . . will be present in any system, but these slippages should not overshadow the substantial benefits of providing relief in the overwhelming majority of cases . . . Care should be taken to avoid sacrificing the great good of such a system simply because perfection cannot be assured."[181]

The current multiplicity of admission requirements inhibits a proper degree of access and an optimal scope of deleveraging. It also prevents both debtors and creditors from predicting the likelihood of access in any given case and therefore assessing and quantifying the risks of potential financial distress. The Commission criticized a similar problem of divergent opening requirements in business restructuring cases,[182] and the variety of conflicting access criteria is no more justified, and equally undesirable, in the personal insolvency context.

Exactly how the single access criterion of "overindebtedness" should be defined has bedeviled European policymakers for years.[183] Bearing in mind the purpose of personal insolvency regimes, however, it seems reasonable to focus attention on inability to service debt as it comes due, rather than on broader inability to meet ongoing household expenses. The latter indicates poverty, not necessarily overindebtedness, though the two often occur together.[184] Existing regimes apply a variety of approaches to identifying the necessary degree of difficulty financing debt obligations, whether by definition (*e.g.,* inability to service debts as they come due) or other objective indicator (*e.g.,* minimum debt level or debt-to-income ratio).[185]

Given the fairly consistent and liberal practices in existing systems with a single entry criterion, it does not seem necessary to mandate a single definition of or method of identifying overindebtedness, as current indicators seem to grasp the concept fairly similarly and well enough. As Civic Consulting observed in their survey report on overindebtedness, "the time may have come to abandon the attempt to precisely define a term that many people seem to find unhelpful, while bearing in mind that the common element of the existing definitions of 'over-indebtedness' is that households suffer ongoing difficulties to meet financial commitments."[186]

Rule 1.1. No enhanced insolvency, maximum insolvency, or other debt-based restrictions

One clear rule follows from this first principle, and it is worth articulating. There is no longer sufficient justification for requiring an enhanced degree of insolvency, be it "hopeless" or "qualified" or otherwise, of debtors seeking relief. Elaborate and probing tests that demand both clarity of debtors' financial lives and hopeless inability to return to solvency under *any* conceivable circumstances, as in the laws in Denmark and Sweden, for example, should be proscribed. When these countries were in the vanguard of the movement to provide relief to financially overburdened consumers, it was sensible to make progress slowly and carefully by limiting the range of debtors receiving relief. After 30 years of practice under such regimes throughout Europe, and in the wake of a worldwide recession that continues to weigh on European productivity, it is time to converge on an internationally accepted standard that distributes relief more broadly. The danger of eroding payment morality is minimal at best, and it is manifestly wasteful and inefficient to process thousands of applications for relief while admitting fewer than 40%. Europe needs an optimal level of personal deleveraging, not a minimal one.

The same is even more clearly true of the unique Hungarian provision that denies relief to consumers who are *too* insolvent. There is no reasonable justification for denying treatment to patients who are *too* ill, so long as these patients are expected to live. The very essence of personal insolvency is that the patient will live (unlike corporate bankruptcy, where terminal debtors are allowed to die, economically and legally), and society is compelled to impose a compromise on creditors to protect such debtors' and their families' futures and their ongoing contributions to society.[187] Wiping away extremely overindebted people's debts will produce most of the same benefits outlined above, for both debtors and society.

Equally unjustified are the other unique access restrictions in the Hungarian law.[188] Claims based outside Hungary are just as subject to adjustment as any other claims, and the Insolvency Regulation determines the proper national jurisdiction for adjusting them (*i.e.,* the location of the debtor's COMI, not the creditor's or the locus of the debt). Claims that are being actively enforced by creditors are even more appropriate for adjustment than others, since enforcement causes the very emotional pressure and economic disruption that insolvency treatment is designed to remedy. And if the debtor has public debts that the State does not wish to forego in insolvency, that might be a proper subject for an exception to the discharge, but not a basis to deny debtors a chance at adjustment of their non-public debts.

Rule 1.2. No required minimum dividend

As a corollary to the previous rule, but which also warrants explicit articulation, provisions like those in Austria and the Czech Republic that require an anticipated minimum payment to creditors should be expressly proscribed. Relatively few individual debtors are able to produce a 10% dividend on their unsecured debt, much less 30%, so imposing this as an entry requirement seriously limits the range of debtors who have access to a deleveraging process. These debtors may well have value to distribute, but their debts are substantial enough to put 10%-30% out of reach even for a moderate-income individual.

Even if these debtors have little or nothing to distribute to creditors, the purposes of personal insolvency legislation are quite distinct from those of traditional, creditor-oriented bankruptcy systems. Producing a benefit for creditors is only one of a large number of goals, as discussed above. Requiring a minimum payout to creditors is an anachronistic method of determining which debtors should be admitted into a procedure that now focuses less on producing value for creditors and more on deleveraging and re-integrating debtors into active society.

Rule 1.3. No mandatory out-of-court negotiation with creditors

To be sure, debtors should be vigorously encouraged and supported in seeking privately negotiated solutions to their debt problems. This saves substantial administrative resources, it allows debtors to avoid the stigma of an insolvency procedure and maintain control of their own fate, and it reinforces the notion that debtors should be responsible for their own financial lives. It also advances a widely shared philosophy that the parties to a contract should be in control of its implementation or modification. Every major recommendation on personal insolvency treatment has stressed the desirability of private workouts over formally imposed relief.[189]

Nonetheless, the expense, delay, and disappointing results of these out-of-court negotiations cannot be ignored. The Leeds study in connection with the Commission's insolvency initiative evaluated mandatory out-of-court negotiation and concluded "the benefit of this may be dubious, being, rather, a prolongation of the debtor's problems and an unhelpful delay."[190] The World Bank also pointed out these shortcomings, noting that "the merits of voluntary settlements are often illusory."[191] Reflecting on long accumulated practice in jurisdictions that require mandatory pre-filing negotiation, it cited long delays, debtors' being pressured to agree to "onerous payment plans that are not viable," and a very small rate of successful compromise, for a variety of powerful reasons.[192] The abandonment of such a requirement by Sweden and then Greece in light of these inevitable, structural problems should stand as a precedent and warning that requiring out-of-court negotiation simply delays real deleveraging relief and interferes with the normal operation of the counselling system for less distressed debtors for whom negotiated solutions are a real possibility.

While mandatory private negotiation should be excluded from the insolvency system, it certainly should be preserved and fostered as an alternative. But as the World Bank again pointed out, "some institutional support and incentives are needed," including free or low-cost assistance from professional advisors with experience negotiating with creditors.[193] Where this process has enjoyed success, it has most often resulted from the intervention of a government regulator, either directly in the negotiations or indirectly, through industry codes of conduct or similar regulatory suasion.[194]

Rule 1.4. No distinction between business and personal debt

Excluding ordinary consumers from the traditional business bankruptcy process was sensible, as that system was designed to ruthlessly extract value for creditors and punish business people for improper management of business risk. Excluding small entrepreneurs or their debts from a system designed primarily to provide *relief* to overindebted individuals makes much less sense. It seems to be justified only by a formalistic adherence to the artificial distinction between "commercial" and "civil" law (or more precisely, "consumer protection" law). These labels ignore the reality that every small entrepreneur is *also* a consumer with a family who suffers from financial distress in precisely the way that consumer overindebtedness regimes were designed to resolve. As the World Bank observed, "it is often quite difficult to draw a meaningful distinction between 'business' and 'non-business' or 'pure consumer' debtors. Natural persons commonly carry heavy debt loads after a termination of business activity" and "persons who engage in small-scale business activity in their own name are often essentially in a similar situation as wage-earning debtors who have become insolvent."[195] 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.[196]

Preventing current and even former small entrepreneurs from accessing one system for holistically readjusting their debts is at least inefficient, and it might deprive some debtors of relief altogether. The distinction between "business" and "personal" debt can be quite blurred in the context of small business people, who often have to finance their businesses with credit cards and similar personal loans, to say nothing of the complex assessment of whether education loans for business and technical education, personal guarantees of business loans, or home mortgages to secure such loans, are "non-professional" debt.[197] Worse yet, small entrepreneurs excluded from the "non-business" system, as in France and Poland, for example, are relegated to the traditional bankruptcy process, which is complex, costly, and lengthy. As the Leeds study put it, since small entrepreneurs are more akin to consumers than corporations, "procedures that are designed for corporate and/or larger business debtors may be inappropriate."[198]

It may well be sensible to differentiate not between business and consumer cases, but between high-value and low-value cases; that is, cases in which the debtor has assets and/or income of significant value, sufficient to attract meaningful attention from creditors.[199] Creditors take very little interest in and participate little if at all in most consumer bankruptcy cases today, because these are "low-value" cases in which the debtor has relatively little to distribute. It is economically inefficient for creditors to invest their time and money in such cases. A small subset of personal insolvency cases, in contrast, involves debtors with substantial value to offer creditors. Not coincidentally, these are usually cases involving former entrepreneurs or other business people (*e.g.,* company directors) with substantial liabilities arising from their business activity and significant value to distribute from, *e.g.,* insurance, income, or other high-value assets. The utility and appropriateness of more complex business reorganization procedures arises not from a necessary connection to business debt, but from the complexity of the task of sorting out liabilities and distributing substantial value that is actually worth pursuing. If individual debtors are to be confined to one or another insolvency regime, the distinction should be drawn based on the relevant crierion—high available asset value and complexity—not on the formalistic and often ambiguous categorization of their activities or debts.

Principle 2. Presume good faith, allowing creditors or case administrators to rebut the presumption with objective evidence of dishonesty

While open access should be the norm, the Commission expressed a desire to distinguish (and presumably sanction) "dishonest" debtors.[200] The hunt for chimerical "abuse" or "dishonesty" or "bad faith" should be properly restrained, however, and it should not interfere with the delivery of needed relief to the overwhelming majority of honest debtors. It has finally become something of a truism in insolvency policy discussion that the perception of supposed "abuse" is far greater than its actual presence, which has been shown to be vanishingly small.[201] It is extraordinarily inefficient to deploy resources in every case in a search for the few instances of debtor fraud that might be discovered. As the World Bank observed, "perfect exclusion of fraud is not an achievable goal" so overindebtedness relief procedures "accept the risk—indeed the certainty—that some limited amount of fraud will creep into the system."[202]

Fortunately, the great majority of existing personal insolvency regimes in Member States have accepted this postulate, and they deny entry to debtors only upon finding "an element of culpability (i.e., intention) for example in relation to knowingly disadvantaging creditors in some way, or taking on debt with no intention of paying and with a view to being discharged."[203] As for taking opportunistic advantage of the discharge process, very few debtors will seek to evade their debts through an onerous three-year payment plan and rigorous, often public scrutiny of their financial lives. Bad faith and abuse are rare, and most European regimes operate on this presumption.

Those few regimes that demand probing scrutiny of every debtor's "good faith" should be strongly encouraged, and perhaps required, to stop doing this. As the Council of Europe's expert group concluded, and the Council accepted, there should be no explicit "good faith" criterion for access to insolvency relief, given the inherent subjectivity and lack of reasonable core characteristics of this concept.[204] Moreover, requiring a good faith showing in every case is inefficient, and it unnecessarily delays the deleveraging and recovery process. As one study commissioned by the Internal Markets Directorate General concluded, "debt cancellation is not, and should not be, an automatic right, but it should be presumed that someone applying should have access to it unless a lender can demonstrate objective evidence of 'bad faith' by the borrower."[205] If a creditor advances reasonably objective evidence of the debtor's dishonest behavior, or if the case administrator finds compelling suggestions of such behavior in the general case file, then dishonesty cannot and should not be allowed to infect the system. But neither should a Quixotic quest to root out "bad faith" undermine the broad-based relief that personal insolvency regimes are expected to provide.

Principle 3. Provide low-cost or cost-free admission

It ought to be self-evident that one should not be denied relief from not having enough money because one does not have enough money to afford relief. Even low-income debtors who cannot afford the administrative costs of an overindebtedness procedure can and should be allowed to benefit from it. Such debtors are also consumers, they contribute to the modern consumer economy, and their suffering from financial distress produces many of the burdens for society that a personal insolvency system is designed to alleviate. The European Economic and Social Committee placed the delivery of overindebtedness relief "free of charge" at the top of its list of expectations in a Commission directive,[206] and rightly so.

The administrative cost of any given procedure is primarily a function of the architecture of that procedure, and Member States have deployed many different vehicles for delivering overindebtedness relief.[207] Where applications for relief are adjudicated by courts, often with traditional formalities borrowed from business bankruptcy practice, the cost burden is generally substantial. Agencies have often managed to reduce costs through greater efficiencies, though court-based procedures have enjoyed efficiency gains, as well. Several regimes have anticipated the Commission's call to reduce or eliminate formalistic procedures that are too expensive for small debtors and are not necessary to protect the practical interests of the parties.[208] Examples from the Netherlands and Sweden are particularly noteworthy. In the court-based Dutch procedure, an official hearing for verification of creditors' claims was originally prescribed, parallel with the practice in ordinary bankruptcy proceedings. Practice soon revealed that little or no distribution was likely to be made to creditors in most cases, so determining the precise volume of claims to which no distribution was to be made was a pointless formality, reminiscent of the headline from a Billy Preston song popular in the U.S. in the early 1970s: "Nothing from nothing leaves nothing."[209] The EESC's insistence on "verification of claims"[210] seems to be unsupported by empirical evidence of the superfluity of this process in most personal insolvency cases. Consequently, the Dutch courts exercised their discretion to stop holding these claims verifications hearings, and the legislature formally ratified this procedural simplification as of 2008.[211] In Sweden, a formerly three-step process involving preliminary agency determinations followed by court confirmation was found to be needlessly formalistic, so it was reduced to one, agency-controlled step, with the courts standing by only as appellate bodies.[212] Other examples of simplification, abandonment of formality, and efficiency enhancement through, *e.g.,* greater use of the internet, appear in several other Member States.[213]

Rather than mandating or even suggesting a particular administrative structure, it seems most prudent to leave it to the Member States to decide how to deliver personal insolvency relief given their existing infrastructures and institutions, so long as cost barriers do not inhibit access. Costs can be contained in a variety of ways, including by implementing efficiencies (as discussed immediately above) or absorbing them into the national budget (as in Germany, Poland, and many other Member States[214]) as a public cost of providing a vital form of social insurance.[215] Indeed, pressed to make these procedures available at low cost, Member States might find more creative ways to finance their personal insolvency systems. For example, Belgian lawmakers diverted funds from creditors to finance the consumer debt adjustment system by taxing a portion of creditors' total consumer lending portfolio in default as of the end of each year.[216] The natural laboratory of Europe is likely to produce more innovative ideas for financing personal insolvency relief if given the proper impetus.

2. Second Chance/Discharge

Principle 4. Provide a discharge of most debts at the conclusion of the procedure

Rule 4.1 Provide a discharge after no more than three years

This is a fundamental but fairly straightforward and easily implemented rule. Only Bulgaria and Malta remain without personal insolvency regimes (they have many models to emulate), and the Commission seems already to have firmly settled on three years as the appropriate length of the discharge period. As it has recognized, this is key to timely deleveraging to encourage consumption and re-integration by debtors and predictability and recovery assessment by creditors. It will also buttress out-of-court negotiation if creditors know what alternative awaits them if the debtor is pressed into engaging a formal relief process. Three years is an aggressive goal, in contrast with present practices that generally require a much longer period, but the shorter term is well supported by research and current practice in respected systems like that in the Netherlands. No legislator has offered a compelling justification for the choice of more than three years, in any event.[217]

It would be preferable to position the starting point of this three-year period at the date of opening of the proceedings, rather than the confirmation of a payment plan. Significant delays often separate the case opening date from the beginning of the repayment period, which again can create wide disparities between national systems and delay needed deleveraging on a system-wide basis. Part of the German reform of 2001 involved anchoring the six-year discharge period to the opening of in-court proceedings (rather than the conclusion) to avoid delays that otherwise extended cases out to as many as eleven years.[218] An additional advantage of this approach is the constructive pressure it applies to Member States to enhance the efficiency of their formal procedures (perhaps referring them out of the court system to a dedicated agency) to avoid disadvantaging creditors. Bureaucratic court formalities in the Greek procedure, for example, have needlessly delayed hearings on debtor's petitions by as long as seven years.[219] Starting the discharge period earlier would not likely ease this overwhelming backup, but it would produce speedier recovery for debtors at likely minimal risk of loss for creditors, who are in any event in a much stronger position to petition national authorities for more efficient insolvency procedures.

Rule 4.2 Confer this discharge automatically, unless a creditor or case administrator pursues an exception

The Commission also has expressed discontent with the common problem of requiring debtors to file a special, separate application for discharge (and likely undergo a separate hearing) upon completion of the three-year period. Like in the case of "good faith," the baseline presumption should be that debtors have earned their fresh start when they complete their three-year discharge obligations.[220] If the debtor has not, or if some other circumstance warrants denying the discharge in a particular case (*e.g.,* on such common grounds as later discovered fraud, failure to cooperate with case administration, or destruction or concealment of assets or income), the trustee or a creditor should be expected to raise and pursue an objection to discharge. Examining every case for "worthiness" is a wasteful formality that needlessly increases cost and delay.

Rule 4.3 Discharge most debts, but allow for limited exceptions

While a broad and automatic discharge should be the norm, every existing regime excludes (or excepts) a few types of debt from discharge. The range of these exceptions is fairly narrow in consumer cases, primarily encompassing family support debts, fines and criminal sanctions, often certain kinds of tort/delictual liability for particularly culpable conduct (*e.g.,* intentional injury to persons or property), often tax debts and other public obligations, and sometimes student loan debt.[221] Given the sensitivity of this issue, its potential impact on national finances, and the often powerful local cultural and moral implications of excepting certain discrete debts from discharge, it is probably best to give Member States significant leeway in establishing exceptions to their discharge. This is likely to have relatively minimal macroeconomic impact on the institution of personal discharge relief, so long as the list of excepted debts is kept under control, as seems currently to be the case throughout Europe.[222]

Principle 5. Inculcate responsibility and maximize creditor recoveries by requiring non-exempt asset liquidation and income turnover during this 3-year period

The Commission seems to presume that asset liquidation and a payment plan will be part of the *quid pro quo* for discharge relief.[223] This is certainly the case in the overwhelming majority of Member States today, at least in most cases. This approach is all but mandated in traditional bankruptcy policy—the primary goal of which was to produce a return for creditors—but it is also perfectly consonant with modern arguments in favor of business restructuring and individual discharge. Creating and maximizing returns for creditors on their legitimate claims remains an important, internationally recognized goal of personal insolvency regimes,[224] though the idea of pressing *all* debtors into such plans should be carefully questioned. This fifth principle is subject to several sub-rules that confine its application in important ways.

Rule 5.1. Require plans only of debtors with apparent payment capacity

The notion of requiring individual debtors to earn a discharge by enduring years on a subsistence budget while complying with a payment plan is not uncontroversial. The Commission's Leeds study notes "[t]here appears to be little evidence on whether Payment Plans merely serve an educative, retributive and symbolic function and are not in fact economically effective in terms of repaying debt."[225] Its appraisal of payment plans is thus not particularly sanguine:

> Methodologically sound research is needed on whether obliging Consumer debtors to earn debt discharge by adhering to Payment Plans in Debt Settlement Procedures over a period of time is genuinely in the public interest on any measure. . . . [T]hey may merely satisfy punitive and retributive norms which rest on the assumption that over-indebtedness is immoral and great effort should be made by the Consumer debtor and family to repay what has been borrowed. A family unit is very different from an economically productive business entity . . .[226]

The Leeds study is not alone in this hesitation regarding payment plans. The World Bank similarly questions the utility of incurring the administrative and emotional burdens of extended payment plans, noting "[i]n the majority of existing systems, in which fewer than one-fifth of cases initiated each year produce returns to creditors, it is highly questionable whether the administrative costs of the 'good behavior system' are justified."[227] Echoing the sentiment expressed in the Leeds report, the World Bank pointed out "[m]any commentators and even lawmakers have questioned the value of imposing plans on individuals who have little or no ability to pay simply as a result of feelings of retribution."[228]

Nonetheless, many if not most Member States seem to have concluded, sometimes explicitly, that the educative and symbolic functions of requiring debtors to adhere to these plans is an important part of the moral balance among debtors, creditors, and society.[229] This sentiment clashes with the Commission's desire to speed up the deleveraging process to enhance consumption, including by low-income debtors, and to avoid formalistic procedures that are not essential to the practical interests of the parties involved.[230] While some form of financial education or even moral suasion might be applied to all debtors, keeping low-income debtors financially deactivated for three years under a plan with no practical financial impact (other than negative, in the case of the unpaid administrative costs of such plans) is directly counterproductive to the Commission's stated goals.

A fairly obvious compromise position is to require payment plans only of debtors who have demonstrated capacity to produce a return to creditors. This is the case formally in France and Poland following the most recent reform there, and it appears to be the case in Ireland, as well. This is a sensible approximation of the U.S. system, for which the Commission expressed its admiration.[231]

The challenge, of course, is separating the "can pay" from the "can't pay" debtors. The U.S. system has struggled with this challenge for years, and the infamous "means testing" resolution of that struggle has not produced particularly satisfying results.[232] The basic idea is nonetheless sound when viewed against the backdrop of current European practice. Following the rules below, administrators can simply subtract the debtor's standardized household expense budget from the debtor's reasonably foreseeable income to indicate payment capacity, if any. Judging by past practice, most debtors will quickly and clearly demonstrate no payment capacity and can be routed to an immediate discharge. Their neighbors should not be overly envious of these debtors, whose income is so low that they can barely meet their basic needs.

For those with some capacity, the hard question is how much is worth pursuing. Projections over three years are bound to be at least a bit inaccurate, and some buffer for unforeseen circumstances is probably also appropriate (as in Swedish practice). The U.S. system presses debtors into a five-year payment plan only if their "excess" income exceeds $12,850 (or 25% of their unsecured debt, if this figure is less).[233] The personal insolvency study commissioned by the Internal Markets Directorate General proposed that payment plans should be required only of debtors who can be expected to produce over three years at least €10,000 or 10% of their total debt.[234] In either event, some provision might be made, as in the law in Luxembourg, for revisiting the question if the debtor "returns to better fortune" within the three-year period.[235] Provisions for modifying plans are quite common, including for unexpected improvements in the debtor's payment capacity, though imposing a plan for the first time later in the process may pose particular difficulties, to say nothing of the monitoring burden.

This is not an easy issue with an obvious solution. Striking the appropriate balance here requires weighing not only the interests of creditors (recall:

Nothing from nothing leaves nothing![236]) and debtors, but also the interests of society in quickly re-integrating an optimal number of consumers to facilitate economic recovery, as well as in avoiding waste of tax receipts on administrative procedures that produce no clear value for anyone. Because the Commission views the discharge as the core issue in its initiative, the decision on payment plans *vel non* is likely best made centrally (*i.e.,* by the Commission, in the directive), once and for all.

Rule 5.2. Allow asset liquidation only for significant net value assets

This rule is the corollary to the preceding one, though its application is easier and less controversial. There is no justification for seizing and selling a debtor's property unless it is expected to produce a significant return to creditors. Most individual debtors have no such assets, as decades of practice has demonstrated. Many European civil enforcement rules already contain a provision (formal or informal) forbidding seizure of low-value items, and avoiding this kind of waste is one of the purposes of personal insolvency law. The determination of whether an item's value is substantial enough and its seizure therefore justified is best left to local authorities, but the principle is worth articulating in the context of a Personal Insolvency Directive for the sake of clarity and completeness.

Principle 6. Ensure predictability and equality by standardizing asset and income exemptions for payment plans during the discharge period

This principle is among the most important from the individual debtor's perspective, and it is vital to the Commission's goal of facilitating creditors' assessment and quantification of the insolvency risks of their customers and their likely recoveries in an insolvency procedure. To be able to plan adequately, debtors and creditors should be able to have a sense in advance of the financial expectations imposed over the three years of a potential or envisioned discharge procedure, and the lack of standardized expectations gives rise to perverse variations in demands from one debtor to another. Many Member States have learned hard lessons about the weaknesses of assigning budgetary decisions to case-by-case discretion of courts or case administrators. There is precious little discussion of this crucial topic in the Leeds study, however, so the Commission could easily overlook it. This would be a debilitating oversight, especially in terms of another core European value—equality.

Most of the rules under this principle are guidelines, rather than clear prescriptions or proscriptions. Some degree of flexibility is inevitable, likely required by subsidiarity and proportionality, and perhaps even desirable to allow the natural laboratory of different national laws to naturally settle on best practices. Careful attention should be paid to where national legislatures draw the lines of debtors' "best efforts" and "human dignity" here, for example, but beyond these baselines, a variety of approaches can be acceptable.

Rule 6.1. Determine discharge payment requirements based on debtors' finances, not creditors' claims (i.e., no minimum payments)

Reiterating the sentiment in Rule 1.2, the requirements for entry into and exit from an insolvency procedure should be based on debtors' financial condition, including reasonable expectations for debtors' fulfilling their debt obligation with available resources. Creditors' claims are exogenous to this determination. The relationship between income and debt is meaningful in determining the presence of insolvency; it is not meaningful in determining a reasonable payment burden to resolve that insolvency. It is not sensible or consonant with the Commission's deleveraging goals to offer a discharge to a debtor with €100,000 in debt but deny a discharge to that same debtor with €300,000 in debt. The World Bank has criticized the undesirable discriminatory effects of provisions that draw this type of distinction.[237]

Whether poor planning or unexpected economic volatility caused the debtor's insolvency, it is simply not relevant to proper discharge policy how large the debtor's debt burden is and therefore what portion available resources can cover in three years. If the debtor is willing to sacrifice those resources for that period of time, the debtor has earned relief consistent with modern personal insolvency philosophy and goals. An effective personal insolvency regime expects debtors to make their best effort to satisfy creditor claims, and those best efforts have little or no relationship with the size of the debt burden.

Rule 6.2. Determine discharge payment requirements based on uniform, national asset and income exemptions

It is a core European value that similarly situated people should be treated similarly. This applies with special force in the insolvency context, where discharge requirements call on debtors to make their best efforts to satisfy creditors and earn relief. It undermines systemic integrity and debtor equality when case administrators are able to define "best efforts" differently by imposing different demands on similarly situated debtors based on nothing more than the identity of the particular decision-maker. The Council of Europe emphasized the importance of uniform policies to be applied to debtors within any one country, including debt management policies like budgeting for payment plans, "with a view to guaranteeing their equal treatment."[238]

As the World Bank observed, "[t]he appropriate measure of sacrifice to be demanded of debtors in exchange for whatever relief an insolvency system offers is a crucial and inherently political decision. Such a central issue of public policy is likely better made by a legislature or other representative entity, rather than by the administrators of the insolvency system."[239] Whatever society demands of debtors in terms of their "best efforts," a national legislature or justice agency is in a much better position to gauge—and be held responsible—for this decision, rather than isolated judges or case administrators with their own individual preferences and prejudices. Case administrators' close contact with debtors and other parties may be a blessing as well as a curse, and it inevitably produces wide variations across national subdivisions. Even if these actors are responsible and sensitive, "they are simply not in the best position to make the sensitive social policy decisions that drive an insolvency regime."[240]

Many models exist for responsible legislative or administrative development of uniform national budgeting standards, and the chosen method and standards might vary from one country to another, as discussed below. The Irish experience is particularly worthy of emulation, with its sensitive "consensual budgeting" process,[241] as is the Danish model of a set of standards developed by the Justice Ministry.[242] Many Member States have coopted for insolvency cases the standard asset and income exemptions applicable in ordinary debt collection cases. This is practically and philosophically sensible, since insolvency is at its core simply a collective debt enforcement proceeding by all creditors simultaneously. This ensures a reasonable degree of parallel, predictable treatment among debtors, both within the insolvency context and in the ordinary debt collection process, enhancing fair and equal treatment of all debtors and facilitating risk planning by creditors.

Of course, a "reasonable degree" of parallel treatment, not perfect uniformity, is all one can reasonably expect, since budget guidelines often by necessity involve judgment calls on certain line items. This is essentially inevitable. Differences in family makeup, local economic and housing conditions, and transfer payment policies may create substantive differences among debtors that can and should be taken into account in the budgeting process. Some discretionary judgment making is unavoidable on the margins, especially with respect to certain unique expense items (*e.g.,* public versus private schooling, essential versus preventative or even cosmetic medical procedures, etc.). Moreover, significant variations among court practices exist even in systems where "uniformity" is a constitutional mandate, such as the U.S.[243] But departing from a uniform guideline productively constrains discretionary variations and is an essential element of the core European value of equal treatment.

Rule 6.3. Ensure that exemptions are indexed for inflation and reasonably reflect living expenses to support debtors' and their families' human dignity

Here again, it is a core European value that individual human dignity be respected. The very purpose of asset and income exemptions is to preserve a minimum of value to support a dignified life for debtors and their families. Modern European society does not countenance sacrificing dignified human existence simply to satisfy creditor's monetary claims. Again, the Council of Europe emphasized that payment plans must be reasonable, so as not to deprive debtors of the ability to satisfy their basic needs "with due regard to their human dignity."[244] The European Economic and Social Committee also demanded that Member States develop asset and income exemptions consistent with the principal purpose of a personal insolvency regime; that is, allocating debtors enough of their income "to live on decently day to day, the aim being to reintegrate the consumer into economic and social life quickly."[245]

Rule 6.4. These exemptions may vary among Member States

Human dignity is likely a universal floor, whereas the definition of debtors' best efforts is a standard more closely tied to local economic conditions (*e.g.,* living costs) and moral and cultural sensitivities, which differ among Member States. While it would be preferable to limit differences in exemptions to avoid creating perverse incentives for cross-border movement (or inhibiting useful migration), it is both sensible and probably required by subsidiarity and proportionality to allow for variations in budgeting expectations among inherently and often deeply diverse Member States. Although the Council of Europe stressed the need for national uniformity of standards to guarantee equality, it accepted *inter*national variation in budgeting standards and income exemptions, so long as they respected the baseline of human dignity.[246]

Even in the U.S., with a Constitution endorsing "uniform" bankruptcy laws and with a single, national Bankruptcy Code, property exemptions vary considerably from state to state. Academics have long criticized this variation,[247] but it has held fast for many years and is unlikely to be abandoned in the foreseeable future. It has not inhibited the effective operation of the personal deleveraging process, though for a very mobile population, it has created complications with respect to choosing the applicable exemptions after recent cross-border movement.[248] This latter problem already has a solution in Europe, as the European Insolvency Regulation exists to determine which Member State's insolvency laws will apply to any given case,[249] and "insolvency tourism" in the personal context does not seem to be a substantial problem for now.[250]

3. Other Miscellaneous Considerations

Beyond the access and discharge topics flowing naturally from the Commission's initiative, a few other salient issues might be addressed in a Personal Insolvency Directive, though clear answers here are harder to find. First, the European Economic and Social Committee mentioned the need for rules on suspension of ordinary enforcement proceedings once collective insolvency proceedings have been opened, as well as a rule mandating equal treatment of ordinary creditors.[251] Neither of these seems to be particularly divisive or problematic in the personal insolvency context, however. While the Commission might include some simple rules calling for such basic provisions, they already seem to be present to the extent necessary in modern practice. They seem to cause few if any intra-national complications or international distortions.

Second, the Commission asked the authors of the Leeds study to investigate the various approaches to representation for debtors and the regulation and remuneration of these insolvency practitioners in the Member States. The Leeds study reported on a wide variety of models,[252] but it offered no suggestion of a need for or clear path to harmonization of this topic, concluding that these differences are "linked to the different political, social and economic conditions in each Member State and in different assessments of what lies in the public interest."[253] It noted that the presence of skilled assistance for debtors was certainly helpful and to be encouraged, as unrepresented debtors are less likely to take advantage of and benefit from these procedures.[254] In the final analysis, this seems to be an issue best left to the Member States to work out in light of local conditions and finances. A Personal Insolvency Directive might include a simple principle encouraging Member States to make such assistance available to debtors to facilitate their access to the deleveraging process, so long as this does not impede Principle 3, on providing low-cost or free admission to the procedure. A mandate for such representation, especially if it has to be subsidized by national finances, may be unnecessarily burdensome.

Finally, the European Economic and Social Committee highlighted the need for a rule allowing debtors to "keep the main residence."[255] This is a highly controversial and sensitive issue, inextricably linked to varying local conditions with respect to security rights, home ownership levels, and the availability of suitable rental housing.[256] Only a few Member States have developed solutions for facilitating the non-consensual retention of residential property by debtors, and these solutions are widely divergent and extremely controversial.[257] It is likely premature (and extraordinarily challenging politically) for the Commission to make any sound prescriptions with respect to home retention in insolvency proceedings.

IV. Conclusion

Even if the Commission includes some or all of these principles and rules in a proposed directive, the initiative still faces a long, politically sensitive process before it might become law. The proposals advanced here, though, canvass the fundamentals of personal insolvency, so even if their substance changes in the process, this article has directed policymakers' attention to the key highlights requiring consideration. As controversial as some of these rules might seem to some, the direction of reform in Europe over the past 30 years suggests that these are the core attributes of an effective and politically acceptable European personal insolvency framework. Gradual convergence among existing personal insolvency regimes suggests that there is a central point toward which these systems are gravitating, and based on a career-long and careful review of the history of personal insolvency in Europe, this article suggests the key contours of that middle ground. A Personal Insolvency Directive along the lines suggested here would accelerate the process of convergence in a way that would greatly benefit all of European society.

NOTES:

[1]This date was announced at the EU-sponsored conference in Brussels on the Commission's insolvency initiative, "Convergence of insolvency frameworks within the European Union — the way forward" (July 12, 2016), http://ec.europa.eu/justice/newsroom/civil/events/160712_en.htm.

[2]Throughout this article, with respect to both the condition of financial distress and the legal procedure for treating that distress, the terms "bankruptcy" and "insolvency," as well as "overindebtedness" and, in the case of the procedure involved, "debt adjustment," will be used interchangeably, with little or no intended difference in meaning. The labels "personal"

and "consumer" are generally synonymous, as well, though the latter is sometimes used to exclude individual debtors with ongoing business activity or even debt from previous business activity. *See infra* notes 87–89 and accompanying text.

[3]THE FEDERALIST NO. 42 (James Madison) (Project Gutenberg ed. 2013, www.gutenberg.org/files/1404/1404-h/1404-h.htm#link2H_4_0042).

[4]Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity,* 58 N.Y.U. L. Rev. 22, 41 (1983).

[5]U.S. Const. art. I, § 8, cl. 4.

[6]*See* Céline Chateau, European Parliament, *The Principle of Subsidiarity* (2016), http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf.

[7]These exclusively Union competencies are primarily related to international trade (*e.g.,* customs union, competition law, and monetary policy). *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 3, Oct. 26, 2012, 2012 O.J. (C 326) 51. Insolvency legislation is not within these exclusive competencies; rather, if falls within the shared competency with the Member States and is therefore subject to the subsidiarity and proportionality restrictions. Id. art. 4(2)(a).

[8]Consolidated Version of the Treaty on European Union art. 5(3)–(4), Oct. 26, 2012, 2012 O.J. (C 326) 18. For a description of the complex process of coming to these conclusions and policing the application of these two principles, see *id.* Protocol 2, 2012 O.J. (C 326) 206–09.

[9]THE FEDERALIST NO. 42, *supra* note 3.

[10]Council Regulation (EC) 1346/2000, On Insolvency Proceedings, recital 3, 2000 O.J. (L 160) 1 [hereinafter, Reg 1346]. The Regulation has been significantly revised recently, effective June 26, 2017. Council Regulation 2015/848, 2015 J.O. (L 141).

[11]*Id.* recital 4.

[12]*Id, passim.*.

[13]*Id.*, recital 11.

[14]*See* Jason Kilborn & Adrian Walters, *Involuntary Bankruptcy As Debt Collection: Multi-Jurisdictional Lessons in Choosing the Right Tool for the Job,* 87 AM. BANKR. L.J. 123, 127–31 (2013).

[15]Principles of European Insolvency Law 66 (W.W. McBryde, A. Flessner, & S.C.J.J. Kortmann, eds., 2003).

[16]Principles of European Insolvency Law 66–67 (W.W. McBryde, A. Flessner, & S.C.J.J. Kortmann, eds., 2003) (noting "[r]eorganisation is a relatively new element in insolvency proceedings," and "[b]ecause of the hesitant and much shorter history of reorganisation as a part of insolvency law, there is here much less common traditional ground to be found among the legal systems").

[17]Principles of European Insolvency Law 66–67, 84 (W.W. McBryde, A. Flessner, & S.C.J.J. Kortmann, eds., 2003).

[18]*See* Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, at 2, COM (2012) 742 final (Dec. 12, 2012) [hereinafter, Communication 2012].

[19]*Id*.

[20]*Id.* at 3.

[21]*Id.* at 4–5.

[22]*See supra* notes 6–8 and accompanying text.

[23]Press Release, European Commission, Giving honest businesses a second chance:

Commission proposes modern insolvency rules (Dec. 12, 2012).

[24]Communication 2012, *supra* note 18, at 6.

[25]*Id.* at 5.

[26]*Id.* at 6.

[27]*Id.*

[28]*Id.* at 9; *see also* Press Release, European Commission, Commission seeks public input on European approach to business insolvency (July 5, 2013).

[29]Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency, COM (2014) 1500 final (Mar. 12, 2014) [hereinafter Recommendation 2014].

[30]*Id.* at 5.

[31]*Id.* at 6–9 (sections 6–29).

[32]For an excellent description and analysis of the business reorganization provisions, see Horst Eidenmüller & Kristin van Zwieten, Restructuring the European Business Enterprise: The EU Commission Recommendation on a New Approach to Business Failure and Insolvency, ECGI Law Working Paper No. 301/2015 (Sept. 2015), online at http://ssrn.com/abstract=2662213.

[33]Recommendation 2014, *supra* note 29, at 9–10.

[34]*Id.* at 4 (recital 15).

[35]*Id.* at 10.

[36]Directorate-General Justice & Consumers of the European Commission, Evaluation of the Implementation of the Commission Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency 1, 4 (Sept. 30, 2015).

[37]*Id.* at 5.

[38]*See* European Economic and Social Committee (EESC), http://europa.eu/about-eu/institutions-bodies/eesc/index_en.htm.

[39]Opinion of the European Economic and Social Committee on 'Consumer protection and appropriate treatment of over-indebtedness to prevent social exclusion' (exploratory opinion), 2014 O.J. (C 311) 38.

[40]*Id.* at 38, 44 (paras 1.8, 5.3).

[41]*Id.* at 38 (para 1.8).

[42]*Id.* at 39, 44–45 (paras 1.9, 5.3)

[43]Conference "Insolvency law in Europe: current trends and future perspectives" (Apr. 23, 2015), https://eu2015.lv/events/political-meetings/conference-insolvency-law-in-europe-current-trends-and-future-perspectives-2015-04-23.

[44]VĚra Jourová, EU Commissioner, Justice, Consumers and Gender Equality, Opening Statement: Insolvency Law in Europe—Giving people and businesses a second chance (Apr. 23, 2015), transcript online at http://ec.europa.eu/commission/2014-2019/jourova/announcements/insolvency-law-europe-giving-people-and-businesses-second-chance_en.

[45]*Id.*

[46]*Id.*

[47]*Id.*

[48]European Commission, Directorate-General Justice & Consumers, Inception Impact Assessment, Initiative on insolvency (Mar. 3, 2016), online at http://ec.europa.eu/justice/civil/files/insolvency/impact_assessment_en.pdf.

[49]*Id.* at 2.

[50]*Id.* at 3.

[51]*Id.* at 10.

[52]*Id.* at 3.

[53]*Id.* at 4.

[54]*Id.*

[55]*Id.* at 5.

[56]*Id.* at 5; *see also id.* at 10.

[57]*Id.* at 6.

[58]*Id.*

[59]*See id.* at 9; Gerard McCormack et al., University of Leeds, Study on a new approach to business failure and insolvency: Comparative legal analysis of the Member States' relevant provisions and practices (Jan. 2016), online at http://ec.europa.eu/justice/civil/files/insolvency/insolvency_study_2016_final_en.pdf. The author was a member of the International Advisory Group for this study, with a particular focus on the consumer insolvency discussion. *See id*. at 17.

[60]Call for Tender No. JUST/2014/JCOO/PR/CIVI/0075, at 8 (Oct. 14, 2014), online at http://ec.europa.eu/justice/newsroom/contracts/files/2014s197-347387/invitation_to_tender_insolvency_study_en.pdf.

[61]*See* McCormack et al., *supra* note 59, ch. 8.

[62]*Id.* at 338.

[63]*See, e.g., id.* § 8.7 at 358 (noting "[t]he legal environment for debt discharge for individuals in the EU is very diverse and reflects to a degree the political and social attitude towards the incurrence of debt by an individual . . . and the ethical approach of each society towards debt and personal responsibility for it").

[64]*Id.* at 360 (noting a broad requirement of debt settlement plans and durations ranging from three to ten years, and in some cases with no time limitation).

[65]*See supra* note 58 and accompanying text.

[66]*See* Jason J. Kilborn, Expert Recommendations and The Evolution of European Best Practices for the Treatment of Overindebtedness, 1984–2010, at 18–19 (2011), *available at* http://ssrn.com/abstract=1663108 [hereinafter KILBORN, EXPERT RECOMMENDATIONS].

[67]*See* McCormack et al, *supra* note 59, at 319, 333–39.

[68]*See* Emir Bahtijarevic & Ema Mendusic Skugor, New Insolvency Legislation to Thoroughly Change Bankruptcy Procedures in Croatia, CEE Legal Matters, Feb. 2016, at 88–89.

[69]*See* McCormack et al., *supra* note 59, at 380 (noting a rejection rate of two-thirds of petitions for relief in Denmark in 2014).

[70]*See id.* at 314–18 and sources cited in nn. 634–39.

[71]*See* Jason Kilborn, *Twenty-Five Years of Consumer Bankruptcy in Continental Europe: Internalizing Negative Externalities and Humanizing Justice in Denmark,* 18 INT'L. INSOL. REV. 155, 166 (2009) [hereinafter Kilborn, Denmark].

[72]*See id.* at 167.

[73]After the reform, the "uncertainty" factor can be set aside in cases of small entrepreneurs. *See id.* at 167 n. 76.

[74]*Id.* at 167.

[75]*Id.* at 168.

[76]*Id.* at 175–76.

[77]This figure is based on data gathered and charted by the author over the years from the court administration's statistics for closed *skiftesager*, online at http://www.domstol.dk/om/talogfakta/statistik/Pages/skiftesager.aspx (last visited July 22, 2016).

[78]*See* KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 42–43.

[79]*See id.* at 43; Sejm Druk nr 2265, Project ustawy o zmianie ustawy — Prawo upadŁoŚciowe i naprawcze oraz niektórych innych ustaw [Draft law amending the law — Law on insolvency and restructuring and other acts (Feb. 7, 2014) (on file with author) (explicitly announcing an intention to "reduce or completely remove" this and other barriers to relief) [hereinafter Sejm Druk 2265].

[80]*Id.*

[81]*Id.*

[82]Act of 29 August 2014 amending the law — Law on insolvency and restructuring and other acts [Poland].

[83]Law on insolvency and restructuring § 491(4)(1) [Poland].

[84]*See* Gusztáv Báger, Introduction of a Debt Management Procedure for Natural Persons in Hungary, 2015 Public Finance Quarterly 492, 498 (2015); Kornelia Nagy-Koppany, *The Hungarian Personal Bankruptcy Act* (Sept. 1, 2015), http://www.lawyerissue.com/the-hungarian-personal-bankruptcy-act/.

[85]*See* Báger, *id.,* at 498–99.

[86]*See id.* at 506, Nagy-Koppany, *supra* note 84.

[87]Code de la consommation art. L. 711-1 [France].

[88]*Id.* art. L. 711-3.

[89]*See* Sejm Druk 2265, *supra* note 79.

[90]*See supra* note 24 and accompanying text.

[91]*See* McCormack et al., *supra* note 59, at 321.

[92]*See id.*

[93]*See* KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 43 n. 124.

[94]*See id.* at 44. For an in-depth examination of the Dutch personal insolvency law and the application of its good faith norm, *see* ARNOUD NOORDAM, SCHULDSANERING EN GEODE TROUW (2007) (published doctoral dissertation, with English summary at 667–85).

[95]*See* KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 35.

[96]*See id.* at 35–36 (also noting the Estonian law seems to apply similarly); Sejm Druk 2265, *supra* note 79; Law on insolvency and restructuring § 491(7)(1) [Poland].

[97]*See* KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 36 n. 107.

[98]*See id.* at 36.

[99]*See id.* at 25.

[100]*See, e.g.,* Theodor G. Katsas, Key Elements of the Greek Legal Framework on Insolvency of Natural Persons, in Comparative Perspectives of Consumer Over-Indebtedness: A View From the UK, Germany, Greece, and Italy (Federico Ferretti, ed., 2016) 259, 263 (noting a success rate of 0.02%).

[101]*See* Kilborn, Denmark, *supra* note 71, at 168–69.

[102]*See* Jason J. Kilborn, *Out with the New, In with the Old: As Sweden Aggressively Streamlines Its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?,* 80 AM. BANKR. L.J. 435, 458–59 (2007) [hereinafter Kilborn, Sweden].

[103]*See id.*; Katsas, *supra* note 100, at 263.

[104]Debtors with a "main creditor" with a mortgage or lease on their principal residence must pursue an out-of-court debt settlement first, though as of October 1, 2016, debtors without such a "main creditor" will be able to move directly to the court-supervised plan negotiation and debt settlement procedure. *See* Báger, *supra* note 84, at 500, 502, 506–07; Nagy-Koppany, *supra* note 84.

[105]*See* Marko Kruc, *Croatia: Consumer Bankruptcy Act Introduces Consumer Bankruptcy into the Legal System* (Jan. 5, 2016), http://www.schoenherr.eu/publications/publications-detail/croatia-consumer-bankruptcy-act-introduces-consumer-bankruptcy-into-the-legal-system/.

[106]*See* Jason J. Kilborn, *The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New U.S. Law From Unexpected Parallels in the Netherlands,* 39 Vand. J. Transnat'l L. 77, 102 (2006) [hereinafter Kilborn, Netherlands].

[107]*See* Jason Kilborn, Two Decades, Three Key Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion, and Sacrifice, in Consumer Credit, Debt and Bankruptcy: Comparative and International Perspectives 307, 320 (Johanna Niemi, Iain Ramsay & William Whitford eds., 2009) [hereinafter Kilborn, *Two Decades*].

[108]Kilborn, Netherlands, *supra* note 106, at 103.

[109]*See* Goda Ambrasaite & Rimvydas Norkus, *Legal Aspects of Insolvency of Natural Persons in the Baltic States,* 21 Juridica Int'l 176, 184 (2014); Kilborn, Expert Recommendations, *supra* note 66, at 51.

[110]*See* Oireachtas Lib. & Res. Svc., *Spotlight: Debt Part 2: Personal Debt and Consequences* 15 (issue no. 3, 2010), http://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/Personal_Debt_and_Consequences.pdf.

[111]Bankruptcy Act 1988 § 85(1), as amended by PIA 2012 § 157 [Ireland]; *see generally* Joseph Spooner, *Long Overdue: What The Belated Reform of Irish Personal Insolvency Law Tells Us About Comparative Consumer Bankruptcy,* 86 Am. Bankr. L.J. 243 (2012).

[112]Law on Insolvency and Restructuring art. 491[15](1), 491[19](1) (as amended 2013) [Poland].

[113]*See* Kilborn, Expert Recommendations, *supra* note 66, at 51; Code de la consommation art. L. 732–3 [France] (allowing for a longer period to allow the debtor to redeem a secured residential loan).

[114]*See* Jason J. Kilborn, *Continuity, Change, and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg,* 14 Am. Bankr. Inst. L. Rev. 69, 84–86 (2006) [hereinafter Kilborn, *Continuity*]; Kilborn, Expert Recommendations, *supra* note 66, at 49 (describing the immediate discharge in the French system); Loi du 8 janvier 2013 concernant le surendettement et portant modification (modifying the law in Luxembourg to adopt the immediate discharge option after liquidation).

[115]*See* Jason J. Kilborn, *The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States,* 24 Nw. J. Int'l L. & Bus. 257, 282 (2004) hereinafter Kilborn, Germany].

[116]*See* Jason J. Kilborn, Comparative Consumer Bankruptcy 83–84 (2007).

[117]*See* Kilborn, Germany, *supra* note 115, at 284.

[118]*See* Jan-Ocko Heuer, Social Inclusion and Exclusion in European Consumer Bankruptcy Systems 15–16 n. 22 (2013 working paper), http://www.academia.edu/3992692/Social_Exclusion_in_European_Consumer_Bankruptcy_Systems.

[119]*See* Kilborn, *supra* note 116, at 83–84.

[120]Law 151/2015 on Insolvency of Natural Persons arts. 72–73 (2015) [Romania].

[121]*See* Katsas, *supra* note 100, at 266; Jason J. Kilborn, *Reflections of the World Bank's Report on the Treatment of the Insolvency of Natural Persons in the Newest Consumer Bankruptcy Laws: Colombia, Italy, Ireland,* 27 PACE INT'L L. REV. 309, 328 (2015) [hereinafter Kilborn, *Reflections*].

[122]*See* Kilborn, *Continuity, supra* note 114, at 87–88.

[123]*See* KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 52.

[124]*See* Kronofogden, Den 1 november ändras lagen om skuldsanering och det kommer en nu lag om skuldsanering för företagare (May 19, 2016), https://www.kronofogden.se/51471.html.

[125]*See generally* The World Bank, Report on the Treatment of the Insolvency of Natural Persons ¶¶ 262, 355–56 (2013); Johanna Niemi-Kiesiläinen, *Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?,* 37 OSGOODE HALL L.J. 473 (1999); Johanna Niemi-Kiesiläinen, Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy, in Consumer Bankruptcy in Global Perspective 41 (Johanna Niemi-Kiesiläinen, Iain Ramsay, & William Whitford, eds., 2003).

[126]*See* KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 46–47; Kilborn, *Two Decades, supra* note 107, at 325.

[127]Law on Insolvency and Restructuring art. 491[16] (as amended 2013) [Poland].

[128]Bankruptcy Act 1988 section 85D(1), as amended by PIA 2012 § 157 [Ireland].

[129]*See* Jason J. Kilborn, La Responsabilisation de l'Economie: W*hat the United States Can Learn From the New French Law on Consumer Overindebtedness,* 26 MICH. J. INT'L L. 619, 648–51, 65–60 (2005) [hereinafter Kilborn, France]; KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 49; Loi du 8 janvier 2013 concernant le surendettement et portant modification, arts. 16–22 [Luxembourg].

[130]Banque de France, Indicateurs statistiques sur le surendettement à fin juin 2016, https://www.banque-france.fr/uploads/tx_bdfgrandesdates/2016-06-statistiques-surendettement.pdf.

[131]*See* Kilborn, France, *supra* note 129, at 644.

[132]*See* Kilborn, Sweden, *supra* note 102, at 450–51.

[133]*See id.* at 452–53.

[134]*See* Kilborn, Denmark, *supra* note 71, at 178.

[135]*See* Katsas, *supra* note 100, at 266–67.

[136]Law on Insolvency and Restructuring art. 491[15](4) (as amended 2013) [Poland].

[137]*See* KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 57; Loi du 8 janvier 2013 concernant le surendettement et portant modification, art. 1 [Luxembourg].

[138]*See* KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 57.

[139]See Kilborn, *Reflections, supra* note 121, at 332.

[140]Ley Concursal art. 178*bis* (2015), as amended by Royal Decree-Law 1/2015 of Feb. 27, 2015 [Spain].

[141]*See* Kilborn, Germany, *supra* note 115, at 285–86.

[142]The Slovenian law adopts this minimal income level as the insolvency budget standard, as well. *See* KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 56.

[143]*See* Kilborn, Netherlands, *supra* note 106, at 98–101.

[144]Bankruptcy Act 1988 section 85D(4), as amended by PIA 2012 § 157 [Ireland].

[145]Insolvency Service, Guidelines on a reasonable standard of living and reasonable living expenses 5–7, 16–20 (2013), http://www.isi.gov.ie/en/ISI/Guidelines_under_section

%2023_June_13.pdf/Files/Guidelines_under_section%2023_June_13.pdf.

[146] *Id.* at 21–30.

[147] *Id.* at 24.

[148] *See* KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 43.

[149] The new Hungarian act contains several odd minimum payment requirements, though that act seems specifically designed to deal with a home mortgage crisis, rather than general personal overindebtedness. *See* Act on Consolidation of Debts of Natural Persons § 74 (2015) [Hungary].

[150] *See supra* note 58 and accompanying text.

[151] *See supra* note 55 and accompanying text.

[152] *See supra* note 29 and accompanying text.

[153] *Accord* McCormack et al., *supra* note 59, at 309–10.

[154] Recommendation 2014, *supra* note 29, at 2, recital 1.

[155] *Id.* at 2–3, recitals 4, 8, 11.

[156] *Id.* at 4, recital 12.

[157] *Id.*

[158] *Id.* at 4, recital 13.

[159] *Id.* at 4, recital 17.

[160] WORLD BANK, *supra* note 125, at 19–40.

[161] *See id.* ¶¶ 61–68 (also noting the benefits of public coordination of collective action and monitoring, removing these complications and expenses from creditors).

[162] Will Dobbie & Jae Song, *Debt Relief and Debtor Outcomes: Measuring the Effects of Consumer Bankruptcy Protection* 2 (Working Paper, Sept. 2014), http://scholar.princeton.edu/sites/default/files/Dobbie_Song_Bankruptcy_0.pdf.

[163] *See* WORLD BANK, *supra* note 125, ¶ 111.

[164] *See id.* ¶¶ 70–75.

[165] *See id.* ¶¶ 85–87, 99–110.

[166] *See id.* ¶¶ 88–93

[167] *See id.* ¶¶ 94–98.

[168] *See id.* ¶¶ 79–84; *see also, e.g., ECB sees Ireland as advice resource in tackling bank debt across euro zone*, THE IRISH TIMES (Mar. 24, 2016), http://www.irishtimes.com/business/financial-services/ecb-sees-ireland-as-advice-resource-in-tackling-bank-debt-across-euro-zone-1.2584723 (noting the importance of markets for non-performing loans and the potential for insolvency frameworks to facilitate these markets).

[169] *See, e.g.,* Yan Liu & Christoph B. Rosenberg, International Monetary Fund, Dealing with Private Debt Distress in the Wake of the European Financial Crisis: A Review of the Economics and Legal Toolbox, IMF Working Paper 13/44, at 5–6 (Feb. 2013); Luc Laeven & Thomas Laryea, Principles of Household Debt Restructuring, IMF Staff Position Paper 09/15, at2 (June 26, 2009).

[170] *See id.* at 14–15 (noting in particular a preference for "repayment terms that accurately reflect the debtor's capacity to repay to ensure an effective fresh start"); KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 18, 33, 40, 45–46, 49–50; London Economics, Study on means to protect consumers in financial difficulty: Personal bankruptcy, *datio in solutum* of mortgages, and restrictions on debt collection abusive practices 190–99 (Dec. 2012), http://ec.europa.eu/finance/finservices-retail/docs/fsug/papers/debt_solutions_report_en.pdf.

[171]Council of Europe, Recommendation Rec(2007)8 of the Committee of Ministers to member states on legal solutions to debt problems (June 20, 2007), https://wcd.coe.int/ViewDoc.jsp?id=1155927&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75# [*hereinafter,* CoE Rec]; *see also* European Committee on Legal Co-operation (CDCJ), *Draft Explanatory Memorandum to Recommendation Rec(2007)8 of the Committee of Ministers to member states on legal solutions to debt problems* (May 18, 2007), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d5d5c [hereinafter, CoE Memo].

[172]CoE Rec, *id.*, art. 4(a); *see also* art. 4(h) (calling for a discharge of debt "with a view to providing the[debtors] with a new opportunity for engaging in economic and social activities").

[173]*Final Activity Report of the Group of Specialist for Legal Solutions to Debt Problems (CJ-S-DEBT)* ¶ 27 (2007).

[174]CoE Rec, *supra* note 171, art. 4(b).

[175]CoE Memo, *supra* note 171, ¶ 32.

[176]CoE Rec, *supra* note 171, art. 5(a).

[177]CoE Memo, *supra* note 171, ¶ 39.

[178]*See supra* notes 6–8 and accompanying text.

[179]On the differences between these two legal instruments in the EU, see Regulations, Directives, and other acts, http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm.

[180]Compare, for example, the structure of the Consumer Credit Directive 2008/48/EC, which seems to be a good model for what might emerge from the Commission's insolvency initiative, as opposed to the more detailed and micromanaging Mortgage Credit Directive 2014/17/EU.

[181]WORLD BANK, *supra* note 125, ¶ 115.

[182]*See* Communication 2012, *supra* note 18, at 6.

[183]*See* Civic Consulting, *The Over-Indebtedness of European Households: Updated Mapping of the Situation, Nature and Causes, Effects and Initiatives for Alleviating Its Impact* 19–31 (2013).

[184]*See* WORLD BANK, *supra* note 125, ¶¶ 33–39.

[185]McCormack et al., *supra* note 59, at 314–18.

[186]Civic Consulting, *supra* note 183, at 29.

[187]*See* WORLD BANK, *supra* note 125, ¶ 50.

[188]*See supra* note 85 and accompanying text.

[189]*See* KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 23–24.

[190]McCormack et al., *supra* note 59, at 348.

[191]*See* WORLD BANK, *supra* note 125, ¶ 131.

[192]*Id.* ¶¶ 133–34, 404.

[193]*Id.* ¶¶ 135, 137.

[194]*Id.* ¶ 136.

[195]*Id.* ¶ 48.

[196]*Id.* ¶ 45.

[197]*See also id.* ¶ 48.

[198]McCormack et al., *supra* note 59, at 288.

[199]The idea in this paragraph was presented by Joseph Spooner, Assistant Professor at the London School of Economics and Political Science, at the EU-sponsored conference on the Commission's insolvency initiative, *supra* note 1.

[200]*See* Communication 2012, *supra* note 18, at 6; Recommendation 2014, *supra* note 29, at 9–10.

[201]*See, e.g.,* WORLD BANK, *supra* note 125, ¶ 118.

[202]*Id.* ¶ 119.

[203]McCormack et al., *supra* note 59, at 321.

[204]*See supra* note 173 and accompanying text.

[205]London Economics, *supra* note 170, at 194.

[206]*See supra* note 42 and accompanying text.

[207]*See* McCormack et al., *supra* note 59, at 343–44.

[208]*See* Recommendation 2014, *supra* note 29, at 4 (recitals 13 and 17).

[209]*See* Nothing from Nothing, https://en.wikipedia.org/wiki/Nothing_from_Nothing_(Billy_Preston_song).

[210]*See supra* note 42 and accompanying text.

[211]*See* Raad voor Rechtsbijstand's Hertogenbosch, Bureau Wsnp, *De Wsnp per 1 januari 2008: Wat wijzigt er?* (October 2007), www.mvz.nl/docs_mvz/watverandert_wsnp.pdf.

[212]*See* Kilborn, Sweden, *supra* note 102, at 439–61.

[213]*See, e.g.,* KILBORN, EXPERT RECOMMENDATIONS, *supra* note 66, at 37.

[214]*See* McCormack et al., *supra* note 59, at 346–47.

[215]*See* Dobbie & Song, *supra* note 162, abstract (noting that the personal bankruptcy system is "one of the largest social insurance programs in the United States"); WORLD BANK, *supra* note 125, ¶ 35 ("Insolvency regimes are . . . like social *insurance*, protecting individuals from financial tragedy.").

[216]*See* Kilborn, *Continuity, supra* note 114, at 103–06.

[217]Danish lawmakers based their choice of five years on a number of analogies, such as the periods in UK and US law, though none of these analogies was justified by anything other than their simple existence. *See* Kilborn, Denmark, *supra* note 71 at 172.

[218]*See* Kilborn, Germany, *supra* note 115, at 285.

[219]*See* Katsas, *supra* note 100, at 264–65 (noting the "inability of the courts' bureaucracy to provide for a timely outcome for th epetitions for insolvency has led to considerably social costs").

[220]*See* Communication 2012, *supra* note 18, at 6.

[221]*See* WORLD BANK, *supra* note 125, ¶¶ 367–74.

[222]*See* McCormack et al., *supra* note 59, at 363–64, 367–79 tbl. 8.8.

[223]*See supra* note 33 and accompanying text.

[224]*See, e.g.,* WORLD BANK, *supra* note 125, ¶¶ 59–68.

[225]McCormack et al., *supra* note 59, at 380.

[226]*Id.* at 359

[227]WORLD BANK, *supra* note 125, ¶ 312.

[228]*Id.*

[229]*See id.* ¶ 315.

[230]*See* Recommendation 2014, *supra* note 29, at 4 (recital 17).

[231]*See supra* note2 45–46 and accompanying text.

[232]*See* Jason J. Kilborn, *Still Chasing Chimeras But Finally Slaying Some Dragons in the Quest for Consumer Bankruptcy Reform,* 25 LOYOLA CONSUMER L. REV. 1, 3–13 (2012).

[233]11 U.S.C. § 707(b)(2)A)(i).

[234]London Economics, *supra* note 170, at 197 (proposing "if a consumer cannot over three years repay either 10% of their total debt or €10,000, whichever is lower, then a 'zero-plan' [immediate discharge] should be imposed, as the case for employing a public official to resolve cases smaller than this appears to be poor value for money.").

[235]*See* Loi du 8 janvier 2013 concernant le surendettement et portant modification § 22 [Luxembourg] (suggesting the immediate discharge could be revoked if the debtor returns to better fortune within seven years).

[236]*See supra* note 209 and accompanying text.

[237]*See* WORLD BANK, *supra* note 125, ¶ 357.

[238]*See supra* note 177 and accompanying text.

[239]WORLD BANK, *supra* note 125, ¶ 290.

[240]*Id.*

[241]*See supra* notes 145–47 and accompanying text.

[242]*See supra* note 134 and accompanying text.

[243]*See* Daniel A. Austin, *Bankruptcy and the Myth of "Uniform Laws,"* 42 SETON HALL L. REV. 1081 (2012).

[244]*See supra* note 175 and accompanying text.

[245]*See supra* note 42 and accompanying text.

[246]*See supra* note 175 and accompanying text.

[247]*See, e.g.,* Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity,* 58 N.Y.U. L. REV. 22 (1983); Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity,* 88 AM. BANKR. L.J. 353 (2014); *see also* Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause,* 64 Case Western Reserve L. Rev. 319 (2013).

[248]*See* 11 U.S.C. § 522(b)(3)(A).

[249]*See supra* note 12 and accompanying text.

[250]*See* McCormack et al., *supra* note 59, at 384.

[251]*See supra* note 42 and accompanying text.

[252]McCormack et al., *supra* note 59 at 324–32.

[253]*Id.* at 329.

[254]*Id.*

[255]*See supra* note 42 and accompanying text.

[256]*See* McCormack et al., *supra* note 59, at 361.

[257]*See, e.g., id.* at 361–62; World Bank, supra note 125, ¶¶ 319–49; London Economics, *supra* note 170 (exploring in part the procedure of *datio in solutum*).

