Ensuring effective insolvency procedures of natural persons (entrepreneurs): analysis of the legal regulation of insolvency in the European Union and Ukraine

Abstract

Full discharge of debts, as an outcome of the insolvency proceeding, should enable an entrepreneur to pursue their economic activity onward. This research analyses the implementation of the European Union’s discharge of debt standards into Ukrainian legislation. The article focuses on the comparison of the discharge procedures of natural persons (entrepreneurs) between the Code of Ukraine on Bankruptcy Procedures (CUBP) No. 2597-VIII from 18 October 2018 and the Directive (EU) 2019/1023 on restructuring and insolvency from 20 June 2019. As a result, the author observes that the CUBP maintains a different approach to protecting creditors’ and debtors’ interests in the discharge procedures compared to the Directive (EU) 2019/1023 on restructuring and insolvency. In conclusion, the author proposes approximating Ukrainian legislation to European standards by amending the CUBP.

INTRODUCTION

The importance of the discharge procedure lies in enabling formerly overindebted entrepreneurs to commence their businesses anew. Discharge of debts equips businesses, especially small ones, with a second chance or fresh start at further economic activity. In essence, if debtors who had failed in business could not be discharged from their prebankruptcy debt, this could diminish entrepreneurship and responsible risk-taking (ECHR Bäck v Finland, Case No. 37598/97, 2004). An efficient discharge procedure allows creditors to obtain satisfaction of their claim in a reasonable period, guaranteeing debtors’ stakes on balance.

The regulation of the discharge of debts in the European Union (EU) has been examined by a number of Baltic legal scholars, in particular, by Edvins Draba, Ieva Strunkienė, Mari Schihalejev, Remigijus Jokubauskas and Toomas Saarma. Their research analyses the problems of implementation of the debt discharge requirements under the EU Directive into Baltic States domestic law. Nevertheless, since European standards on the discharge of debts shall be implemented not only by current EU Member States but also by Candidate States to the EU, this topic has become crucial for Ukrainian legal researchers. This article aims to fill the gap in the scientific literature with respect to the implementation of the EU standards on the discharge of debts into Ukrainian national acts. Ukrainian agenda on this matter is based upon the following preconditions.

Firstly, the economic decline caused by the full-scale aggression against Ukraine, launched on 24 February 2022, revealed the vulnerability of a number of households. In February 2022, following the Opendata analytics, 36,632 Ukrainian entrepreneurs terminated their activities (Opendatabot.ua, 2023). Between 24 February and 6 May 2022, as announced by the Ministry of Justice, 57 debtors were declared bankrupt, of which 36 were legal entities and 21 were natural persons (Ministry of Justice of Ukraine, 2022). To return the collapsed business on the economic track, the Code of Ukraine on Bankruptcy Procedures (CUBP) No. 2597-VIII adopted on 18 October 2018 regulates conditions for opening and conducting the insolvency proceedings.

Secondly, the travaux préparatoires of the CUBP indicated the following reasoning for its adoption. Pursuant to the legislator, the previous insolvency regulation had allowed debtors to avoid fulfilling their obligations to creditors, not to mention that bankruptcy procedures were too long and inefficient. The property sale procedure did not allow selling the debtor’s property at the highest price and did not ensure reliable protection of the creditor’s property rights. The domestic market was uncompetitive in the global struggle for financial resources since it did not protect creditors’ interests. The above-mentioned factors stimulated reforming the insolvency domain. By adopting the CUBP, the legislator aimed to achieve (1) reduction of the terms of insolvency procedures, (2) ensuring a significant...
improvement of business conditions in Ukraine, (3) protection of creditors’ interests and (4) reducing the possibility of abuse in bankruptcy procedures (Explanatory note to the CUBP, 2018).

Thirdly, Ukraine intends to join the EU and adopt its legislative acts according to EU standards (Constitution of Ukraine, 1996). Given Article 11(2) of the Ukrainian Law on the principles of domestic and foreign policy, the Ukrainian legal acts shall be approximated to the legislation of the EU. As a country seeking EU accession, the Ukrainian legislator should consider provisions of EU directives due to a requirement imposed by Article 286 of the Treaty on the Functioning of the European Union. The latter prescribes a directive to be binding but leaves the methods of its implementation into national legislation up to each Member State. The EU has recently adopted an act partly dedicated to insolvency issues of entrepreneurs, namely the Directive (EU) 2019/1023 on restructuring and insolvency from 20 June 2019 (hereinafter – Directive). The Directive obliges the Member States to ensure at least one procedure leading to a full discharge of debt for entrepreneurs (Article 20) by implementing this rule into the Member States’ national laws by 17 July 2021 (Article 34). Also, since both the CUBP and Directive have been adopted recently, they need more academic examination, which additionally has induced this research.

The research aims to compare the CUBP and the Directive on aspects related to the discharge of debts available to entrepreneurs. The article examines four relative criteria under the CUBP and the Directive: (1) subjects eligible to request the discharge of debts, (2) requirements to access the discharge of debts, (3) the discharge period and (4) the disqualification period. This structure reflects the framework upon which the Directive is based. In conclusion, possible ways to approximate the CUBP to the Directive are suggested where the CUBP’s approach does not coincide with the Directive.

**RESEARCH RESULTS AND DISCUSSION**

**Subjects eligible to request the discharge of debts**

A stable economy is one of the main commitments of each government, even though such an aim is rather unattainable. Each decade is full of social disasters (pandemics, wars, etc.) that substantially impact the economy, causing inflation, increased interest rates and over-indebtedness. While corporates might resist dire economic straits because of their previous turnovers, capital savings, and shareholders’ contributions, sole traders lack financial instruments to be assisted. Admittedly, the latter takes new loans to repay previous ones, amplifying the debt amount and the number of creditors. While creditors aim to satisfy their claims, debtors pursue to discharge their debts as soon as possible. Article 20 of the Directive imposes the main requirement on the discharge procedure for entrepreneurs. Pursuant to this article, Member States shall ensure that insolvent entrepreneurs have access to a full discharge of debt. Subsequent provisions of the Directive (Articles 21–24) detail further aspects of the discharge procedure.

The notion of ‘entrepreneur’ is defined broadly in the Directive, meaning a natural person who exercises a trade, business, craft or profession (Article 2(1)(9)). The Civil Code of Ukraine perceives an entrepreneur as (1) a natural person conducting entrepreneurial activity, (2) included to the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organisations (hereinafter – Unified State Register), (3) responsible for duties related to entrepreneurial activity with all their property, except for property that cannot be levied according to the law. It has been specified by the Supreme Court of Ukraine in its judgement O. v Delta Bank No. 6-125uc13 from 4 December 2013. The Court clarified that the exclusion of an entrepreneur from the Unified State Register and the consequent completion of their entrepreneurship does not terminate liabilities imposed on them under previously concluded contracts. Obligations remain for them as for a private individual since though the status of an entrepreneur ceases to exist, the natural person status does not. Thus, if an entrepreneur borrows a loan, the latter stays upon termination of the entrepreneurial status for them as for a private individual (consumer).

Both entrepreneurs and consumers are regarded as a natural person. The difference between these statutes lies in the extent and nature of their involvement in the economic domain. The Court of Justice of the European Union characterises an entrepreneur as a natural person who (1) carries out an economic activity independently, (2) bears an economic risk and (3) has a significant influence over their revenue or their expenditure (CJEU IO v Inspecteur van de rijksbelastingdienst, Case C-420/18, 2019). A similar approach is seen in Article 42 of the Commercial Code of Ukraine. Defining ‘entrepreneurship’, the Code names it as ‘an independent, initiative, systematic and risk-taking economic activity conducted by economic entities (entrepreneurs) aimed at achieving an economic and social outcome, and generating profit’. In opposition to Article 20 of the Directive on restructuring and insolvency, a ‘consumer’ is regarded as a natural person acting outside their trade, business, craft or profession in Article 2(1) of the Directive 2011/83/EU on consumer rights. Separation from entrepreneurial activity as a criterion to define consumers is also observed in Article 1(22) of the Law of Ukraine ‘On Consumer Rights Protection’. Providing a broader definition than in the Directive 2011/83/EU, a consumer is recognised as an individual who purchases, orders, uses or intends to
purchase or order the products for personal needs, which are indirectly not related to the business activity or performance of employee’s duties. Consequently, assuming the economy was a ‘tree’, entrepreneurs would be active creators of its ‘fruits’ while consumers would be passive ‘fruits’ collectors. If entrepreneurs are supposed to generate income, consumers spend it on their personal and family needs. Distinguishing the consumer and entrepreneur depends on a person’s inseparability from economic activity, in other words, their functioning inside or outside the economic context.

The Directive does not include binding rules on the over-indebtedness of consumers but recommends that Member States apply the provisions of this Directive concerning the discharge of debts to them too (Rec. 21). Conversely, the CUBP concentrates primarily on consumer insolvency issues rather than entrepreneurial ones. The only provision of the CUBP dedicated to the peculiarities of entrepreneurial insolvency is Article 137. It requires making entries in the Unified State Register upon commencement or termination of an entrepreneurial insolvency procedure. Except for this rule, the essence of insolvency procedures for consumers and entrepreneurs are identical.

The blurring between entrepreneurial and consumer insolvencies in the CUBP might be attributed to the recent introduction of the personal insolvency institute in Ukraine. Before the adoption of the CUBP, the previous Law ‘On Restoring a Debtor’s Solvency or Recognizing It Bankrupt’ allowed insolvency procedures only for legal entities and entrepreneurs, excluding consumers. While adopting a new insolvency law, the legislator switched its emphasis from an entrepreneur to a consumer. It is apparent even from the introductory part of the CUBP. The legislator supports a two-sided manner (legal entity – individual) in the preamble to the CUBP, stating, ‘This Code establishes the conditions and procedures for recovery of the solvency of a debtor – a legal entity […] as well as to recover the solvency of an individual and while defining a ‘debtor’ in the Article 1 of the CUBP as ‘a legal entity or an individual, including an individual entrepreneur’.

From the practical point of view, the consumer insolvency orientation is seen in the list of non-dischargeable debts under the CUBP. Article 134(2) provides an exhaustive list of debt that a debtor shall not be discharged from: (1) compensation for damage caused by injury, other damage to health, or death of an individual, (2) payment of alimony, (3) fulfilment of other claims that are inextricably linked to the identity of an individual. The latter characterises obligations in which the substitution of a debtor is impossible since they cannot be transferred to another third party by their nature (Commercial Court of Ukraine Daniel Bank v Expobank and Others, Case No. 910/10405/14, 2015). In comparison, the Directive suggests a broader list of non-dischargeable debts be established in the national law of the Member States that includes (1) secured debts, (2) debts arising from or in connection with criminal penalties, (3) debts arising from tortious liability, (4) debts regarding maintenance obligations arising from a family relationship, parentage, marriage or affinity, (5) debts incurred after the application for or opening of the procedure leading to a discharge of debt and (6) debts arising from the obligation to pay the cost of the procedure leading to a discharge of debt (Article 23(4)). Quoted types of debt in the CUBP are more attributable to a private person than an entrepreneur. Meanwhile, the Directive encompasses a list plausible to both private individuals and entrepreneurs. The approach maintained in the CUBP omits that the debts of entrepreneurs and private individuals differ in nature. The difference between professional and non-professional debts has been considered in the practice of the Supreme Court of Ukraine in the case Dovhal v Ukrsib Bank No. 922/4404/15 from 04 June 2019. Deciding whether the private house obtained under the mortgage agreement is encompassed by the insolvency estate of an entrepreneur, the Court declared that ‘the inclusion to the insolvency estate and sale by the insolvency practitioner of collateral (mortgage) items to satisfy obligations unrelated to business activity in the entrepreneurial insolvency procedure shall be excluded’. This position emphasises not only the fact that the mortgage loan is a secured debt but also that this loan does not relate to entrepreneurial activity. Given the approach of the Supreme Court, it might be doubted whether debts stemming from consumer relations are discharged in the insolvency procedures of entrepreneurs.

Nevertheless, debts deriving from entrepreneurship and consumption may intertwine. For instance, an entrepreneur might take a mortgage for private reasons but work from the pledged house remotely. The same condition applies to a borrowed personal car that might be used for business purposes (e.g., meeting clients or delivering goods). To tackle this issue, Article 24(1) of the Directive requires each Member State to ensure that professional debts incurred in the course of trade, business, craft or profession, as well as non-professional debts incurred outside those activities, which cannot be reasonably separated, are treated in a single procedure to obtain a full discharge of debt. Additionally, Article 24(2) of the Directive advises treating professional debts and non-professional debts that can be indeed differentiated into separate but coordinated procedures or in the same procedure. Recital 21 of the Directive provides the reasoning for implementing Article 24 in the following way: ‘It is often not possible to draw a clear distinction between the debts incurred by entrepreneurs in the course of their trade, business, craft or profession and those incurred outside those activities. Entrepreneurs would not effectively benefit from a second chance if they had to go through separate procedures,
with different access conditions and discharge periods, to release their business debts and other debts incurred outside their business’.

On the contrary, the CUBP does not contain articles similar to either Article 24(1) or Article 24(2) of the Directive. It is recommendatory to consider the regime suggested by Article 24(2) and to include to the CUBP the provision under which ‘professional and non-professional debts of an entrepreneur shall be treated in the same procedure regardless of the separability of such debts’. There are several reasons to treat professional and non-professional debts together. Firstly, searching for methods to prove the close connection between professional and non-professional debts, prescribed in Article 24(1) of the Directive, might impose an additional burden on a debtor. Entrepreneurs should not be supposed to calculate time dedicated to the profession spent in their pledged houses, other premises, vehicles, etc., to prove that these arrears link to work more closely than to private life. Secondly, professional and non-professional debts are overlapped since an entrepreneur is responsible for duties related to the economic activity with all their property, even if such property belongs to them as to a consumer. Thirdly, it would be doubtful that an entrepreneur encountering solvency issues in their business activity has an impeccable loan history in their consumer status. However, it can be costly to maintain entrepreneurial and consumer insolvency procedures for the same individual simultaneously. If there is no need to initiate two separate procedures for a legal entity since only one encompasses all its debts, the same approach should also apply to a natural person. It will contribute to balancing treatment for entrepreneurs and corporates alongside avoiding additional economic difficulty for financially deprived individuals.

Requirements to access the discharge of debts

The Directive demands to ensure entrepreneurs’ access to at least one insolvency procedure that leads to the full discharge of debts. Meanwhile, the Member States establish precise conditions for entrepreneurs to access the discharge procedure under national legislative frameworks. Though small businesses may face financial struggles periodically, the mere fact of such difficulties only grants the discharge of debts if sole traders comply with specific requirements. The Directive does not regulate insolvency as a condition for opening insolvency proceedings. What is an entrepreneur’s insolvency depends on each Member State’s national legislative provisions.

The discharge of debts might be granted on the basis of the excessiveness of a financial burden that a debtor experiences (debtor-oriented approach). For instance, it can be an extensive amount of debt. Alternatively, the discharge of debts might depend on the extent of a debtor’s commitment to fulfilling their obligations towards creditors (creditor-oriented approach). The example of a creditor-oriented insolvency system is envisaged in Article 20(2) of the Directive, under which a full discharge of debt can be conditional on a partial repayment of debt by the entrepreneur.

The CUBP establishes a debtor-oriented approach specifying in its preamble that this Code ‘aims to recover solvency of a legal entity in order to satisfy their creditors’ claims and to recover solvency of individuals’. The idea of the preamble is to assist a legal entity with solvency and satisfy its creditors’ claims while, for an individual, it would be sufficient only to recover their solvency. An individual’s creditors are ‘bracketed out’ in this equation of interest.

In practice, the grounds for the opening of insolvency proceedings reflect a debtor-oriented approach. Under Article 115(2) of the CUBP, an entrepreneur can apply to the commercial court with a request to open insolvency proceedings if at least one of the following grounds is present: (1) they have stopped repaying loans or making other scheduled payments in the amount of more than 50% of monthly payments for each of the loan and other obligations within 2 months, (2) a resolution has been adopted in the enforcement proceedings on the absence of the individual’s property, which may be subject to foreclosure, or (3) there are other circumstances confirming that in the near future they will not be able to fulfil monetary obligations or make regular current payments (threat of insolvency).

This list of grounds for insolvency proceedings commencement causes several setbacks related to compatibility with the Directive. The first ground stimulates debtors to bad faith conduct, meaning pretending to be insolvent even though debtors can proceed with reimbursement onward. The CUBP provides termination of payments as a ground to open the insolvency proceeding without requiring to establish the objective impossibility of a debtor to satisfy creditors’ claims. To commence an insolvency procedure, entrepreneurs merely need to reduce their monthly payments to a particular amount to all their creditors within several months, regardless of whether the reason for such termination was the inability of a debtor to fulfil monetary obligations (insolvency) or only their intention to obtain the discharge of debts. The CUBP provides no solvency tests to substantiate this ground under Article 115. On the contrary, the Directive determines in Recital 78 that a full discharge of debt can be disallowed if the debtor is dishonest or has acted in bad faith. Additionally, given Article 23(2)(a) of the Directive if ‘the insolvent entrepreneur has substantially violated […] legal obligation aimed at safeguarding the interests of creditors, including the obligation to maximise returns to creditors’, they will be denied or restricted with the debt release.

In essence, good faith shall be perceived as the honesty of a debtor in its statement of being insolvent. As explained in the
Communication from the Commission No. COM/2012/0742, the ‘honest’ failure is a case where the business failure was through no obvious fault of the owner or the manager, i.e., honest and above-board, contrary to cases where the bankruptcy was fraudulent or irresponsible. Therefore, pursuant to the Communication, it is recommendatory to regulate insolvency proceedings for honest and dishonest entrepreneurs separately.

The CUBP, in turn, prescribes good faith conduct for insolvency practitioners while exercising their liabilities in Article 12(3). Also, the CUBP establishes in Article 128(3) a penalty if a debtor violates the restructuring plan. Creditors whose claims are included in such a plan have the right to refer to the commercial court with a petition to close the proceedings or introduce the debtor’s restructuring plan. If the court satisfies one of such petitions, the creditors’ claims, which should have been cancelled (written off) under the terms and conditions of the debt restructuring plan, are restored in full force and effect. It is important to mention that no such penalty is prescribed for a debtor’s violation of a repayment plan. The CUBP does not comprise honesty requirements for a debtor who only requests the commencement of the insolvency procedure. However, the Directive and the Communication attribute the opening of the insolvency proceedings to proving by an entrepreneur that they indeed experience unbearable financial difficulties in order to avoid the abuse of creditors’ property rights.

The second ground, despite its orientation to be an objective insolvency criterion, nonetheless has shortcomings too. It contradicts a debtor-oriented approach declared by the preamble of the CUBP. Also, it contravenes Article 115(1) of the CUBP, which excludes creditors from initiating an entrepreneurial insolvency procedure. Article 115 is supposed to demonstrate that a debtor’s willingness is the only precondition for opening an insolvency procedure. However, a debtor has to wait until creditors commence a civil procedure, the court recognises creditors’ demands, and the judgment is not enforced. The debtor’s discharge depends on the creditor’s effort to reimburse claims that contravene both parties’ interests. Moreover, instead of applying for insolvency and seeking assistance from an insolvency practitioner, who specialises in maintaining assets in financial difficulties, an entrepreneur has to wait until the situation becomes so critical that they have no property to pay their loans off. It would be impossible for an insolvency practitioner to comply with their obligation to ‘form an insolvency estate’, defined by Article 114(2)(6), if there is nothing to form from. Besides, the absence of any property on a debtor’s side worsens the position of creditors in the insolvency procedure. In contrast, the need to balance the interests of both debtors as well as of their creditors is highlighted in several provisions of the Directive (e.g., Article 20(2), Article 23(2)(a), Rec. 78) and, also supported by the European Court of Human Rights in the case Bäck v Finland (Para. 67).

Turning to the third ground, a requirement of ‘other circumstances’ lacks detachment making the opening of insolvency procedures susceptible to a broad discretion of the commercial court rather than to some objective criteria like the balance sheet test or the cash flow test.

There was an additional monetary barrier in the CUPB to access insolvency procedures for entrepreneurs as the amount of overdue obligations not less than 30 minimum wages. It was excluded from the CUPB on 20 March 2023. Nevertheless, such a threshold is still relevant in the number of EU Member States. For instance, Lithuanian insolvency law requires that the overdue total debt exceeds 25 minimum wages (currently, it is €21,000), while Latvian – €5,000. Similar to Ukraine, in Lithuania and Latvia, only a debtor has the right to initiate bankruptcy proceedings and creditors lack such right (Schihalejev et al., 2021). Estonian experience demonstrates a different approach, and the minimum threshold amount is applicable only if creditors submit a bankruptcy petition with claims exceeding €1,000. Should a debtor request an opening of the insolvency procedure, the total amount of the creditors’ claims is irrelevant. Neither of the listed Member States requests the limitation of payments to a certain extent to all creditors to commence insolvency proceedings as the CUBP determines. Unlike in Ukraine, in Estonia, the presence of an unsuccessful execution proceeding is relevant only in case creditors submit a bankruptcy petition (not a debtor).

In Lithuania and Latvia, access to insolvency depends on cumulative conditions such as a certain amount of total overdue debt alongside the inability of a debtor to cover these debts with their assets (the balance sheet test) or income (the cash flow test). In Estonia, it is only sufficient that the debtor substantiates the cause of the insolvency and provides a list of debts. Noteworthy, in all Baltic states’ insolvency regulations, the debtor’s good faith is required (Schihalejev et al., 2021), as it is also required in the Directive.

In order to approximate the CUPB to Articles 20(2), 23(2)(a) of the Directive and legal regulation of other EU Member States, it is advisable to substitute current grounds in the CUPB with more flexible and predictable for a debtor and creditors. It could be cumulative conditions such as the amount of overdue debt alongside the balance sheet or cash flow test. Besides, a debtor’s lack of abusive conduct and good faith in applying for insolvency shall also be prioritised in the CUBP.

**Discharge period**
Individuals should not fear insolvency but consider this procedure a second chance in their entrepreneurial future. The long-lasting and bureaucratic insolvency procedure is the opposite of an effective one. Therefore, the Directive demands a 3-year term of the insolvency procedure, upon completion.
of which an entrepreneur has no obligations towards their creditors anymore. Pursuant to Article 21 of the Directive, Member States shall ensure that the period after which insolvent entrepreneurs are able to be fully discharged from their debts is no longer than 3 years starting at the latest from the date of either: (1) in the case of a procedure that includes a repayment plan, the decision by a judicial or administrative authority to confirm the plan or the start of the implementation of the plan; or (2) in the case of any other procedure, the decision by the judicial or administrative authority to open the procedure, or the establishment of the entrepreneur’s insolvency estate. There is no indication in the Directive why a 3-year period should be the maximum period for the discharge procedure. However, the travaux préparatoires of the Directive indicate that one of the main goals of the Directive was to reduce the period of discharge since shorter discharge periods are linked to improved entrepreneurship (Jokubauskas, 2023).

The path to debt release for an entrepreneur, according to the CUBP, contains three stages with definite and indefinite periods: (1) restructuring of debts (maximum period of 5 years), (2) repayment plan (the CUBP does not prescribe maximum period), (3) adjudication of an entrepreneur bankrupt and their discharge of debts. The first stage is obligatory, which can be attributed to the primary objective of the CUBP to save an individual’s solvency and avoid bankruptcy. According to Article 124 of the CUBP, the restructuring plan, aiming to recover a debtor’s solvency, might contain provisions on the change in methods and procedures for the fulfilment of obligations, the extension or postponement of payments, cancellation (write-off) of debts, the fulfilment of the debtor’s obligations by third parties, etc. Given Article 130 of the CUBP, if within 120 days from the date of opening of insolvency proceedings, a creditors’ meeting: (1) has not approved a debtor’s restructuring plan, or (2) has decided to proceed to a debtor’s repayment procedure, the commercial court shall introduce the repayment plan. Afterwards, following Article 134 of the CUBP, the commercial court grants the discharge of debts to an entrepreneur upon completion of the repayment plan by the latter.

Such a scheme has several contradictions to the Directive. Firstly, the CUBP declares the maximum period of the restructuring procedure as 5 years but does not establish a maximum period for the repayment plan. As a result, the moment of the debt discharge is unpredictable for an entrepreneur. Secondly, the Directive requires balancing creditors’ and debtors’ interests. However, creditors are indeed willing to satisfy their claims rather than to allow a debtor to undertake the restructuring procedure with postponement of payments, cancellation of debts and similar consequences. Therefore, a creditors’ meeting is more likely to disagree with a restructuring plan. Article 130 of the CUBP grants more rights to a creditors’ meeting while deciding on a restructuring plan and does not take into account a debtor’s weaker position.

To improve the compliance of the CUBP with Article 21 of the Directive, it is advisory (1) to narrow the period of the repayment plan up to 3 years under the CUBP and (2) to amend Article 130 of the CUBP by obliging the commercial court to consider the position of a debtor while deciding on commencement of the repayment procedure.

**Disqualification period**

In December 2012, the European Commission released an official Communication COM/2012/0742 implicitly calling for abandoning the historical, punitive approach to business insolvency. The Commission asserted that modern insolvency law in the Member States should help sound companies to survive and encourage entrepreneurs to get a fresh start. The second chance (fresh start) to individual debtors should be provided through timely discharge of unpaid debt and a minimum of restrictions on post-discharge activity (Kilborn, 2016). Continuing this tendency, Article 22(1) of the Directive stimulates entrepreneurs to restart their businesses from scratch. By this article, the Member States shall ensure that, where an insolvent entrepreneur obtains a discharge of debt, any disqualifications from taking up or pursuing a trade, business, craft or profession on the sole ground that the entrepreneur is insolvent cease to have effect, at the latest, at the end of the discharge period. Thus, upon completion of the discharge period, an entrepreneur should continue conducting business without being burdened by any restrictions related to former insolvency issues.

The CUBP formally does not prohibit being economically active upon completion of the discharge procedure. However, the CUBP imposes several negative consequences on entrepreneurs. Given Article 135(2) of the CUBP: (1) within 5 years after an individual has been recognised as bankrupt, before concluding loan, credit, surety or pledge agreements, such a person is obliged to notify the other parties to such agreements in writing of the fact of his/her insolvency, and (2) an individual cannot be considered to have an impeccable business reputation for 3 years after being recognised as bankrupt. Since an entrepreneur has already undergone the repayment procedure and has been released from their debts, such restrictions have a rather punitive nature.

Following the first consequence, it cuts an entrepreneur from sources of further financing. Insolvency issues of an entrepreneur in the past become a red light for their investors within the succeeding 5 years. Besides, it might be felt due to the requirement under the CUBP to make entries in the Unified State Register that an entrepreneur has been insolvent (Article 137). The legislator does not clarify when such entries should be excluded from the Register, imposing
The CUBP has a different approach in comparison with requirements imposed by the Directive (EU) 2019/1023 on restructuring and insolvency. Firstly, the Directive suggests that Member States treat professional and non-professional debts of entrepreneurs in the same insolvency procedure, whilst the CUBP does not contain a similar provision. Secondly, the Directive prescribes a good faith test for a debtor to apply for insolvency, but the CUBP formally attributes a good faith obligation only to an insolvency practitioner in the exercise of their duties. Also, the peremptory idea of the Directive is to balance the interests of creditors and debtors, while the CUBP deems its provisions as debtor-oriented. Thirdly, the Directive establishes a 3-year maximum period for the repayment plan, whilst the CUBP does not provide any time brackets for it. Fourthly, the Directive calls for the abandonment of all restrictions on economic activity conduct for an entrepreneur after the discharge of debts; however, the CUBP requires an entrepreneur to inform their future creditors about the former insolvency issues within 5 years after the discharge of debts and announces an entrepreneur’s business reputation as peccable within 3 years upon the discharge of debts. Since Ukraine intends to join the EU and adopt its legislative acts according to EU standards, an approximation of the CUBP with provisions of the Directive is advisable. To accommodate the rules on discharge procedure under Ukrainian law to the Directive, the following amendments might be considered (1) to include the provision to the CUBP under which professional and non-professional debts of an entrepreneur shall be treated in the same procedure regardless of the separability of such debts, (2) to exclude current grounds for insolvency application for entrepreneurs under the CUBP and substitute them with more predictable for creditors and debtors as the amount of overdue debt, the balance sheet or cashflow test, alongside to include a requirement on the lack of abusive conduct of a debtor and its good faith in applying for insolvency, (3) to narrow the period of the repayment plan up to 3 years under the CUBP and (4) to exclude from the CUBP limitations imposed on an entrepreneur after the discharge period.

REFERENCES

Commercial Court of Ukraine, Daniel Bank v Expobank and Others, Case No. 910/10405/14, 10.03.2015.  
Court of Justice of the European Union, IO v Inspecteur van de rijksbelastingdienst, Case C-420/18, 13.06.2019.  
