The over-indebted European consumers: *quo vadis* personal insolvency law?*

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Abstract

In the wake of the financial turmoil that has characterised recent years, this paper examines the state and adequacy of EU law in dealing with the large scale of over-indebted consumers and their insolvency. Legal responses taken within the context of the overall goal of the integration of the EU retail financial market will be examined, whilst the potential for EU personal insolvency law to stem the 'dark side' of such a market in the future will be evaluated. At EU level, the policy and legal measures adopted so far, concentrate on the prevention of behavioural causes of over-indebtedness, but the intertwined situation of consumer defaults and insolvencies has been left to the uncoordinated competence of national legislators. The fragmented EU legal framework, insofar as it attempts to deal with over-indebtedness and personal insolvency legislation, is addressed in the context of the legal instrument of mutual recognition that aims to promote clarity of the procedural and jurisdictional rules in cross-border matters. The most recent case law of the European Courts and its limitations are considered, together with the increasing drive towards further integration of EU markets and the economy that creates a mounting pressure for substantive harmonisation. In the promotion of consumer protection, the challenge will lie in addressing

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the current and profound diversity of national laws and the impact that harmonisation may have on exclusive national competences over social policies.

Introduction

The EU has both witnessed and experienced one of the most severe recessions in its history, followed by austerity measures taken by, or imposed on, Member States and the growing financial difficulties of consumers in repaying their debts. In this context, this paper investigates the state and appropriateness of the law in the EU in dealing with over-indebted consumers and their insolvency. This is further examined in the context of the EU goal of integrating retail financial markets and its unwanted, yet inevitable, impact on consumers in becoming unable to meet their financial commitments. In light of these latest developments, the ultimate question is what legal future lies ahead for debt solutions of consumers in financial difficulty.

The integration of consumer and mortgage credit markets features significantly in the functioning of the EU financial system and its economy, as well as being important for the full achievement of the fundamental freedoms set by the EU Treaties and the establishment of the internal market. However, it is only in recent years that both the consumer and the mortgage credit markets have been receiving substantial attention from policy makers. During the last couple of decades, the market for loans made available to consumers, across the EU, has developed rapidly and become increasingly open, accessible and sophisticated. EU legislation seeking harmonisation has also been passed.

At the same time, alongside consumer indebtedness, the growth of financial difficulties is becoming both an economic and a social cost, raising concerns across Europe. This, in turn, has placed household debt levels high in the policy agendas of both national and EU policy-makers alike.[1]

[1] E.g. see Eurostat, Over-indebtedness and financial exclusion statistics, data from September 2012, available at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Over-indebtedness_and_financial_exclusion_statistics according to which across the EU in 2011 one in almost nine households (11.4%) were in arrears with payments on rent/mortgage, utility bills and/or hire-purchase/loan agreements. See also M.Cussen, B.O'Leary and D.Smith, "The Impact of the Financial Turmoil on Households: A Cross Country Comparison", (April 2012) 78 *Central Bank Quarterly Bulletin*.

Not only has the financial crisis raised important questions regarding the protection of consumers and the scope, intensity and effectiveness of regulation in financial markets; it has highlighted the need for additional safeguards to stem the social problems that the crisis has exacerbated. Although consumers have undoubtedly borne the costs of the failure of financial markets, in some cases suffering consequences as severe as the loss of their own homes, the financial crisis has also had an impact on the financial and social stability of society as a whole.[2]

Therefore, the policies and the ensuing legal responses require an assessment as to their appropriateness and effectiveness in attempting to address the individual, social and economic costs of the problem. In turn, this demands a prior understanding of the notion of over-indebtedness alongside closer scrutiny of the private law relationship between borrowers and financial institutions within the broader legal framework of the EU.

The first section of this article, based on the latest in-depth findings relating to the nature and causes of over-indebtedness, summarises the complexities surrounding the concept. This helps to provide a new perspective from which to reconsider the measures required to tackle the phenomenon. The second section explores the competence of the EU in limiting the problem and examines the multi-level governance in place between the prevention and treatment/cure of over-indebtedness. The third section focuses on the EU measures taken to prevent over-indebtedness and on the level of harmonisation they have reached. The fourth section examines the dissimilar legislative approaches taken towards the prevention and the treatment/cure of the problem, despite the fact that they are essentially two sides of the same coin of market integration. More specifically, it examines the legal instruments adopted at EU level to ensure coordination of national personal insolvency regimes. The role undertaken by the European Courts, when setting out to limit some of the problems created by gaps in the law of the Member States, is considered in the fifth section, alongside the relevant jurisprudence. This is followed, in the sixth section, by an exploration of the adequacy of the current EU legal framework and the future potential, if any, for further EU intervention. By analysing the inconsistencies created in the EU legal order, and investigating the extent to which EU principles are emerging in relation to a problem that derives from the EU market itself, this section questions whether harmonisation might be a

2 Commission Staff Working Paper on National Measures and Practices aimed at Avoiding Foreclosure Procedures for Residential Mortgage Loans, SEC(2011) 357 final; International Monetary Fund, Dealing with Household Debt, *World Economic Outlook* 2012.

realistic option for future action. The final section summarises and draws tentative conclusions, ultimately framing the leading question '*quo vadis*?' (with a warning).

Understanding over-indebtedness

Over the years there have been several attempts to understand and define consumer over-indebtedness. The phenomenon has been traditionally associated with financial credits, whose use and cultural approach have varied significantly from one Member State to the other. This stance mostly derives from the liberalisation and expansion of European credit markets, which was accompanied by the inevitable increased availability of credit from financial institutions to feed the consumption model of modern society. Market deregulation, coupled with inadequate social safety nets is often recognised as providing the structural conditions that lead to an environment hospitable to financial difficulty.[3] At the same time, consumer access to open credit markets and the financial inclusion of all consumers have dominated the study of over-indebtedness in terms of facilitating the excessive lending and borrowing, overpricing, and/or unfair practices by lenders that have left consumers in a state of financial difficulty.[4] As a consequence, the contractual relationship between lenders and borrowers, and the behaviour of the parties to the contract has attracted the scrutiny of analysts and policy-makers seeking to promote financial inclusion through market discipline.[5]

Yet, if the contractual credit relationship gives rise to indebtedness, the extent to which the latter turns into, and is responsible for, 'over'-indebtedness is not straightforward. Similarly, the measurement of the dividing line between indebtedness and over-indebtedness is problematic.

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[3] S.Nield, "Mortgage Market Review: 'Hard-Wired Common Sense'" (2015) 38 *Journal of Consumer Policy* 139; I. Ramsay, "Between Neo-Liberalism and the Social Market: Approaches to Debt Adjustment and Consumer Insolvency in the EU" (2012) 35 *Journal of Consumer Policy* 421; J.Braucher, "Theories of Overindebtedness: Interaction of Structure and Culture" (2006) 7 *Theoretical Inquiries in Law* 323.

[4] H.W.Micklitz, "Access to, and Exclusion of, European Consumers from Financial Markets after the Global Financial Crisis", in T.Wilson (ed) *International Responses to Issues of Credit and Over-indebtedness* (Fernham: Ashgate, 2013), p. 47.

[5] G.Comparato, "The Design of Consumer and Mortgage Credit Law in the European System", in H.W.Micklitz and I.Domurath (eds), *Consumer Debt and Social Exclusion in Europe* (Fernham: Ashgate, 2015), p. 9.

Over time, EU studies and academic literature have attempted to define the exact and unequivocal terms or boundaries of the phenomenon.[6] However, such efforts have largely focused on the observation of national situations characterised by structural or prolonged difficulties in repaying personal debts, and a common definition or measurement at EU level has struggled to emerge.

The study that possibly makes the best effort towards the establishment of a common definition of over-indebtedness at EU level concedes that the concept varies too broadly across the Member States. Despite attempts to identify common elements, there remain too many national discrepancies in the measurement unit, including the 'household' vis-à-vis the 'individual debtor', the length of time of the financial difficulty, the type of financial commitment (e.g. the inclusion or exclusion of the cost of living), etc. Ultimately, the common denominator that emerges across the various jurisdictions is the incapacity to honour the contracted obligations by way of payment.[7]

As well as highlighting terminological and conceptual divergences, the study has captured a multi-dimensional nature of the problem. This includes an economic dimension of over-commitment and a time dimension over a long period which makes it structural; a social dimension leading to exclusion; and a psychological dimension of induced stress that is also detrimental to health and well-being[8]

These conceptualisations may be helpful in increasing the understanding or recognition of the scope of the problem but this multi-dimensional approach, and its acknowledged effects, can prove difficult in identifying any practical solutions, especially if it has to be translated into supranational law with the conferment of a status to the situation of over-indebtedness, or the scope of application of its norms. Recent scholarship has acknowledged that the continuing vacuum of a clear content-based notion of over-indebtedness not only

[6] For a complete overview of these studies see J.Kilborn, "Expert recommendations and the evolution of European best practices for the treatment of overindebtedness", *1984-2010* (August 21, 2010), available at SSRN: http://ssrn.com/abstract=1663108 or http://dx.doi.org/10.2139/ssrn.1663108. E.g. see U.Reifner, J.Kiesilainen, N.Huls, H.Springeneer, "Consumer Overindebtedness and Consumer Law in the European Union, Final Report", Contract Ref. B5-1000/02/000353 (September 2003); N.Huls, U.Reifner and T.Bourgoinie, *Overindebtedness of consumers in the EC Member States: facts and search for solutions* (Louvain-la-Neuve: Kluwer, 1994); Group of Specialists on Seeking Legal Solutions to Debt Problems (Cj-S-Debt), "Final Activity Report of the Group of Specialist for Legal Solutions to Debt Problems" (CJ-S-DEBT), CJ-S-DEBT (2006) 6 Final (Strasbourg, 18 January 2007); OCR Macro, "Study of the problem of Consumer Indebtedness: Statistical aspects", Report submitted to the Commission of the EU DG Health and Consumer Protection, Contract n. B5-1000/00/000197 (October 2001).

[7] OEE Etudes, "Towards a Common European Operational Definition of Over-Indebtedness", Report prepared for the use of the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (February 2008).

[8] OEE Etudes, "Towards a Common European Operational Definition of Over-Indebtedness" (2008).

makes the comparison between Member States difficult[9] but also a European response problematic.

The most recent study on the mapping of the situation, its nature, and its causes reveals empirically how time may have come to abandon attempts to precisely define a term, that the large majority of stakeholders at all levels - from the industry to civil society organisations, and from public authorities to independent experts - seem to find unhelpful. Consumers are considered over-indebted if they are having ongoing difficulties in meeting, or are falling behind with, their financial commitments, whether these relate to servicing secured or unsecured borrowing or to payment of rent, utility or other household bills. This characterisation is not limited to debts stemming from financial credits but it includes all outgoings considered 'essential' for the consumer, and it is tied to income and other expenditures relating to taxation or cuts in social welfare.[10]

The major causes of consumer over-indebtedness, already acknowledged in the literature,[11] have been confirmed to be external life-time events such as illness or divorce, or macro-economic factors like unemployment, declining wages, or a low income vis-à-vis the cost of living.[12] The findings reveal that people who lose their jobs and income are more likely to default and become entrapped in unsustainable debt, as do those people confronted with accidents of life that no one can anticipate. Mere behavioural factors, such as poor financial choices, mismanagement of resources, or irresponsible lending practices seem to have a more limited impact in this respect. In the end, however, a combination of external events and consumers failing to adjust their budgets to deal with such changes seems even more likely to have a significant impact in this regard.[13]

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[9] H.W.Micklitz, "The Regulation of Over-Indebtedness of Consumers in Europe" (2012) 35 *Journal of Consumer Policy* 417.

[10] Civic Consulting, The Over-Indebtedness of European Households: Updated Mapping of the Situation, Nature and Causes, Effects and Initiatives for Alleviating its Impact (*Civic Consulting Report*) (Brussels, 2014).

[11] E.g. see I.Ramsay, *Consumer Law and Policy* (Oxford: Hart, 2007), sp. 578-580; D.Caplovitz, *The poor Pay More: Consumer Practices of Low Income Families* (New York: Free Press, 1963); M.Adler and E.Wozniak, "The Origins and Consequences of Default – An Examination of the Impact of Diligence", *Research Report n. 6*, (Scottish Law Commission, 1980); R.Berthoud and E.Kempson, *Credit and Debt: The PSI Report* (London: PSI, 1992); G.Hoermann (ed), *Consumer Credit and Consumer Insolvency: Perspectives for Legal Policy from Europe and the USA* (Bremen: ZERP, 1986); A.Elliott, *Not waving but drowning: Over-indebtedness by misjudgment* (London: CSFI, 2005); N.Balmer, P.Pleasence, A.Buck, and C.Walker, "Worried Sick: the Experience of Debt Problems and their Relationship with Health, Illness and Disability" (2006) 5 *Social Policy and Society* 39; N.Dominy and E.Kempson, *Can't Pay or won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (London: DCA 2003); J.Niemi, "Consumer bankruptcy in comparison: do we cure a market failure or a social problem?" (1999) 37 *Osgoode Hall Law Journal* 473.

[12] *Civic Consulting Report* (2014).

[13] E.g. see Banque de France, Étude des Parcours Menant au Surendettement (September 2014).

Some Member States have experienced other issues. For example, a number of new Member States have been through structural changes in a relatively short period of time, and they have common structural characteristics that may have exacerbated the effects of the financial turmoil or have impacted differently on the causes of over-indebtedness (e.g. borrowing in foreign currencies, heavy reliance on the influx of foreign capital, transition to the market economy and a sudden increase in house prices followed by severe negative equities, etc.).[14]

Thus it becomes clear that the nature of the problem is rooted in a number of distinct national issues, which are beyond the remit or control of the law generally and the EU legislator in particular. These are much broader than the credit-debt relationship – for example issues of political economy, taxation, labour markets, salary levels and the cost of living, etc. There are obvious limits as to how far EU policies and law can be expected to deal with such sensitive and political matters of the individual Member States.

The 'Twin Peaks' Competence of the EU and the Member States

The extent to which it is the task of the EU legislator, as opposed to that of national legislators, to intervene, regulate and tackle consumer over-indebtedness and aim to limit private debt problems, is debateable.

Until the Maastricht Treaty in 1993 and the establishment of the single market, over-indebtedness was perceived purely as an internal matter to be addressed by national authorities. However, following the opening-up and integration of national credit markets under EU impetus, an increasing number of reports and literature have started pointing to the adoption of common traits or convergence towards a European approach.[15]

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[14] E.g. see European Central Bank, Banking Structures in the New EU Member States (January 2005), at https://www.ecb.europa.eu/pub/pdf/other/bankingstructuresnewmemberstatesen.pdf; B.Farkas, "The Impact of the Global Economic Crisis in the Old and New Cohesion Member States of the European Union" (2012) 57 *Public Finance Quarterly*, 53; Y.Koyama, "Economic Crisis in New EU Member States in Central and Eastern Europe: Focusing on Baltic States" (2010) 5 *Romanian Economic and Business Review* 31.

[15] See the literature and reports cit. supra in footnote nr. 6. See also Opinion of the Economic and Social Committee on 'Household over-indebtedness', (2002/c 149/01); Opinion of the Economic and Social Committee on 'Consumer protection and appropriate treatment of over-indebtedness to prevent social exclusion' (Exploratory opinion), INT/726 (Brussels, 29 April 2014).

At the same time, debates over the division of competences between the EU and the national policy-makers, and issues of subsidiarity, have cast doubts over the appropriate level of responses.[16]

Pragmatically, it has to be acknowledged that consumers are key economic agents of credit markets, who are inevitably encapsulated in the process of integration under EU law - for example, the EU has already affirmed competence in the areas of consumer credit and mortgages.[17]

In line with the efforts to achieve a single market in credit for consumers, the EU policy response to over-indebtedness has been limited to a mainly preventative approach, such as delivering a credit market that is 'responsible'. The main objective of EU measures to achieve a responsible internal market is directed towards the creation of a regime which encourages vigorous competition, innovation, and choice within a trust-worthy framework that favours access to credit and rejects unfair and irresponsible practices.[18] However, the main driving force remains the economic one of enabling consumers and businesses to take full advantage of the single market.[19] By contrast, the intertwined situation of consumer defaults and debt solutions has not been included in such policies and legal responses. Many studies have stressed the national legal traditions, local institutional structures, or cultural attitudes concerning consumer insolvency laws as barriers to EU action.[20] At the

[16] E.g. see S.Weatherill, "Competence and European Private Law", in C.Twigg-Flesner (ed) *The Cambridge Companion to European Private Law* (Cambridge: CUP, 2010), p. 58; Comparato, "The Design of Consumer and Mortgage Credit Law in the European System" (2015); M.Loos, "Full Harmonisation as a Regulatory Concept and its Consequences for the National Legal Orders: The Example of the Consumer Rights Directive" *Centre for the Study of European Contract Law Working Paper Series No. 2010/03* (July 2010), at SSRN: http://ssrn.com/abstract=1639436 or http://dx.doi.org/10.2139/ssrn.1639436.

[17] See Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, L 133/66 and Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, L 60/34.

[18] See Communication of the European Commission to the European Council of 4 March 2009 'Driving European Recovery', COM (2009) 114 and the Public Consultation on Responsible Lending and Borrowing, at ec.europa.eu/internal.../responsible_lending/consultation_en.pdf.

[19] See e.g. European Commission, Discussion Paper for the Amendment of Directive 87/102/EEC concerning consumer credit (2001); see also the Recitals of the Consumer Credit Directive and the Mortgage Credit Directive. A latest example is the European Commission Green Paper on Financial Services and Insurance. Better products, more choice, and greater opportunities for consumers and businesses, COM(2015) 630 final.

[20] J.Ziegel, "Facts on the Ground and Reconciliation of Divergent Consumer Insolvency Philosophies" (2006) 7 *Theoretical Inquiries in Law* 299; J. Niemi, "Overindebted households and law: prevention and rehabilitation in Europe", in J.Niemi, I.Ramsay, W.C.Whitfords (eds), *Consumer Credit, Debt and Bankruptcy. Comparative and International Perspectives* (Oxford: Hart, 2009), p. 91; Ramsay, "Between Neo-Liberalism and the Social Market: Approaches to Debt Adjustment and Consumer Insolvency in the EU" (2012).

same time, however, empirical evidence has provided little support for such contentions.[21] Unquestionably, personal insolvency laws are only one aspect of the broader ideologies, policies, or other legislation that over-indebtedness forms a part of – e.g. the role of national welfare systems, as well as supply and demand market structures also play a part.[22] Yet, these are deep political issues which suggest obstacles of this nature are more than the imputation of cultures and traditions. If anything, over the years, the latter have already gone through radical transformations in terms of the availability of credit, mass accessibility, and the changing of moral attitudes towards indebtedness.

Arguments may be developed to justify the EU multi-level governance such as identifying market issues as best being dealt with at a supranational level, whilst leaving welfare and social concerns, such as those generated by debt problems (alongside the procedures to alleviate them) to be dealt with at national level. As already noted, these are politically sensitive claims, but more importantly, the interdependency of the two makes such a division unattainable. Market access and financial inclusion go hand-in-hand with social inclusion and the deterrence of degradation.[23] If in the past the goals of insolvency law were ideologically divided between the cure of a market failure versus that of a social problem,[24] such a division has been challenged by the latest economic crisis, which has exposed the inseparable nature of the two.

Possible justifications have been identified based on both the subsidiarity and proportionality principles underpinning EU law, which justify EU action in areas of non-exclusive competence only if these are better and more efficiently regulated to internalise negative externalities. In this case, such a justification appeared less compelling due to the limited outreach of vulnerable consumers beyond their national boundaries.[25] However, such doubts take little account of the increases in labour and citizen mobility throughout the EU, (together with their personal debts), especially as a result of the economic crisis.

[21] J.Spooner, "Fresh Start or Stalemate? European Consumer Insolvency Law Reform and the Politics of Household Debt" (2013) 3 *European Review of Private Law* 747.

[22] Braucher, "Theories of Overindebtedness: Interaction of Structure and Culture" (2006); Ramsay, "Between Neo-Liberalism and the Social Market: Approaches to Debt Adjustment and Consumer Insolvency in the EU" (2012).

[23] Comparato, "The Design of Consumer and Mortgage Credit Law in the European System" (2015).

[24] J.Niemi, "Consumer bankruptcy in comparison: do we cure a market failure or a social problem?" (1999).

[25] Ramsay, "Between Neo-Liberalism and the Social Market: Approaches to Debt Adjustment and Consumer Insolvency in the EU" (2012).

Likewise, even if the concept of European cross-border personal insolvency is still in its infancy, Member States have started to pay attention to the issue.[26]

In short, it appears that the combination of political resistance and claims of subsidiarity explain – but probably no longer justify - a kind of 'schizophrenic' attribution of competences, where the promotion of financial inclusion and the empowerment of consumers as efficient economic actors become policy and legal tools for market functionalisation, but social inclusion and protection remain a national or local problem at the margins of EU action.

The prevention of over-indebtedness and responsible lending: (circumscribed) EU harmonisation

At EU level, over-indebtedness has become incorporated into the rhetoric of 'responsible lending and borrowing' taking the form of the introduction of best market practices to be achieved by means of public intervention in the behaviour of the contracting parties of credit contracts. The emphasis focuses on the behavioural grounds of over-indebtedness, which, as previously discussed, do not take account of its main causes.

The Consumer Credit Directive (CCD)[27] provides a clear example of a full harmonising measure attempting to extend the internal market for financial services to the specific field of consumer credit. The original intention of the European Commission, as part of the enactment of the CCD, was aimed at avoiding the consumer's over-indebtedness by evading unreasonable credit contracts. It introduced and imposed duties and responsibilities on lenders to assess and advise consumers on the risks of default during all phases of the contractual relationship.[28] However, the final version of the CCD remains anchored to the usual paradigm of transparency and information requirements being imposed on both

[26] T.Linna, "Cross-Border Debt Adjustment – Open Questions in European Insolvency Proceedings" (2014) 23 *International Insolvency Review* 20.
[27] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, L 133/66.
[28] P.Rott, "Consumer Credit", in N.Reich, H.W.Micklitz, P.Rott and K.Tonner (eds), *European Consumer Law* (Cambridge: Intersentia, 2014), p. 197; I.Lobocka-Poguntke, *The evolution of EC Consumer Protection in the field of consumer credit* (Frankfurt am Main: Peter Lang, 2012).

lenders and borrowers, focusing on a new requirement of creditworthiness assessment.[29] Hence, the real significance of "responsible lending" becomes limited to duties to explain and disclose, and an undetermined obligation to assess the creditworthiness of consumers, based once again on providing information. Article 8 of the CCD states that creditors have to make such an assessment on the basis of sufficient information obtained from the consumer and, where it is necessary, on the basis of a consultation of the relevant databases.[30]

In general, the CCD has been criticized both for failing to imbue proper responsible lending into its provisions and more particularly for relying on the ability of informed, confident, and rational consumers as drivers of economic efficiency,[31] whilst paying scant attention to the more socially and financially vulnerable consumers,[32] such as those who become over-indebted.

To some degree, the Mortgage Credit Directive (MCD)[33] reproduces the information and transparency model of the CCD in regulating advertising, marketing, product specifications, and pre-contractual and contractual information (including intermediaries and representatives), etc.[34]

The novelty is in the introduction of a number of norms that in principle may better correspond to those policies underpinning the concept of responsible credit..[35] These provisions, focused on the financial education of consumers in relation to responsible borrowing and debt management, include guidance to consumers on the credit granting process;[36] the conduct of business obligations and product suitability that is more tailored to

[29] See Articles 4-6 CCD.
[30] For the interpretation of Article 8(1) CCD see *CA Consumer Finance SA v Ingrid Bakkaus, Charline Bonato, née Savary, Florian Bonato* (C-449/13) EU:C:2014:2464, according to which it "must be interpreted to the effect that, first, it does not preclude the consumer's creditworthiness assessment from being carried out solely on the basis of information supplied by the consumer, provided that that information is sufficient and that mere declarations by the consumer are also accompanied by supporting evidence and, secondly, that it does not require the creditor to carry out systematic checks of the veracity of the information supplied by the consumer".
[31] Micklitz, "The Regulation of Over-Indebtedness of Consumers in Europe" (2012); S.Nield, "Responsible lending and borrowing: whereto low cost home ownership" (2010) 30 *Legal Studies* 610.
[32] Micklitz, "The Regulation of Over-Indebtedness of Consumers in Europe" (2012).
[33] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, L 60/34.
[34] See Articles 8, 10, 11, 3, 14, 15, 16 MCD.
[35] The making of the MCD was shaped by the financial crisis and international responses such as the G20 High Level Principles on Financial Consumer Protection (October 2011).
[36] Article 6 MCD.

individual circumstances; methods of providing incentives or remuneration for staff or intermediaries;[37] and methods for calculating interest rates transparently.[38]

However, it is the creditworthiness assessment of consumers in the MCD that really stands out as the tool most capable of fostering responsible lending. The EU legislators believe that imposing such a duty will enable lenders to determine the ability of consumers to meet their obligations under the credit agreement, thereby providing the means to detect or prevent over-indebted consumers.[39]

In turn, the CJEU has clarified in *LCL Le Crédit Lyonnais*[40] that the aim of the obligation to assess the creditworthiness of the borrower is that of protecting consumers against the risk of over-indebtedness and insolvency. In *Consumer Finance*[41] it was corroborated that all the above obligations deriving from responsible lending are pre-contractual in nature. These judgements are significant in clarifying that the creditworthiness assessment is undertaken in the interests of the consumer and that the nature of the duty is one of private law. However, they leave unanswered, questions as to the remedies available to consumers if the creditor does not comply with such a duty, and the extent of the remaining enforcement duties under public law.[42]

The MCD provides a more innovative approach in its enactment of specific principles on arrears and foreclosures. At first sight, this may be seen as an initial attempt to introduce a set of remedial measures under EU law. However, upon closer examination it is clear that these are preventative in nature and aimed at facilitating the early detection of financial distress before any real default occurs. Therefore, they cannot be categorised as remedial debt solutions once the debt position is at an advanced stage.

In its preamble, the MCD acknowledges that foreclosure can have significant consequences for consumers and asserts that it is appropriate to encourage creditors to deal proactively with emerging credit risks at an early stage. It also emphasizes the importance of having measures in place to ensure that lenders exercise reasonable forbearance and make reasonable attempts to resolve the situation through other means before foreclosure

[37] Article 7 MCD.
[38] Article 17 MCD.
[39] Articles 18 and 20 MCD.
[40] *LCL Le Crédit Lyonnais* (C-565/12) EU:C:2014:190.
[41] *Consumer Finance* (C-449/13) EU:C:2014:2464.
[42] These issues exceed the scope of this study and they have been addressed in F.Ferretti, R.Salomone, H.Sutschet, V.Tsiafoutis, “The regulatory framework of consumer over-indebtedness in the UK, Germany, Italy, and Greece: comparative profiles of responsible credit and personal insolvency law” (2016) 2-3 *Business Law Review* 64.

proceedings are initiated.[43] Article 28 of the MCD therefore, specifically requires that Member States adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated.

Adopting a similar approach, the European Banking Authority has issued opinions identifying best practices for (a) responsible mortgage lending, and (b) for the treatment of borrowers in mortgage payment difficulties. The aim is that of promoting common practices, enhancing consumer protection, and contributing to the stability and integrity of the financial system.[44] It is therefore unfortunate, that everyday conduct of business in the Member States shows that forbearance is variable and dependent on the individual attitude of the lender involved and the specific circumstances of debtors.[45] Another drawback with forbearance is that whatever best practices are in place it remains a private negotiation between the parties. Unless the parties are in agreement, it does not alter the legal rights of creditors to mature interests, repossess properties, and/or recover the money. Equally, the financial position of the over-indebted consumer persists or exacerbates the problem.[46]

The MCD is still relatively new and undergoing implementation in the Member States, but its primary focus on creditworthiness assessment encourages similar conclusions to those advanced by Weatherill in the context of the CCD – i.e. that behind its immediate provisions lies the real debate about the proper reach of EU intervention in this area and the continuing and opposing thrust of EU policies in opening up competitive credit markets at the expense of dealing with, or focusing on, the vulnerability of over-indebtedness.[47]

Moreover, even if it is undeniable that mortgage debt can give rise to serious problems, this is not the only type of debt that consumers have, default on, or contribute to.[48]

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[43] Recital 27 MCD.

[44] The 'Opinion of the European Banking Authority on Good Practices for Responsible Mortgage Lending', EBA-Op-2013-02 (13 June 2013) sets out good practices on the following aspects on the verification of information provided by the mortgage applicant; reasonable debt service coverage; appropriate loan-to-value ratios; and lending and supervisory processes. The 'Opinion of the European Banking Authority on Good Practices for the Treatment of Borrowers in Mortgage Payment Difficulties', EBA-Op-2013-03 (13 June 2013), in turn, sets out good practices on general principles; policies and procedures; provision of information and assistance to the borrower; and the resolution process.

[45] A.Wallace et al, "Exiting Unsustainable Homeownership: Understanding current practice and the potential of Assisted Voluntary Sales", *Research Report, Centre for Housing Policy* (University of York, September 2011).

[46] Nield, "Mortgage Market Review: 'Hard-Wired Common Sense'" (2015).

[47] On the original consideration on the CCD see S.Weatherill, *EU Consumer Law and Policy* (Cheltenham: Edward Elgar 2013), sp. 102-103.

[48] *Civic Consulting Report* (2014).

Responsible credit has been criticised on several grounds, e.g. for being too narrowly implemented,[49] incomplete,[50] unable to provide a common European framework,[51] or inadequate in its own right to tackle over-indebtedness.[52]
Clearly, it addresses the problem in a haphazard and inadequate manner, being limited to certain debts which the law addresses from two different perspectives, distinguishing between two single types of credit, and dealing only with the pre-contractual stage of accessing those credits.

The treatment of over-indebtedness and personal insolvency law: national law and mutual recognition

National law

What attracts a jurist's attention is the absence of measures to remedy or mitigate over-indebtedness at the same levels of EU legislation. Consumer defaults are the other side of the same coin, but EU law appears oblivious to the negative economic and social consequences generated by the same market that it aims at integrating.
To the extent that the EU focuses on the prevention of behavioural causes of over-indebtedness, it overlooks the externalities that are arguably the main causes of the problem. In so doing, it leaves a vacuum in market functionalism and consumer protection.
It is conceded that there are limits as to how far the law can be expected to solve the unexpected and major causes of consumer defaults, because these are often matters of wider social and economic policy. Nonetheless, the law may address a palpable market failure by providing alleviating measures to repair or restructure the economic situation of the persons

[49] I.Domurath, "Consumer Debt and Social Exclusion in Europe", in Micklitz and Domurath (eds), *Consumer Debt and Social Exclusion in Europe* (2015), p. 155.
[50] FinCoNet, FinCoNet report on responsible lending – Review of supervisory tools for suitable consumer lending practices (July 2014).
[51] V.Mak, "What is Responsible Lending? The EU Consumer Mortgage Credit Directive in the UK and the Netherlands" (2015) 38 *Journal of Consumer Policy* 411.
[52] F.Ferretti, "The over-indebtedness of European consumers: time for a 'fresh-start' of the EU policy and legal agenda?" (2015) 11 *European Review of Contract Law* 346.

concerned, allowing them to return to a financially sustainable or socially acceptable situation.

However, personal insolvency law has become the 'elephant in the room' in EU credit market law.[53] As indicated earlier, debt solutions and procedures, once consumers become insolvent, have been left to the competence of national legislatures in a multi-level division of functions between the EU and the Member States. This is in spite of the EU's interest in such matters, as evidenced by the many commissioned reports.[54]

The traditional and parochial nature of personal insolvency law is also well documented in legal scholarship. Endogenous systems have developed at various times in history depending on localised social values, culture, and moral codes of conduct.[55] Although defaulting debtors are no longer banished or imprisoned, different countries have addressed in their own way, the long-established contract law principle of *pacta sunt servanda* and the degrees of primacy attached to ensuring that debtors honour their contractual obligations. The same has occurred with the stigmatisation of personal failure and/or the value given to moral hazard deployed in their systems.

There have been attempts to classify these different systems, formulated on various approaches, and taking into account that some Member States have no tradition or history of personal insolvency law (e.g. Italy, Spain). Examples of the Nordic model (e.g. in Scandinavian countries) are characterised by a common long-standing attitude of accepting the breach of contractual obligations to relieve over-indebtedness and offering formal relief based on a good faith test, e.g. the occurrence of external factors on an otherwise disciplined debtor. The Germanic model, open to all debtors, is generally characterised by firm and sometimes draconian rules that eventually allow a discharge of the obligations (e.g. Germany, Austria, Estonia).[56]

Other types of classifications have focused on market models, based on quick discharges and the encouragement of a fresh start for debtors. These may take the form of re-allocation or re-equilibrium of risk in credit markets by shifting it from debtors to creditors to increase

[53] Ferretti, "The over-indebtedness of European consumers: time for a 'fresh-start' of the EU policy and legal agenda?" (2015).
[54] For a reference of the studies see above footnote nr. 6.
[55] I.Ramsay, "Comparative Consumer Bankruptcy" (2007) 1*University of Illinois Law Review* 241; J.Kilborn, "Two decades, three key questions, and evolving answers in European consumer insolvency law. Responsibility, discretion, and sacrifice", in J.Niemi, I.Ramsay, and Whitford (eds), *Consumer Credit, Debt and Bankruptcy. Comparative and International Perspectives* (2009), p. 307.
[56] Niemi, "Overindebted households and law: prevention and rehabilitation in Europe" (2009); Kilborn, "Two decades, three key questions, and evolving answers in European consumer insolvency law. Responsibility, discretion, and sacrifice" (2009).

market efficiency - albeit with economic, political, and civil disqualifications - as well as restrictions during and after the insolvency procedure (e.g. the UK).

Another model is one based on creditor protection and long discharge periods with behavioural obligations for debtors aimed at maximising payments (e.g. Germany and Austria).

By contrast, a 'mercy' model is one focusing on the characteristics of the debtor, in particular on the deservedness or good faith of the latter, which concentrates on the capabilities of debtors and the discretionary powers of Courts, or other officials, in shaping the proceedings and their outcome (e.g. France, the Benelux countries, and the Scandinavian countries).[57]

Niemi offers a legislative classification vis-à-vis the social policies of a given country, whereby some Member States have incorporated consumer insolvency within broader corporate bankruptcy codes (e.g. Germany, Austria, Estonia, Portugal, and the UK); others have chosen an approach based on broader consumer protection (e.g. France and Belgium); whilst others have focused on rehabilitation as a social policy goal (e.g. the Scandinavian countries).[58]

Whatever classification one may be drawn to, the reality is that with the increase of over-indebtedness in the aftermath of the 2008 economic crisis, many Member States have moved towards brand new, or renewed, national regimes for the protection of consumers in financial distress and the treatment of the insolvency of natural persons. Nearly all Member States now have such laws in place.[59] However, these disparate and uncoordinated legal initiatives in the Member States highlight the absence of any common, harmonized or appropriately resourced strategies at EU level. Each Member State has developed its own regime with its own features and institutional infrastructure for the implementation of the law, (including the availability and training of judges and trustees, administrative capacity, and accounting and valuation systems), the design of which has been driven by emergency situations and purely internal social policy considerations.[60]

[57] O.Heuer, Social Inclusion and Exclusion in European Consumer Bankruptcy Systems, Paper for the conference Shift to Post-Crisis Welfare States in Europe? Long Term and Short Term Perspecti*ves* (Berlin, 4-5 June 2013).

[58] J.Niemi, "Consumer Insolvency in the European Legal Context" (2012) 35 *Journal of Consumer Policy* 443.

[59] 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", Final Report MARKT/2011/023/B2/ST/FC (December 2012).

[60] Y.Liu and C.Rosenberg, "Dealing with Private Debt Distress in the Wake of the European Financial Crisis - A Review of the Economics and Legal Toolbox" (2013) *IMF Working Paper WP/13/44*.

The result is that personal insolvency laws in the EU lack cohesion.[61] Many substantive differences exist in relation to the content-based notion of over-indebtedness, the institutional arrangements, the type of procedures (judicial or administrative), the prerequisites and impediments or exclusions *rationae personae* to access the procedure, the modalities or conditions and timeframe for accessing the procedures, the duration of payments and time to grant the discharge, the stay on enforcement actions, the involvement of creditors in the procedures, the ranking of creditors' claims, the treatment of secured credits, and the costs of the procedures, etc.

Mutual recognition

Within the described fragmented legal framework, the EU has pursued the route of mutual recognition to ensure engagement between the Member States. This principle - which derives from the seminal case of *Cassis de Dijon*[62] in its aims to give effect to the principles of freedom of movement and obviate the absence of relevant harmonising provisions – holds that a Member State should not apply its domestic law to regulate activities originated in another Member State. Instead, it has to recognise the equivalent, albeit different, law of the Member State of origin unless there are special circumstances that justify doing otherwise ('country of origin' principle). This provision of a system of order that sidesteps diverse laws between the Member States, is a common method employed by the EU, for example in the field of corporate law.[63]

The legal instruments which have emanated from the EU concern procedural aspects and jurisdictional rules applicable to cross-border insolvencies, mostly in the context of the cognate – yet different – area of business insolvency.

(a) Council Regulation 1346/2000

Council Regulation (EC) 1346/2000,[64] designed to deal with business insolvency, also applies to natural persons as consumers, provided the national proceedings are listed in its Annex A. The listed national proceedings do not include the large number of national

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[61] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, COM(2012) 743 final.

[62] *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis)* (Case C-120/78) [1979] ECR I-649.

[63] P.Craig and G.De Bùrca, *EU Law* (Oxford: OUP, 2015), 684-689.

[64] OJ L 160/1.

insolvency laws, which have been enacted at a later date by the Member States. The application of Brussels I(a) Regulation 1215/2012[65] to these latter legal instruments is questionable. Firstly, it may apply only to some proceedings as long as these qualify for the requirement of decisions being issued by a 'court or tribunal'. Therefore, it does not apply in those jurisdictions where insolvency proceedings are administrative in nature. Secondly, but most importantly, it does not apply to "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings",[66] where the 'analogous proceedings' have been interpreted as including those dealing with personal insolvency.[67]

A drawback of these provisions is that in cases where a payment plan is confirmed by a Court in a Member State, this is not recognised or enforceable in another Member State. As a result, debtors remain liable to foreign creditors thereby frustrating the aims of the proceedings.[68]

In any event, regardless of the (then) scant number of relevant national proceedings for the insolvency of natural persons contained in Annex A, the Regulation neither regulates substantive insolvency law nor attempts to enforce a common system at EU level. It deals with matters of jurisdiction, recognition and enforcement, applicable law, and cooperation in cross-border proceedings. The principle of mutual recognition is at the heart of the Regulation, insofar as it aims to make sure that insolvency proceedings opened in one Member State are recognized in all other Member States. The Regulation establishes that the domestic law of the country where the case is opened is applicable for the insolvency proceedings and their effects.[69] In theory, as the determination of 'who' qualifies for bankruptcy/insolvency is determined under national law,[70] any European consumer who meets the qualification criteria of a country which does permit consumer insolvency has the

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[65] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1.

[66] Regulation 1215/2012 Article 1(2)(b).

[67] Linna, "Cross-Border Debt Adjustment – Open Questions in European Insolvency Proceedings" (2014); J.Israël, *European Cross-Border Insolvency Regulation* (Cambridge: Intersentia 2005).

[68] The personal insolvency procedures in Annex A are those of Austria, Belgium, the Czech Republic, Cyprus, Germany, Latvia, Malta, The Netherlands, Poland and partly France, Slovenia, and the UK. See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings, COM(2012) 743 final. According to the London Economics Study (2012), many countries have moved or are moving from judicially-led to administrative processes because of the high costs of the former when consumers are unable to meet such costs.

[69] Regulation 1346/2000 Article 4.

[70] Regulation 1346/2000 Article 4.2(a).

ability and right to access this, effectively making their domestic or other legislative position irrelevant.[71] The Regulation further provides that the domestic law of the country where the case is opened is applicable as long as the individual has established a 'centre of main interest' (COMI) in the relevant jurisdiction. The concept of COMI, designed with businesses in mind, corresponds to the place where the debtor conducts the administration of his interests on a regular basis.[72] Incidentally, the Regulation's rules have given rise to forum shopping, by a handful of natural persons, on the basis of abusive COMI-relocation. However, this is a marginal issue for over-indebted consumers, because COMI provisions are only capable of affecting a minority of skilled or well-informed individuals, or small traders, who take advantage of regulatory arbitrage. In reality, they can hardly be applicable to the millions of people in real financial distress across the EU, i.e. the vulnerable consumers.

(b) The Recast Regulation 2015/848

The Recast Regulation 2015/848[73] - that comes into effect from 26 June 2017 and only applies to insolvency proceedings opened after that date[74] - builds on the main shortcomings identified under the Regulation 1346/2000, namely its scope of application; the exact determination of which Member State is competent to open insolvency proceedings; issues with COMI jurisdiction (forum shopping); the opening of secondary proceedings in other Member States; problems with rules on publicity of proceedings; the lodging of claims; and the absence of specific rules dealing with the insolvency of multinational enterprises.[75]
Of interest to this study, is the scope of application of the Recast Regulation to include pre-insolvency proceedings for viable debtors and the many personal insolvency proceedings that were outside the scope of the prior law for their posterior enactment in the Member States. Unlike its predecessor, the Recast Regulation does not limit itself to dealing with the

[71] London Economics Study (2012).
[72] Regulation 1346/2000 Recital 13.
[73] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast), OJ L 141/19.
[74] Ahead of that date, Member States will be required under Art. 86 Regulation 2015/848 to provide a description of their national insolvency legislation and procedures. In turn, Art 24(1) Regulation 2015/848 – to come into effect on 26 June 2018 - provides for the establishment of publicly available insolvency registers in each Member State, with the European Commission to establish a system for the interconnection of these registers by 26 June 2019.
[75] See European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM (2012) 744 final - followed by the endorsement from the European Parliament's Legal Affairs Committee (JURI) on 17 December 2013 (MEMO/13/1164).

liquidation proceedings. It extends to proceedings which provide for the restructuring of a debtor's liabilities, at a stage where there is only a likelihood of insolvency; proceedings which leave the debtor fully or partially in control of his assets and affairs; and proceedings providing for a debt discharge or a debt adjustment for consumers and self-employed persons. The employed technique is the addition, to the pre-existing requirement of proceedings based on laws in which "a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed",[76] of alternative proceedings where "the assets and affairs of a debtor are subject to control or supervision by a court".[77] Since consumer proceedings do not necessarily entail the appointment of an insolvency practitioner, the Recitals clarify that they should be covered by the Recast Regulation only if they take place under the control or supervision of a Court (including situations where the Court only intervenes on appeal by a creditor or other interested parties).[78]

The new law also stipulates that it only applies to proceedings which are based on laws relating to insolvency. Therefore, excluded from its ambit, are proceedings based on general company law that are not designed solely for insolvency situations, together with specific proceedings in which debts of a natural person of very low income and very low asset value are written off (the so called 'NINA' – no income, no asset consumers - or 'LILA' – little income, little asset consumers), provided that this type of proceedings does not make provisions for payment to creditors.[79] This excludes the application of proceedings in those Member States where laws have been designed to maximise creditor returns or to preserve human dignity, and access to discharge has been made easier for NINAs/LILAs,[80] (who also account for the majority of over-indebted consumers). Insolvency proceedings usually rely on the liquidation of some assets to satisfy creditors, or a repayment plan between the creditor and the debtor allowing for a rescheduling of the payments. In many systems this presupposes that there are some realisable assets to be drawn upon for the creditors or a regular income to set up payments to extinguish the debt according to the plan. NINAs/LILAS remain outside these systems because neither of these procedures may be appropriate for them.

[76] Regulation 2015/848 Article 1(1)(a).
[77] Regulation 2015/848 Article 1(1)(b).
[78] Regulation 2015/848 Recital 10.
[79] Regulation 2015/848 Recital 16.
[80] E.g. the proceedings in the France, Sweden, Austria, Germany Belgium, Estonia, and Denmark. See Kilborn, "Two decades, three key questions, and evolving answers in European consumer insolvency law. Responsibility, discretion, and sacrifice" (2009).

The other provisions applicable to consumers under the Recast Regulation relate to the improvement of the co-ordination of insolvency proceedings within the EU, the equitable treatment of creditors, and the minimisation of 'forum shopping' (including the movement of assets from one country to another to take advantage of a more favourable legal position). For individuals who do not carry on an independent business or professional activity, COMI is to be presumed to be the place of the individual's 'habitual residence', unless this altered during the last six months, in which case the presumption does not apply.[81] As explicated in the Recitals, it should be possible to rebut the presumption, for example where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence, or where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation.[82] Evidence about the location needs to be given, and is strengthened under Article 4, which requires the Court, of its own accord, to examine whether it has jurisdiction and to specify the grounds on which jurisdiction is based. However, the requirement of 'habitual residency' remains unclear, especially in those circumstances when an individual moves to another Member State and the continuity or stability of such a move needs to be determined. Once again, the emphasis given to COMI relocation seems to be far removed from the reality of millions of over-indebted vulnerable consumers.

Moreover, like its predecessor, the Recast Regulation neither attempts to harmonise substantive provisions nor aims to tackle divergences or inconsistencies between proceedings under national law.

Mutual recognition and private international law are legal tools usually employed within the EU when it is difficult for Member States to reach agreement on substantive laws. In this sense, they have both been portrayed as a fall-back or ancillary position where harmonisation cannot be achieved.[83] On the basis of what has been discussed so far, this also seems to be the approach taken in relation to personal insolvency legislation.

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[81] Regulation 2015/848 Article 3.
[82] Regulation 2015/848 Recital 30.
[83] A.Mills, *The Confluence of Public and Private International Law*, (Cambridge University Press 2009). See also Council of the European Union, The Hague Programme: strengthening freedom, security and justice in the European Union available at http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf, 31.

Moreover, given the absence of substantive harmonisation, some Member States remain exposed to internal systems that are weak and where coordination may be less than straightforward.

The role of the European Courts in protecting over-indebted consumers

The significance of personal insolvency proceedings to promote legitimate social and economic objectives finds early recognition in the jurisprudence of the ECHR in *Bäck v Finland*,[84] which takes a human rights perspective vis-à-vis the right of property of the creditor. Although the Court stated that there must be limits to safeguard property rights if there is an excessive burden on the creditor, it established that restrictions to property rights are justified by a general public interest served by the national insolvency law.

This approach sets an international precedent in affirming a balance between the creditor's rights and debt discharge, taking away the private approach to the underlying relationship and expanding it to a broader issue of social welfare and human dignity.

The 2008 economic crisis has exacerbated the latter aspect with over-indebtedness growing exponentially. In its wake, the case-law of the CJEU has shown a surge in litigation grounded in the dated unfair contract terms legislation (UCTD)[85] applied to procedures relating to credit agreements of consumers in financial distress.

The 'Spanish saga' takes stock of the situation and the way the UCTD has been used in national procedural law to protect over-indebted consumers. Significantly, Spain did not have legislation in place for debt solutions or the insolvency of individual debtors.

From its jurisprudence in *Océano Grupo*,[86] *Penzügyi*,[87] and *Invitel*[88] the CJEU has developed a doctrine of procedural effectiveness of unfair terms, obliging national judges to undertake an investigation to assess the effective protection of consumers.

In *Aziz*[89] Spanish procedural law was found to breach EU law because it failed to provide for the assessment of a court with regard to the unfairness of standard terms in a mortgage

[84] Application n. 37598/97 of 20 July 2004.
[85] Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts ,OJ 1993, L 95/29
[86] *Océano Grupo* (C-240/98) [2000] ECR I-4963.
[87] *Penzügyi* (C-137/08) [2010] ECR I-0000.
[88] *Invitel* (C-466/11) EU:C:2012:242

contract, or offer interim relief. Particular reference was made to the impossibility of suspending mortgage execution proceedings, as a result of which the debtor could have been evicted from his property before a court could give a judgment on the fairness of the lender's standard mortgage terms. As a result, national law was amended to repair the legal flaws concerning the enforcement of mortgage contracts.[90]

Later, in *Sánchez Morcillo*[91] it was held that the amended Spanish procedural law still fell short of the standards required under the UCTD for leaving to the discretion of the national court the assessment of the unfairness of the relevant terms. Moreover, the law did not grant consumers the same procedural defences accorded to lenders.

Unicaja Banco and *Caixabank*[92] confirmed the trend of Member States having to ensure that over-indebted consumers are protected and not bound by unfair clauses in credit agreements. The question referred by the Spanish courts asked whether they should declare unfair clauses regarding default interest rates higher than those set by law, void and not binding on the consumer, or whether they should adjust the clause to the statutory limits instead. Article 6 UCTD provides that unfair terms should not be binding on consumers, who nevertheless remain bound by the other terms of the contract, if it is possible for a binding and enforceable contract to remain in existence without the excluded unfair term. At the same time, EU law does not authorise national courts to revise the content of the unfair term, as affirmed in case-law[93] where the contract before the CJEU contained the term "must continue in existence, in principle, without any amendment other than that resulting from the deletion of the unfair terms, in so far as, in accordance with the rules of domestic law, such continuity of the contract is legally possible".[94] However, in *Kasler*[95] it was agreed that the contract could not subsist without the unfair clause and, given the negative consequences this would have had on the consumer, the CJEU held that the national court was allowed to replace the unfair term with a supplementary provision of national law.

Against this legal background, the referred issue raised difficult questions because the continuing existence of the mortgage contract might have been under threat if the lenders no

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[89] *Aziz v. Catalunyacaixa* (C-415/11) EU:C:2013:164.

[90] Lei 1/2013 amending Article 695 of the Spanish Code of Civil Procedure.

[91] *Sánchez Morcillo y Abril García v Banco Bilbao Vizcaya Argentaria SA* (C-169/14) EU:C:2014:2099.

[92] *Unicaja Banco, SA v José Hidalgo Rueda and others* and *Caixabank SA v Manuel María Rueda Ledesma and others* (Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13) EU:C:2015:21.

[93] See *Banco Español de Crédito* (C-618/10) EU:C:2012:349; *Asbeek Brusse and de Man Garabito* (C-488/11) EU:C:2013:341.

[94] *Unicaja Banco* and *Caixabank* (Joined Cases C 482/13, C 484/13, C 485/13 and C 487/13) EU:C:2015:21, para 28.

[95] *Kasler* (C-26/13) EU:C:2014:282.

longer received interest payments, arguably an essential part of the mortgage agreement.[96] Nevertheless, the CJEU held that national law is compatible with EU law provided it enables national courts' to hold that unfair terms are not binding on the consumer, but without having to revise the term's content,[97] thus effectively offering protection to the affected consumers.

Again, in *BBVA SA v Lòpez et al*[98] the CJEU persisted in the reinforcement of the protection of the over-indebted consumer. With reference to cases in which enforcement proceedings were pending and no unfair terms control had been exerted under the procedural rules in place before the *Aziz* case, the new Spanish law granted consumers a one-month period from its publication to bring an action based on the unfairness of a contractual term. The CJEU found that the transitional provision did not guarantee the effective exercise of the new right.

The 'Spanish saga' is not yet set, with a recent opinion of the Advocate General in *Finanmadrid EFC SA*[99] reinforcing the move towards protecting the over-indebted consumer. Moreover, new preliminary references have already been filed. They challenge other aspects of Spanish procedural law on similar grounds of unfairness,[100] and they herald a new approach in testing the compatibility of the law with the principle of effective judicial protection, as affirmed in Article 47 of the Charter of Fundamental Rights of the European Union.[101]

The case-law suggests a new, more activist (constitutional) approach by the CJEU,[102] with the judiciary setting out to supplant the legislator(s) in both policy and law making. Wherever a Member State and the EU have failed to put in place measures to provide for the insolvency of over-indebted consumers, the CJEU has been described as engaging in a form

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[96] *Unicaja Banco* and *Caixabank*, (Joined Cases C 482/13, C 484/13, C 485/13 and C 487/13), Conclusions of the Advocate General Whal (16 October 2014) EU:C:2014:2299.
[97] *Unicaja Banco* and *Caixabank* (Joined Cases C 482/13, C 484/13, C 485/13 and C 487/13) EU:C:2015:21.
[98] *BBVA SA v Lòpez et al* (C-8/14) EU:C:2015:731.
[99] *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and others* (C-94/14) EU:C:2015:723. The AG finds it against EU law national legislation not providing for the judge of the execution the possibility to declare *ex officio* abusive clauses void and not binding for the consumer.
[100] Request for a preliminary ruling from the Audiencia Provincial de Cantabria (Spain) lodged on 7 August 2015 — *Liberbank S.A. v Rafael Piris del Campo*, (C-431/15) Application: OJ C 354 from 26.10.2015, p.21.
[101] Request for a preliminary ruling from the Audiencia Provincial de Illes Balears (Spain) lodged on 16 July 2015 — *Francisca Garzón Ramos and José Javier Ramos Martín v Banco de Caja España de Inversiones, Salamanca y Soria, S.A., Intercotrans, S.L.*, (C-380/15) OJ 2014/C 380/03.
[102] See H.W.Micklitz, "Unfair Contract Terms – Public Interest Litigation before European Courts. Case C-415/11 Mohamed Aziz" in E.Terryn, G.Straetmans, and V.Colaert (eds) *Landmark Cases of EU Consumer Law - In Honour of Jules Stuyck* (Cambridge: Intersentia 2013), p. 633; O.Gerstenberg, "Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts", (2015) 21 *European Law Journal* 599.

of social engineering which compensates for the deficiencies of the institutions pre-established by law.[103]

An incoherent EU legal framework: towards EU principles or back-door harmonisation of personal insolvency law?

Inconsistencies in the EU legal framework

Insofar as the case-law of the CJEU contributes towards the provision of remedies for over-indebted consumers at EU level, it arguably does so via procedural rather than substantive means. This case-law could now be read in conjunction with *Radziejewski*[104] which is the CJEU's first, and so far only, jurisprudence on personal insolvency proceedings and the potential negative effects of national remedies on the internal market. The case establishes that national insolvency procedures for natural persons may be restrictive of the fundamental free movement rights of the EU. It dealt with 'residency' as a requirement for access to the national insolvency procedure and its compatibility with Article 45 TFEU on the free movement of persons. The CJEU, recalling its jurisprudence in *Olympique Lyonnais,*[105] noted that national provisions which preclude or deter someone from leaving his country of origin in order to exercise his right to freedom of movement constitute restrictions on that freedom, even if they apply regardless of the nationality of the workers concerned. Therefore, it found that national law which makes the grant of debt relief subject to a condition of residence in that Member State is unlawful under EU law.

This element may have far reaching consequences, as 'habitual residence' forms the basis of jurisdiction in national insolvency laws and it is at the heart of the Recast Regulation, as already noted.[106]

To the extent that *Radziejewski* enables national law to be altered so as to ensure compatibility with EU law, the impact on the Recast Regulation may be that of frustrating

[103] H.W.Micklitz, "Conclusions: Consumer Over-Indebtedness and Consumer Insolvency – from Micro to Macro", in Micklitz and Domurath (eds), *Consumer Debt and Social Exclusion in Europe* (2015), p. 229; D.Kelman, *The Transformation of Law and Regulation in the European Union* (Cambridge:Harvard University Press, 2012).
[104] *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm* (C-461/11) EU:C:2012:704.
[105] *Olympique Lyonnais* (C-325/08) EU:C:2010:143.
[106] Regulation 2015/848 Article 3.

its *ratio* over COMI alongside the EU legislator's principal concern over forum shopping. In the absence of a definition of 'habitual residence', in its former jurisprudence on unrelated EU law the CJEU has affirmed that 'habitual' requires a certain permanence or regularity, making reference to the *ratio* of the Regulation under discussion.[107] Nevertheless, the absence of a specific authoritative interpretation by the CJEU is likely to create inconsistency and therefore uncertainty in the EU legal framework.

Comment [D1]: I am struggling to work out what you are trying to say here so will need ot keep thinking about it, or you may be able to express it better yourself.

Other shortcomings exist in the EU legal framework examined so far.

The CJEU jurisprudence that deals with the procedural control of fairness - though significant in plastering problematic situations emerging from a legal vacuum in the treatment of over-indebtedness – has limits, especially in the large majority of such cases where there are no unfair standard terms to be contested. This occurs most frequently, where, under the UCTD, the assessment of fairness of a term cannot be related to the definition of the main subject matter of the contract or to the adequacy of the price or remuneration.[108] For example, this explains the overriding failure of attempts to use the UCTD to challenge mortgage agreements in foreign currencies that has created so many problems in a number of countries. Moreover, providing consumer protection through procedural means is difficult, as it depends, to a large extent, on over-indebted consumers having both the capacity and resilience to seek enforcement of their rights.

Another major gap in the law is in dealing with consumers with little or no assets (the NINAs and LILAs). This often affects over-indebted consumers, who are in that situation precisely because they have no other means of discharging their debts. Although the substantive laws of the Member States are very different, many countries, which focus on the fair treatment and satisfaction of creditors, exclude this kind of debtor from insolvency proceedings precisely because of the impossibility of setting up a repayment plan. Similarly, the Recast Regulation is explicit in excluding them from its scope, even under legislation allowing for the writing-off of such debts.[109] This exclusion arguably infringes the free movement of those vulnerable consumers who, after the economic crisis, have shown a tendency to move to other EU countries to escape the lack of jobs or austerity in their home Member State.

[107] *Mercredi v Richard Chaffe*, (C-497/10) EU:C:2010:829 on Council Regulation 2201/2003 concerning jurisdiction and the recognition of judgements in matrimonial matters and parental responsibilities.
[108] UCTD Article 4.
[109] Regulation 2015/848 Recital 16.

The surfacing of EU principles?

Despite substantive differences in national laws and reliance on mutual recognition, some broad-contour principles have started to emerge at EU level, boosted in particular by the emergency caused by the economic crisis. 'Soft law' instruments of the EU have encouraged Member States to follow basic principles in the enactment of national laws. Also, as the EU and other international organisations, such as the IMF and the World Bank, have contributed to the framing of national laws of the Member States in need of financial assistance,[110] it appears that some form of alignment of the basic features of modern personal insolvency regimes has started to emerge.

(a) Recommendation CM/Rec(2007)8

Recommendation CM/Rec(2007)8 focuses specifically on consumer over-indebtedness. It acknowledges the development of the consumer credit market and the increased debt problems caused by more lending. In recognising the scale of the matter, it addresses the social and health problems of the over-indebted, as well as their social exclusion. At the same time, however, it stresses the responsibility of the Member States for the effects of their economic and social policies.

The Recommendation is explicit in leaving the regulation of consumer debt solutions to the national laws of the Member States. Nonetheless, it recommends that Member States take appropriate measures to alleviate the effects of debt recovery by providing an efficient and unbiased enforcement system that also ensures respect for the debtor's rights and human dignity, (e.g. through the introduction of enforcement alleviation procedures that include measures designed to protect the essential assets of the debtor and his basic living needs).[111] However, these are merely principled recommendations, not legally binding on the Member States, and in that respect fall short of any attempts to harmonise the substantive laws of Member States.

In line with Regulation 1346/2000, in force at the time, it confirms the principle of mutual recognition by recommending the recognition and enforcement in Member States of

[110] E.g. see the IMF involvement in Latvia, Romania, Spain, Greece, Hungary, Ireland and Portugal. The international dimension is comprehensively documented in I.Ramsay, "Two Cheers for Europe: Austerity, Mortgage Foreclosures and Personal Insolvency Policy in the EU" in H.Micklitz and I.Domurath (eds), *Consumer Debt and Social Exclusion in Europe* (2015), p.189.

[111] Recommendation CM/Rec(2007)8 of the Committee of Ministers to member states on legal solutions to debt problems (Adopted by the Committee of Ministers on 20 June 2007), 3a-c.

payment judgments and repayment plans emanating from the competent authorities in other Member States.[112]

(b) The 2014 Commission Recommendation

The latest Commission Recommendation[113] on business failure and insolvency has emerged from the proposal stage of the lengthy process of the reform of Regulation 1346/2000, which ended with the later adoption of the Recast Regulation. In this sense, it can be considered an evolution of the latter.

The 2014 Recommendation aims to tackle discrepancies in preventive procedures promoting the rescue of economically viable debtors. Its objective is to ensure that viable enterprises in financial difficulty have access to national legislation enabling them to restructure as early as possible, thereby giving them a second chance. Although, officially, it does not apply to situations of consumer over-indebtedness and insolvency, it nevertheless invites Member States "to explore the possibility of applying these recommendations also to consumers, since some of the principles *(…)* may also be relevant for them".[114]

The rationale behind the Recommendation lies in the inconsistencies between national restructuring frameworks and the national rules that give honest entrepreneurs a second chance. These discrepancies are likely to fragment conditions of access to credit and result in different recovery rates for creditors depending on the jurisdiction. This generally leads to increasing costs and uncertainties that dis-incentivise investments in other Member States or cross-border activities. Therefore, measures that encourage Member States to put in place national systems for restructuring and/or to enable honest entrepreneurs to re-enter the market also aim to create a level playing field and a smoother functioning of the internal market.[115] The recommended minimum standards encourage the availability of a preventive restructuring framework as soon as the likelihood of an insolvency becomes apparent. They request that a procedure is put in place to suspend enforcement actions, facilitate out of court negotiations, adopt a restructuring plan later confirmed by a Court binding on all creditors, and protect new financing necessary for the implementation of the restructuring plan.[116] Similarly, other recommended minimum standards are in the second chance given

[112] Recommendation CM/Rec(2007)8.
[113] Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency, C(2014) 1500 final.
[114] Commission Recommendation of 12.3.2014 Recital 15.
[115] Commission Recommendation of 12.3.2014 Recitals 4, 8-11 and Article I.
[116] Commission Recommendation of 12.3.2014 Article III A-D.

to entrepreneurs, that allow for the full discharge of the debts included in a bankruptcy procedure after a maximum of three years, with the warning of the inappropriateness of discharges after a longer period. The recommendation seeks to balance these standards by advocating the desirability of having in place stringent provisions that discourage actions carried out dishonestly, in bad faith, or non-compliance with the plan.[117]

However, these soft-law instruments do not bind the Member States. In particular, the provisions of the Recommendation are of a very general nature and, when it comes to consumer over-indebtedness proceedings, they are limited to a Recital with 'an invitation to explore a possibility'. This falls far short of suggesting at which stage of the default process EU action is needed, or even what type of action should be taken. Nevertheless, such recommendations arguably represent a step further in the definition of common EU macro-principles alongside those set by the jurisprudence of the CJEU in respect of procedural fairness and of the ECHR on the public interest served by insolvency law.[118]

What emerges from a general assessment is that modern systems seem to depart from the punitive models of dealing with insolvency that were characterised by the enforcement of national moral codes of conduct alongside the steadfast protection of creditors' interests. Instead, they seem to be heading towards a more balanced or equitable allocation of the risk of default between creditors and debtors in a transparent and predictable manner. One illustration of this is in enabling innocent debtors to return as viable economic actors after a reasonably short period of three years. To ensure the 'fresh start', presupposes a principled, automatic and temporary stay on enforcement actions followed by the establishment of repayment terms that accurately reflect the debtor's capacity to repay, whilst at the same time ensuring adequate safeguards are in place to protect creditors' interests.

The establishment of appropriate filing criteria, (allowing innocent debtors access to fair procedures), and the minimisation of system abuses, completes the emergence of a picture,

[117] Commission Recommendation of 12.3.2014 Article IV.

[118] According to the European Commission, the Recommendation has provided useful focus for some Member States which have undertook reforms in the area of insolvency. E.g. Spain, Hungary, Croatia, and Romania have improved their personal insolvency regime. However, Spain did not follow the Commission's recommendation on limiting the discharge periods for honest debtors. In Lithuania discussions on the personal insolvency laws are being discussed, while in others Member States consideration is still being given to whether any specific action is necessary following the Recommendation, e.g. in Sweden a special committee was appointed to look at the need to adapt national legislation in the light of the Recommendation; and in the UK a public consultation has been carried out recently. See 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 (30 September 2015), from http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm.

that relies on the principle of mutual recognition of foreign proceedings and cross-border cooperation.[119]

Harmonisation through the back-door of the CMU: from principles to rules?

Although it can be maintained that the EU is moving towards some common basic principles, the significant differences between the substantive insolvency laws of the Member States, are likely to create obstacles, difficulties, and/or competitive advantages or disadvantages, especially for companies with cross-border activities.[120] This is not a matter of consumer protection or social welfare but of integration or strengthening of the internal market. It is a market perspective from the viewpoint of creditors.

It is in this context that the establishment of the Capital Markets Union (CMU) has become a new political priority for the EU. It is an initiative part of, and designed to give effect to, the free movement of capital, which is one of the (often neglected) fundamental freedoms of the EU. Its main aim is the funding of the EU economy through the creation of a single market for capital by removing barriers to cross-border financing and investments.

The creation of the CMU touches upon many areas of law, including insolvency law generally and personal insolvency proceedings in particular,[121] and is likely to lead to a potential inundation of harmonisation proposals that could haunt the EU legislator(s) for years.

Although the targets of the CMU are mostly small and medium enterprises (SMEs), consumers are included. The rhetoric of the European Commission advocates that a CMU should move towards a situation where SMEs can raise finance as easily as large companies, and lenders are able to provide capital to SMEs and consumers cross-border: that seeking or providing finance in another Member State should not be impeded by legal or supervisory barriers. According to this view, effective levels of consumer and investor protection become priorities to ensure trust in capital markets across borders.[122]

[119] See also Liu and Rosenberg, "Dealing with Private Debt Distress in the Wake of the European Financial Crisis - A Review of the Economics and Legal Toolbox" (2013).
[120] INSOL Europe, *Harmonisation of Insolvency Law at EU level* (European Parliament, Direcorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 2010).
[121] European Commission, Green Paper – Building a Capital Market Union, COM(2015) 63 final; European Commission Green Paper on Financial Services and Insurance. Better products, more choice, and greater opportunities for consumers and businesses, COM(2015) 630 final.
[122] Green Paper – Building a Capital Market Union (2015).

In short, the CMU would require the removal of barriers for capital providers to supply credit cross-border, as well as for consumers, who should become confident in accessing capital across borders. Under the current regime, to the extent that consumers may receive the protection afforded by EU law or the law of their home country (depending on the stage and situation of the financing relationship), lenders, by contrast, face risks and costs where EU law does not provide a cohesive framework. The diversity - and in some cases the inadequacy - of national insolvency laws would make it difficult for foreign investors to assess the risks and consequences of dealing with 28 different legal systems, a circumstance that would lead to low recovery rates or costly procedures for creditors. Cross-border capital provision and investments by companies would, at best, become unattractive, exorbitant, or both; or at worst, would no longer be feasible.

In such cases, only the elimination of uncertainties to the supply-side, through the reduction of divergences, would contribute to the emergence of a CMU, in turn benefiting consumers on the demand-side. Thus, to the extent that the supply-side is provided with a cohesive and potentially favourable environment for debt solutions, it may be encouraged to open-up capital access to foreign consumers and SMEs.

From this perspective, the mutual recognition of insolvency proceedings may be a potential barrier, incompatible with an effective CMU as the expression of the fundamental EU principle of free movement of capital. In attempting to achieve the institutional goals of the EU, maintaining broad principles or the 'common cores' of national laws is likely to result in the lowest point of possible convergence among the Member States. Instead, the CMU is likely to reject the use of such principles to fill in the gaps in EU law, and it may require an obligation to achieve legal harmonisation through positive rules.

Under these circumstances, the real challenge for effective consumer protection would become the origin and design of the law. Some principles already derive from the common cores, soft law, and CJEU jurisprudence outlined above, whilst other guarantees would derive from the Charter of Fundamental Rights, which sets out the basic rights that must be respected both by the European Union and the Member States when implementing EU law.

Concluding Remarks

This paper examined the type and appropriateness of the responses of the law in dealing with over-indebted consumers and their insolvency in the context of the integration of EU retail financial markets.

Over-indebtedness is a complex structural phenomenon, further complicated by liberalised and expanded European credit markets, that predominantly has its roots in events external to the credit relationship. Behavioural factors of the creditor or the debtor - such as the mismanagement of resources, irresponsible lending or borrowing, or unfair practices - seem to play a secondary role in the large number of cases of financial difficulty.

Yet, at EU level, the policy and legal measures adopted concentrate on the prevention of behavioural causes of over-indebtedness. The EU has already affirmed competence in consumer credit and mortgage legislation under the rhetoric of delivering a responsible credit market which encourages competition, innovation and choice. By contrast, dealing with the intertwined situation of consumer defaults and insolvencies – the other side of that same credit market – has been left to the uncoordinated competence of national legislators. Whether this approach is justifiable, it is open to debate. The result is a fragmented EU legal framework with substantive differences in the treatment of over-indebtedness and personal insolvency legislation, where EU law only provides for the legal instrument of mutual recognition to ensure clarity over procedural and jurisdictional rules in cross-border matters. The combination of traditional moral factors, political resistance, and claims of subsidiarity, used to explain this multi-level division of competence between the EU and the Member States. Today, this stance is becoming increasingly difficult to justify in light of the interdependency between the market on the one side, and welfare and social concerns on the other. The economic crisis has exposed the inseparable nature between market failure and social concerns. That the same market continues to be regulated inconsistently, despite the intertwined nature of access, inclusion, default, exclusion, and the relationships of cause and effect, is questionable.

If, in principle, preventive measures are deemed desirable - but the principles of responsible lending and borrowing, as administered throughout the EU, do not seem suited to deal with the complex multi-dimensional nature of the problem - it seems that a more coherent and holistic approach, dealing with the effects brought about by the major causes of over-indebtedness, would be desirable. No policy or law, designed to prevent over-indebtedness without ex-post debt solutions, can, on its own, address the problem conclusively.

Even though the CJEU has shown a significant activism beyond the exercise of its traditional function in developing the protection of consumers in financial difficulty, the legal instruments at its disposal have been and remain limited.

Arguably, the procedures available to consumers who default and become insolvent need the same level of attention, not only for the sake of promoting the internal market and consumer protection, but also in terms of providing access to justice and effective remedies. Otherwise, apparent inconsistencies in the current legal framework may create a deadlock to the detriment of stakeholders, whilst political resistance may make it difficult to agree on the content of a law.

Nevertheless, the EU may be guided by some basic binding principles, for example in harmonising the scope of the procedure; the duration of the insolvency; the payment period for debtors who can pay; the liquidation of the debtor's non-exempt assets; the prevention of insolvency misuse; essential debtor obligations; restrictions and disqualifications; stay of individual debt enforcement; the treatment of NINAs/LILAs debtors; and the nature and powers of insolvency officials.

Hence, questions arise as to the future direction of personal insolvency law in the EU, or how much of a future it has – *quo vadis* personal insolvency law?

Following the introduction of 'soft' EU law and the involvement of other international organisations in the design of national personal insolvency legislation in Member States, especially those overwhelmed by the financial turmoil, some broad-contour principles are emerging. Even so, the question remains about EU full harmonisation in an area of law traditionally sensitive.

However, if the increasing integration of EU markets and the economy create a mounting pressure for more substantive harmonisation, this may come through the back-door, prompted by the EU prioritising the CMU and further integration of retail financial services markets. In this context, fragmented national insolvency laws are likely to constitute barriers for the free movement of capital and the free movement of services within the EU. For consumer protection, the challenge will lie in the design of the law, and in this respect, the Charter of Fundamental Rights of the EU and the principles of procedural fairness developed by the CJEU should assist the legislators. But everything else risks being jeopardised by local interests and concerns of the Member States coming from further afield; for example, the harmonisation of insolvency law would indirectly impact on social security strategies that are at the 'hard-core' of the Member States exclusive competence.[123]

Hence one final observation: '*quo vadis?*' may be a tantalizing question to ask when taken from its original biblical context. "*Quo vadis, Domine?*" (Where are you going, my Lord?), asked Peter the Apostle fleeing from Rome and meeting Jesus walking in the opposite direction. "*Eo Romam, iterum crucifigi*" (I am going to Rome to be crucified again), answered Jesus.

What are the chances that the answer for personal insolvency law will be: "*Eo Brussels, iterum crucifigi*"?

[123] E.g. see N.Bolleyer and C.Reh, "EU Legitimacy Revisited: the Normative Foundation of a Multilevel Polity" (2012) 19 *Journal of European Public Policy* 472.