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RECONCILING A FRESH START WITH PERSONAL DATA: THE CHALLENGE OF EU INSOLVENCY DISCHARGE

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ABSTRACT

Designed to provide a fresh start, the discharge procedure relieves debtors of pre-bankruptcy debts, allowing them to resume economic activity. Attainment of this aim is also linked with the processing of the debtor's personal data during and even after the discharge procedure is completed. The processing of the debtor's personal data in the discharge procedure is subject to the general rules of protection of personal data in the European Union law. This article analyzes what the legal basis for processing of debtor's personal data is during and after the discharge procedure. It also deals with the question whether a proper balance between the principle of publicity of the discharge procedure and the main goals of the processing of personal data (lawful processing of personal data, data minimization principle) are achieved under the current legal framework of the European Union. To show the practical problems in this area, the article focuses on the recent case law of the Court of Justice of the European Union, which reveals the problems to achieve the proper balance between the different aims of the discharge of debt procedure and processing of personal data.

KEYWORDS

Personal data, discharge procedure, European Union insolvency law, right to private life.

INTRODUCTION

Publicity is one of the main elements of the insolvency proceedings, including the discharge procedure[1]. In corporate insolvency proceedings, processing of personal data often does not trigger substantial questions since data protection laws are applicable to the data related to natural persons.[2] However, the story is different in the case of the discharge procedure, where the debtor is a natural person. Publicity of the discharge procedure means that the debtor's personal data relevant for the conduct of this procedure is collected and processed to serve the needs of this procedure and it is important for the proper exercise of the rights and functions of the participants in this procedure. An insolvency practitioner should collect debtor's personal information to make proper decisions, including challenge of transactions and treatment of assets, creditors should be aware of the possible restrictions which apply to enforcement against the debtor, periods for lodgement of a claim, third-party debtors should know whether the special legal regime is applicable for the performance of their obligation, credit institutions should also be aware in order to prevent them from executing payment transactions to the detriment of the insolvency estate.[3] Furthermore, processing of the debtor's personal data remains relevant after the discharge procedure is completed, since access to such information is still published for a certain period in the national insolvency register of the Member States of the European Union (hereinafter – Member States) and also processed by the private credit assessment agencies which collect personal information from the national insolvency register for the calculation of a credit score of a debtor.

With the adoption of the Directive on Restructuring and Insolvency (hereinafter – Directive)[4], certain elements of the discharge procedure have been harmonized in the EU insolvency law.[5] One of the main aims of this act is to provide a fresh start (a second chance) for insolvent debtors after the discharge procedure (Recital 1 of the Directive)[6],

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1 "Discharge procedure" in the legal literature and national laws may also be referred as personal insolvency proceedings or discharge of debt procedure. In this case the term „dischare procedure" is used since it is emloyed in the relevant legal acts of the European Union.

2 Article (1) of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119.

3 Reinhard Bork, Kristin van Zwieten, *Commentary on the European Insolvency Regulation. S*econd Edition (Oxford University Press, 2022), 385.

4 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) OJ L 172.

5 Christoph G. Paulus and Reinhard Dammann, *European Preventive Restructuring: An Article-by-Article Commentary* (Beck/Hart/Nomos, 2021); Remigijus Jokubauskas, "Discharge of Debts of Insolvent Entrepreneurs Under the Restructuring and Insolvency Directive," *Utrecht Journal of International and European Law* 38(1) (2023): 64–75.

6 Remigijus Jokubauskas, "The concept of a fresh start in the discharge of debt procedure in European Union insolvency law," *Maastricht Journal of European and Comparative Law* (2023): 1–26; Remigijus Jokubauskas, *Fizinių asmenų bankroto procesas* (Księgarnia Akademicka, MRU, 2023).

which is coupled with the full discharge of pre-bankruptcy debts[7] (Article 21 of the Directive). However, the Directive does not establish the rules on processing of debtor's personal data during and after the discharge procedure.

Since after the discharge procedure a debtor should enjoy a fresh start,[8] which also includes the possibility to pursue business (entrepreneurship) activities and consume without the burden of pre-bankruptcy debts after the discharge is granted, the relevant data about the fact that the discharge procedure has been opened and conducted may have strong implications first for the evaluation of creditworthiness of a debtor by the private credit assessment agencies and others. Access to such information may reduce the credit score, which is an important criterion for decision making of credit institutions whether a credit contract should be concluded or not.

The general rules on personal data protection are applicable in the discharge procedure. Data protection law aims to minimize access to data and reduce the risk of data breaches.[9] Under Article 5(1)(c) of the General Data Protection Regulation[10] (hereafter– GDPR), processed personal data must be "adequate, relevant, and limited to what is necessary in relation to the purposes for which they are processed". Also, this necessity requirement not only refers to the quantity but also to the quality of personal data.[11] The processing of personal data should be kept to the minimum to process only that information which is vital to achieve certain legitimate goals. Balancing is required between the need for data processing in personal insolvency proceedings and a debtor's right to lawful personal data treatment. Insolvency law only requires what personal information should be collected and publicly announced but does not provide any specific legal requirement how personal data should be treated. The goals of insolvency and data protection laws are different since "for the former, access to information by creditors and courts is of fundamental importance, the latter aims rather to minimise access so as to reduce the risk of data breaches. The two ends are, however, in most cases reconcilable."[12]

The core challenge lies in reconciling the goals of insolvency law (providing a fresh start through discharge) with data protection laws (ensuring lawful and minimal processing of personal data). This raises several key questions: How can we achieve a proper balance between transparency in the discharge procedure and lawful data processing? What legal justification exists for processing a debtor's personal information during the discharge process? What specific information is necessary to collect and make public during and after the procedure? For how long should this information remain publicly accessible? Does a debtor have the right to request the erasure of their personal data from the national insolvency register after the discharge is complete?

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7 Pre-bankruptcy debts is the legal term to separate the "old" and "new" debtor's debts. The discharge procedure is namely concerned with the "old debts" which occurred before the opening of the discharge procedure and failure to perform these debts constitute debtor's insolvency. A debtor is discharged of pre-bankruptcy unless the insolvency law rules establishes that a debtor is not discharged from certain debts.

8 Thomas H. Jackson, "The Fresh-Start Policy in Bankruptcy Law," *Harvard Law Review* 98 (1985): 1393–1448.

9 *Supra* note 3, 827.

10 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119).

11 Christopher Kuner, Lee A Bygrave, Christopher Docksey, Laura Drechsler, *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford University Press, 2020), 317.

12 *Supra* note 9.

Article 8(1) of the Charter of Fundamental Rights of the European Union (hereinafter – Charter)[13] establishes that "everyone has the right to the protection of personal data concerning him or her". GDPR establishes the legal basis and principles of lawful processing of personal data. The rules on the processing and protection of personal data are extensive, complicated, and are quickly changing. Not only the extensiveness of the rules of the GDPR, but also the amount of the relevant case law of the CJEU in this regard may trigger a question about how such rules should be applied in the discharge procedure. The provisions of the GDPR are also applicable to the discharge procedure and thus have to be applicable in harmony with the relevant provisions of EU insolvency law establishing the discharge procedure. Simply filing for a discharge procedure can hamper a debtor's creditworthiness and diminish their chances of obtaining credit for entrepreneurial activities. The recent Schufa case[14] before the CJEU reveals the problems of processing of debtor's personal data after the discharge procedure and a fresh start.

The search for a balance between the processing of a debtor's personal data in the discharge procedure and a fresh start in the EU insolvency law has not been addressed yet. Previous studies have focused on the general issues related to a fresh start, but not the problems related to processing of personal data.[15] To address the problems of processing of personal data in the discharge procedure this article consist of four parts: first, it deals with the legal basis of processing of personal data in the discharge procedure; second, it analyses the current rules of processing of personal data in the EU insolvency law; third, it deals with the problem of removal of personal data from insolvency register after the discharge procedure; and fourth, it focuses on the search for a proper balance processing of personal data after discharge procedure and assessment of creditworthiness.

The article focuses on the relevant case law of the Court of Justice of the European Union (hereinafter – the CJEU), which reveals the current legal issues in this area of law and the previous studies on a fresh start in the EU insolvency law. The authors analyse the recent case law of the CJEU regarding the application of the law governing processing of personal data in the context of discharge procedure of insolvent entrepreneurs. The analysis of the relevant case law reveals the problems with which the national courts encounter when dealing with the application of the laws on protection of personal data in case of discharge of debt procedure.

1. LAWFULNESS OF PROCESSING OF DEBTOR'S PERSONAL DATA IN THE DISCHARGE PROCEDURE IN THE EU LAW

Analysis of the problems of processing of personal data in the discharge procedure first require determining what is processing of personal data. Pursuant to Article 4(1) of the GDPR, "personal data means any information relating to an identified or identifiable natural person; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural

[13] Charter of Fundamental Rights of the European Union OJ C 326.
[14] Judgment of the CJEU of 7 December 2023 in joined Cases C26/22 and C64/22.
[15] *Supra* note 5; *supra* note 6; Gerard McCormack, *The European Restructuring Directive* (Edward Elgar Publishing, 2021).

person". The concept of "personal data" reflects the aim of the EU legislature to assign a wide scope to that concept, which potentially encompasses all kinds of information.[16] Personal information relates to an identified or identifiable natural person where, by reason of its content, purpose or effect, it is linked to an identifiable person[17].

Article 4(2) of the GDPR establishes that "processing means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction". The concept of "processing" has a broad scope, and is defined by establishing a non-exhaustive list of operations.[18]

In the discharge procedure, the debtor's personal data is information that identities a debtor, such as name, surname, information about the assets, employment (business activities) is collected first to determine the existence of the grounds of opening the discharge procedure. In essence all the data which is collected and can be associated with a debtor should fall under the concept of "personal data".

Article 6 of the GDPR establishes the exhaustive list of the grounds for lawful processing of personal data. The consent for processing of personal data is the simplest and most efficient way to process personal data, since the data subject gives an acceptance of processing of personal data. However, insolvency law does not require a debtor to give a consent for processing of personal data in the discharge procedure. Such consent may be required in the application for the opening of the discharge procedure; however, due to the various personal data that is processed, such consent may be simply inefficient and would not cover all the situations when the need for processing of personal data arises. Also, the requirements for consent in the GDPR shall comply with the strict requirements and such presumed consent does not satisfy such requirements.

The possible ground for processing of personal data is found in Article 6(1)(f) of GDPR, which establishes that processing shall be lawful if "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data".

Application of 6(1)(f) of GDPR requires three cumulative conditions for the processing of personal data to be lawful, namely "1) the pursuit of a legitimate interest by the data controller or by a third party, 2) second, the need to process personal data for the purposes of the legitimate interests pursued, and 3) the interests or freedoms and fundamental rights of the person concerned by the data protection do not take precedence".[19] GDPR does not define "a legitimate interest", but it should encompass a wide range of interests.[20] Pursuit of legitimate interests requires ascertaining that "the legitimate data processing interests pursued cannot reasonably be achieved just as effectively by other means less restrictive of the fundamental rights and freedoms of data subjects".[21] The balance of the interests of a data subject requires assessment of the balance of "the opposing rights and interests at issue which depends in principle on the

[16] Judgment of the CJEU of 4 May 2023 in case C487/21, para. 23.
[17] Judgment of the CJEU of 20 December 2017 in case C434/16, para. 35
[18] *Supra* note 16, para. 27.
[19] Judgment of the CJEU of 4 July 2023 in case C252/21, para. 106.
[20] *Supra* note 14, para. 75.
[21] *Supra* note 19, para. 108.

specific circumstances of the particular case".[22] Also, assessment of the lawfulness of the treatment of personal data requires assessment of whether the data subject could have "reasonably expected processing of personal data".[23] Thus, a data subject should be able to foresee processing of personal data.

Moreover, processing of personal data should be carried out as far as "strictly necessary" for the purposes of that legitimate interest.[24] This requirement is coupled with the principle of data minimization. Pursuant to Article 5(1)(c) of GDPR, personal data shall be "adequate, relevant, and limited to what is necessary in relation to the purposes for which they are processed". The principle of data minimisation requires that only the personal information necessary for the performance of the duties under the insolvency law by an insolvency practitioner should be processed.

The legal basis for the processing of a debtor's personal data in the discharge procedure is found in GDPR. In the absence of debtor's consent for processing of personal data, it seems that the rule established in Article 6(1)(f) of GDPR should be regarded as the legal basis for processing of debtor's personal data. Additionally, considering the amount of collected personal data in the discharge procedure, the principle of minimisation of collection of personal data should be properly applied in the discharge procedure.

2. THE CURRENT LANDSCAPE OF THE RULES OF THE EU INSOLVENCY LAW ON PROCESSING OF PERSONAL DATA IN THE DISCHARGE PROCEDURE

EU insolvency law scarcely regulates processing of debtor's personal data in cross-border or national insolvency proceedings. Protection of personal data is not absolute. This means that it should be balanced with the protection of other rights.[25] The existing rules on processing of personal data in the EU insolvency law are applicable in cross-border insolvency proceedings when the exchange of personal data is necessary for effectiveness of insolvency proceedings. Currently, the EU insolvency law is regulated by the EIR and the Directive. Certain proposals related to processing of personal data are established in the Proposal for the Insolvency Directive harmonising certain aspects of insolvency law (hereinafter – Proposal for the Insolvency Directive)[26].

The EIR establishes the main rules of cross-border insolvency proceedings, including the processing of personal data. Most of the discharge procedure under the national laws of the Member States of the European Union fall under the scope of the EIR (Article 1(1) of the EIR, Annex A of the EIR). One of the main aspects of insolvency proceedings covered by the EIR is publicity (Article 1(1) of the EIR). The relevant rules related to the processing of personal data in cross-border insolvency proceedings in the EIR may be divided into two parts, namely: the rules on insolvency registers and the information announced after the opening of the discharge procedure (Article 24–30 of the EIR) and the rules on data protection (Article 78–83 of the EIR). The EIR does not establish how a debtor's personal data should be processed, but instead establishes the rules for processing of personal data to ensure publicity of insolvency proceedings which is particularly relevant in cross-border insolvency scenario where creditors have

[22] *Ibid.*, para. 110.
[23] *Ibid.*, para. 112.
[24] Judgment of the CJEU of 4 May 2017 in case C13/16, para. 30.
[25] *Supra* note 3, 827.
[26] Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law COM/2022/702 final.

to exercise their rights and an insolvency practitioner has to exercise his functions abroad.

Protection of a debtor's personal data is one of the substantive rights in cross-border insolvency proceedings. One such substantive right is the protection of personal data. Cooperation and communication between the courts and insolvency practitioners in insolvency proceedings entails exchange and publication of personal data of a debtor, which raises concerns as to protecting the debtor's right to privacy. Nevertheless, nearly all cross-border insolvency laws are silent on the matter, since most of them were formulated at a time when data protection was not the focus of legislators with the exception to the EIR.[27]

Processing of personal data in cross-border insolvency cases is a challenging task: for instance, when such data should be used for the cooperation between insolvency practitioner and courts (Articles 41–43 of the EIR). Prior to the implementation of the EIR, it became clear that general references to data protection laws, while necessary, were insufficient to effectively safeguard personal data during insolvency proceedings due to the intrusive nature of the process.[28] People who process personal data should explore different methods of publication to find the one which would be consistent with the objective of publication, while causing the least interference with the beneficiaries' rights to private life and to protection of personal data.[29]

The EIR recognizes that lawful processing of personal data is a fundamental component of cross-border insolvency proceedings. Recital 83 of the EIR establishes that the fundamental rights and observes the principles recognised in the Charter, including the protection of personal data, the right to property and the right to an effective remedy and to a fair trial should be respected. Also, Recital 84 of the EIR recognises that "Directive 95/46/EC of the European Parliament and of the Council and Regulation (EC) No 45/2001 of the European Parliament and of the Council apply to the processing of personal data within the framework of this Regulation". The policy considerations in the EIR reveal that the fundamental rights in EU law, such as protection of personal data, should be protected in cross-border insolvency proceedings and the EU law rules on data protection should be applied in such cases.

Publicity of the opening of cross-border insolvency proceedings is indeed one of the key elements for effectiveness of cross-border insolvency proceedings. To provide an opportunity for the opening of personal insolvency proceedings, "Member States shall establish and maintain in their territory one or several registers in which information concerning insolvency proceedings is published. That information shall be published as soon as possible after the opening of such proceedings" (Article 24(1) of the EIR). The requirements for the publishing of such data are mandatory.[30] Such publicly available information includes various data about the debtor who is an individual whether or not exercising an independent business or professional activity, namely the debtor's name, registration number, if any, and postal address or, where the address is protected, the debtor's place and date of birth (Article 24(2) of the EIR). Such information should serve for identification of a debtor. However, Article 24(4) of the EIR establishes that "Member States shall not be obliged to include in the insolvency

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27 Reinhard Bork, *Principles of Cross-Border Insolvency Law* (Intersentia, 2017), 140.
28 Opinion of the EDPS on the Commission Proposal for a Regulation amending Council Regulation (EC) No. 1346/ 2000 on Insolvency Proceedings of 27 March 2013.
29 Judgment of the CJEU of 9 November 2010 in joined cases C-92/09 and C-93/09, paras. 56–64.
30 Reinhard Bork, Renato Mangano, *European Cross-Border Insolvency Law* (Oxford University Press, 2016), 225.

registers the information referred to in paragraph 1 of this Article in relation to individuals not exercising an independent business or professional activity, or to make such information publicly available through the system of interconnection of those registers", provided that known foreign creditors are properly informed under the EIR. This rule is coupled with protection of persona data of debtor who are not entrepreneurs. Such protection aims to minimize personal data which may not be relevant for the exercise of foreign creditors' rights if they are properly informed about the opening of insolvency proceedings.

Chapter VI of the EIR (Articles 78-83) addresses the questions of protection of personal data in cross-border insolvency proceedings. Article 78 of the EIR establishes that "National rules implementing Directive 95/46/EC shall apply to the processing of personal data carried out in the Member States pursuant to this Regulation, provided that processing operations referred to in Article 3(2) of Directive 95/46/EC are not concerned. Regulation (EC) No 45/2001 shall apply to the processing of personal data carried out by the Commission pursuant to this Regulation". Pursuant to Article 78 of the EIR, the general data protection laws apply to the processing of personal data in cross–border insolvency proceedings falling within the scope of the EIR.[31]

The application of the EIR in the processing of personal data is limited. The rules of the Chapter VI of the EIR are applicable to "personal data of identified or identifiable natural persons", when the national insolvency proceedings fall "within the scope of the EIR" and if "the processing is linked to the publicly available interconnected system of insolvency registers introduced by EIR".[32] The EIR does not establish how personal data should be processed in insolvency proceedings and/or the principles of lawful processing of personal data. In essence, it merely recognizes that it should be compatible with the EU rules on protection of personal data and requires compliance with these rules in cross-border insolvency proceedings.

The EIR specifically deals with the information related to insolvency registers. Article 82 of the EIR establishes that, "as regards information from interconnected national databases, no personal data relating to data subjects shall be stored in the European e-Justice Portal. All such data shall be stored in the national databases operated by the Member States or other bodies". Pursuant to Article 83 of the EIR, "personal data stored in the national insolvency registers referred to in Article 24 shall be accessible via the European e-Justice Portal for as long as they remain accessible under national law".

Thus, the EIR does not establish how long information should be available on the insolvency register, but merely refers this question to the national laws of the Member States. Such divergent access to insolvency registers can lead to different treatment of personal data in EU insolvency law and effectiveness of the discharge procedure since in different Member States information about insolvency proceedings will be processed differently. It may lead to situations when the laws of one Member State are more favourable for a debtor (where the personal information is available to the public of a shorter period) and thus may also be one of the reasons for abuse of the rules on jurisdiction of opening of the discharge procedure.

The Proposal for the Insolvency Directive addresses some questions related to processing and protection of personal data. The need to provide direct access to centralised bank account registries or a data retrieval system means that certain information about

[31] *Supra* note 3, 829.
[32] *Ibid*.

a debtor should be collected, such as the information about the bank account. Recital 16 of the Proposal for the Insolvency Directive establishes that "in order to respect the right to the protection of personal data and the right to privacy, direct and immediate access to bank account registries should be granted only to courts with jurisdiction in insolvency proceedings that are designated by the Member States for that purpose. Insolvency practitioners should therefore be allowed to access information held in the bank account registries only indirectly by requesting the designated courts in their Member State to access and run the searches". Pursuant to Recital 18 of the Proposal for the Insolvency Directive, "any personal data obtained under this Directive should only be processed in accordance with the applicable data protection rules by designated courts and insolvency practitioners where it is necessary and proportionate for the purposes of identifying and tracing assets belonging to the insolvency estate of the debtor in on-going insolvency proceedings".

Article 16 of the Proposal for the Insolvency Directive establishes the rules on monitoring access and searches by designated courts. Article 16(3) of this proposal establishes that "the logs referred to in paragraph 1 shall be used only for the monitoring of compliance with this directive and obligations stemming from the applicable EU legal instruments on data protection. The monitoring shall include verifying the admissibility of a request and the lawfulness of personal data processing, and whether the integrity and confidentiality of personal data is ensured. The logs shall be protected by appropriate measures against unauthorised access and shall be erased five years after their creation, unless they are required for monitoring procedures that are ongoing".

In sum: the EU insolvency law regulates only certain elements of processing of personal data in cross-border insolvency proceedings. However, even though the EIR requires establishment of insolvency registers and what information should be available in them, it does not provide rules on processing of personal data and for how long the information in such register should be available. The Proposal for the Insolvency Directive only deals with the processing of personal information related to access to the debtor's bank account but remains silent on the processing of the personal data in the discharge procedure. Thus, there is no harmonized approach on the processing of personal data in the discharge procedure under EU insolvency law and, importantly, how it should be compatible with the aim of a fresh start for the debtor after the discharge procedure.

3. ERASURE OF PERSONAL DATA FROM THE NATIONAL INSOLVENCY REGISTER AFTER THE DISCHARGE PROCEDURE

The EIR requires establishment of the insolvency register in the Member States and which information should be contained in such a register. The information in the insolvency register is accessible during and after the discharge procedure to serve the needs of insolvency law and the possibilities for the participants in these proceedings to exercise their rights effectively. However, accessibility of such information after the discharge procedure can raise questions whether a debtor receives a fresh start since the information about his or her discharge procedure remains accessible for the public. It may discourage the new potential lenders from providing financing for a debtor and or potential counterparties to enter into the contract with a debtor since the fact that the discharge procedure was opened and closed may reduce creditworthiness of a debtor or just simply create an impression what a debtor fails to perform obligations.[33]

EU insolvency law does not regulate processing of a debtor's personal data in the insolvency register after the discharge procedure. However, the Directive established a prohibition to disqualify a person from pursuing entrepreneurship activities because the discharge procedure was opened. Pursuant to Article 22(1) of the Directive, "Member States shall ensure that, where an insolvent entrepreneur obtains a discharge of debt in accordance with this Directive, any disqualifications from taking up or pursuing a trade, business, craft or profession on the sole ground that the entrepreneur is insolvent, shall cease to have effect, at the latest, at the end of the discharge period". Such prohibition relates to the national rules of the Member States related to the exercise of the pursuit of entrepreneurship activities. It reaffirms the freedom to conduct business under Article 16 of the Charter which should be regarded as a part of a fresh start.[34]

The question arises: does a debtor as a data subject have the right to demand erasure (i.e. removal) of information from the insolvency register, relying on Article 17 of GDPR? Article 17(1) of GDPR establishes that "the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay". The exhaustive list of the grounds for erase of personal data is established in Article 17(1) of the GDPR. The most likely grounds for erasure of information from the insolvency register after the discharge procedure is that the "personal data is no longer necessary in relation to the purposes for which they were collected or otherwise processed" (Article 17(1)(a) of the GDPR). This reason may be applicable when the purposes for which the data was collected appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.[35] Granting public access to certain personal information necessitates assessing whether such information serves a legitimate public interest.[36]

What are the public interests related to access of personal information about the debtor (the data subject) that justify maintaining such information? Does the interest of the public to know such information outweigh a fresh start? What time should elapse until such information is no longer relevant for public interest? For instance, what if a debtor argued that the fact that such information is accessible after the discharge procedure restricts the possibilities conduct business? The accessibility of such information may indeed impact the right to pursue business, since the creditors and other persons may be discouraged to give a loan to such persons or have contractual relations in general. Also, future employees may be also discouraged to work for an entrepreneur against whom the discharge procedure was recently closed.

EU law does not regulate that public information should be published about a natural personal pursuing business activity without incorporation or any other natural persons. However, it establishes that certain information about companies should be accessible to the public and "any person wishing to establish and develop trading relations with companies situated in other Member States has a right to obtain essential information relating to the constitution of trading companies and to the powers of

[33] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Overcoming the stigma of business failure – for a second chance policy – Implementing the Lisbon Partnership for Growth and Jobs COM/2007/0584 final.
[34] *Supra* note 6.
[35] Judgment of the CJEU of 13 May 2014 in case C131/12, para. 93.
[36] *Ibid.*, para. 97.

persons authorised to represent them", which requires that all the relevant information should be expressly stated in the register.[37] Such requirements for accessibility of the information relates to protection of the interests of the third parties generally.[38]

The *Camera di Commercio* case by the CJEU is a proper example to show the problems associated with retention of personal information of the owner of a company which impedes the exercise of the right to pursue business activity. Manni was the sole director of a building company which was awarded a contract for the construction of a tourist complex. He brought a claim against the Lecce Chamber of Commerce, claiming that the properties in that complex were not selling because it was apparent from the companies register that he had been the sole director and liquidator of another company which had been declared insolvent in 1992 and removed the companies register. Manni argued that the personal data concerning him, which appear in the companies register, had been processed by a company specialised in the collection and processing of market information and sought the Lecce Chamber of Commerce to erase, anonymise, or block the data linking him to the liquidation of the company, together with an order that that chamber compensate him for the damage he suffered by reason of the injury to his reputation.[39]

The central issue in the Camera di Commercio case revolved around whether a company director's personal data should remain accessible in the company register after a set period following the company's closure. The data subject, in this case, requested the data's erasure, anonymization, or restriction of disclosure.

The CJEU first analysed the purpose of the register of the companies. It established that the purpose of disclosure of data is "to protect the interests of third parties in relation to joint stock companies and limited liability companies, since the only safeguards they offer to third parties are their assets" and thus, "the basic documents of the company concerned should be disclosed".[40] Though the relevant EU law existing at that time did not establish whether information about the company and the personal data of natural persons should be accessible after the dissolution of the company, the CJEU held that even after the dissolution of a company, rights and legal relations relating to it continue to exist. Such data may be relevant in case a dispute arises when it is necessary "to assess the legality of an act carried out on behalf of that company during the period of its activity or so that third parties can bring an action against the members of the organs or against the liquidators of that company".[41]

Considering the complexity of the national rules on keeping such data and needs of such data, the CJEU found that it is impossible to "identify a single time limit, as from the dissolution of a company, at the end of which the inclusion of such data in the register and their disclosure would no longer be necessary".[42] Thus, such period would have to be assessed individually in each distinct case.

The CJEU further determined that requests to remove personal data from the company register could be granted. In such cases, national courts must weigh all relevant circumstances, including "the time elapsed since the company's dissolution" and any legitimate reasons that might exceptionally justify restricting access to data revealing

37 Judgment of the CJEU of 12 November 1974 in case C-32/74, para. 6.
38 Judgment of the CJEU of 4 December 1997 in case C97/96, paras. 19, 20, 22.
39 Judgment of the CJEU of 9 March 2017 in case C398/15, para. 23-29.
40 *Ibid*., para. 49.
41 *Ibid.*, para. 53.
42 *Ibid.*, para. 55.

a person's prior role as sole administrator and liquidator.[43] Additionally, the court found that "the mere fact that, allegedly, the properties of a tourist complex of which Manni was the sole director, do not sell because of the fact that potential purchasers of those properties have access to that data in the company register, cannot be regarded as constituting such a reason, in particular in view of the legitimate interest of those purchasers in having that information".[44]

The judgment in the *Camera di Commercio* case reveals that public access of personal information related the liquidated company may contradict with the purpose to pursue business activities. Though liquidation of such company would not automatically mean that such information should be deleted; however, after the lapse of certain period of time the need for public access to this information diminishes and may justify deletion of such information. The objective period of time when such information should be accessible could be related to the statutory limits for filling the actions related to liquidation procedure of the company. The diminishing of the interest to hold this information relates to the legal basis of erase of personal data under Article 17(1)(a) of the GDPR because it is "no longer necessary in relation to the purposes for which they were collected or otherwise processed".

The judgment in the *Camera di Commercio* case suggests that after the discharge procedure a debtor (a data subject) should have the right to demand erasure of personal information in the insolvency register when there are relevant reasons which justify that there is no longer a public interest that such information should be available. Such assessment requires balancing the interests of a debtor and the public. However, the mere fact that availability of such information may have potentially negative economic consequences to a debtor and the exercise of the right to conduct business should not be the basis for the erasure of such information.

4. PROCESSING OF PERSONAL DATA AFTER THE DISCHARGE PROCEDURE AND ASSESSMENT OF CREDITWORTHINESS OF A DEBTOR

Publicly available information about the fact that the discharge procedure was opened and completed (even if successfully) may have an impact of the future possibilities for conduct of business for the debtor. Such information may be perceived as debtor's failure and reduce creditworthiness. Since a fresh start aims to provide the possibility for a debtor to live without the burden of pre-bankruptcy debts and start economic activities anew, it is debatable whether such a goal may be achieved when the information about the discharge procedure is accessible to the public including private credit assessment agencies. The restrictions or hurdles to get a credit for a debtor after the discharge procedure can significantly diminish the effects of a fresh start. This is especially the case for individual entrepreneur whose possibilities to secure performance of a credit contract are less attractive for the credit institutions.

Article 83 of the EIR establishes that "personal data stored in the national insolvency registers referred to in Article 24 shall be accessible via the European e-Justice Portal for as long as they remain accessible under national law". Each Member State may choose for how long personal information related to the discharge procedure could be publicly accessible in the insolvency register. Such lack of harmonized approach could also lead to different possibilities to achieve a fresh start.

43 *Ibid.*, para. 63.
44 *Ibid.*, para. 63.

In a credit relationship, lenders (credit institutions) seek to avoid lending money that will not be repaid. If they do not have the same information that borrowers have on their ability or willingness to repay a debt, they will incur a higher risk of making bad business. This risk, in turn, poses problems of bad debts and adverse selection.[45] The assessment of creditworthiness is based on the credit scoring models which are mathematical algorithms or statistical programmes that determine the probable repayments of debts by consumers and assigns a score to an individual based on the information processed from a number of data sources.[46] However, what every such scoring model needs is personal data which is processed to make a decision on creditworthiness.

The EU law establishes the obligation to assess creditworthiness before entering into certain credit transactions. Article 8(1) of the Directive on credit agreements for consumers[47] establishes that "Member States shall ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database".

Pursuant to Article 18(1) of the Directive on credit agreements for consumers relating to residential immovable property[48], "Member States shall ensure that, before concluding a credit agreement, the creditor makes a thorough assessment of the consumer's creditworthiness. That assessment shall take appropriate account of factors relevant to verifying the prospect of the consumer to meet his obligations under the credit agreement". According to Article 21(1–2) of this directive, "each Member State shall ensure access for all creditors from all Member States to databases used in that Member State for assessing the creditworthiness of consumers and for the sole purpose of monitoring consumers' compliance with the credit obligations over the life of the credit agreement. The conditions for such access shall be non-discriminatory. These requirements apply both to databases which are operated by private credit bureaux or credit reference agencies and to public registers".

The Schufa case[49] before the CJEU reveals the problems for a fresh start after processing of debtor's personal data by the private credit assessment agency. In this case the information about the opening and closure of the discharge procedure was available to the public in the national insolvency register, which was later retrieved by a private credit assessment agency and used for the calculation of a credit score. This case shows the close ties between the requirements under EU law to public certain personal information about a debtor for the purposes of effective cross-border insolvency proceedings and lawfulness of processing of personal data. Article 79(4) of the EIR requires that "Member States shall be responsible for the collection and storage of data in national databases and for decisions taken to make such data available in the interconnected register that can be consulted via the European e-Justice Portal". Pursuant to Article 79(5) of the EIR, a data subject should have the possibility to "exercise their rights, and in particular the right to the erasure of data. Thus, Member States

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[45] Federico Ferretti, Daniela Vandone, *Personal Debt in Europe: The EU Financial Market and Consumer Insolvency* (Cambridge University Press, 2019), 107–108.

[46] *Ibid*., 113–114.

[47] 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 *OJ L 133*

[48] 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 Text with EEA relevance OJ L 60.

[49] *Supra* note 14.

shall inform data subjects of the accessibility period set for personal data stored in insolvency register".

Before the Schufa case, the CJEU had already found that personal data concerning recovery of debts is sensitive data for the data subject's private life. In the *Google Spain SL* case, a person argued that personal information about him in a newspaper publication[50] should be removed since it breached his personal rights.[51] The CJEU acknowledged that such personal information has sensitivity for the data subject's private life.[52] Not only information about the personal insolvency proceedings, but only information related to recovery of debt may have significant impact on the person's social life. Such information regarding the failure to pay debts may be considered as relevant for the assessment of person's creditworthiness.

Personal data from the national insolvency register processed originally by the government in the insolvency register may be retrieved by the private credit assessment agencies. It was established in the *Schufa case* that the discharge procedure was opened against two individuals who were granted discharge from the debts and a judicial order granting a discharge were made. Pursuant to the relevant national rules[53], such information was subject to official notification on the internet, which was deleted after six months. However, the private credit assessment agency published the information relating to early discharges from remaining debts in its own databases but does not delete it until three years after entry. The individuals contacted the agency for the removal of such information, but the requests were dismissed.[54]

The Advocate General in the *Schufa* case focused on the search for the balance between the principles of lawful processing of personal data and data minimization and the right to a fresh start. The Advocate General noted that the processing of information by the credit information agency for the reasons to assess the creditworthiness of potential business partners is a legitimate interest which justifies processing for such information.[55] The retrieval of personal data concerning insolvency from public registers and the private storage of those data are the only means for the credit information agency to offer that precise information to its clients for business purposes.[56]

Turning the question of the balance between the competing interests, the Advocate General found that publication of such information has an impact on the processing on the data subject considering the period when such information is available. He noted that there is a link between the amount of time the information is available and when it should have been deleted, namely, "the longer the period for which data are stored in the databases of private credit information agencies, the greater the consequences for the data subject."[57] The parallel publication of such data in the database of the governmental institution and private credit agency has a further impact on the private life of the individual in addition to the negative consequences of those data being available in public registers.[58] Moreover, such information was available to unlimited number of people.[59] In addition, the time factor was considered since there was no justification for

[50] Person's name was mentioned in the publication relating to a real-estate auction connected with attachment proceedings for the recovery of social security debts.
[51] Judgment of the CJEU of 13 May 2014 in case C131/12.
[52] *Ibid*., para. 98.
[53] Paragraph 9(1) of the Insolvency Code and Paragraph 3(1) and (2) of the InsBekV.
[54] Opinion of Advocate General Pikamäe of 16 March 2023 in case C26/22 and C64/22, para. 14–17.
[55] *Ibid.*, para. 61–64.
[56] *Ibid.*, para. 65–68.
[57] *Ibid.*, para. 71.
[58] *Ibid.*, para. 72.
[59] *Ibid.*, para. 73.

keeping such information for three years instead of six months.[60] The Advocate General found that the negative consequences for the data subject of storing data beyond six months outweigh the commercial interests of the private agency. Therefore, storing personal data by a private credit information agency after it's been erased from the public register violates Article 6(1)(f) of the GDPR.[61].

The Advocate General found that in this case the practice of a private credit information agency of storing those data is not consistent with the principles of purpose limitation and data minimisation. According to this position, there is no public interest in processing such personal data for the longer period and coupled such principle with the idea the goals of the aim of a fresh start, namely, that "the discharge from remaining debts granted is intended to allow the beneficiary to re-enter economic life. This objective would be frustrated if private credit information agencies were authorised to store personal data in their databases after the data have been erased from the public register."[62]

The arguments put forward by the Advocate General reveal the main considerations related to provision of a fresh start and also the business of private credit assessment agencies, which publish the information about the discharge procedure retrieved from the public database of the government. The Advocate General found that a fresh start and the principle of minimisation of processing of personal data dominate over the interests of publishing such personal data after it lacks relevance for the needs of the discharge procedure. The CJEU, in essence, followed this approach.

The CJEU ruled that credit information agencies processing personal data related to a debtor's discharge from remaining debts constitutes sensitive information about their private life. This processing can harm the debtor's interests since it could significantly hinder their ability to exercise their freedoms, especially those related to fulfilling basic needs.[63]

Regarding the requirement to keep personal information for the purposes of cross-border insolvency proceedings, the CJEU noted that "the purpose of a public insolvency register is to improve the provision of information to creditors as well as to the courts concerned". However, in the absence of the harmonisation of the rules on the time period for retention of such personal data under EU law, the Member States should establish such period "in compliance with the GDPR".[64] Consequently the court held that the interests of the credit sector in having access to information on a discharge from remaining debts cannot justify the processing of personal data "beyond the period for which the data are kept in the public insolvency register".[65]

The Schufa case hinges on whether a private credit bureau publishing discharge procedure information after it's removed from the government insolvency register (six months after the procedure ends in Germany) complies with the GDPR's lawful processing requirements. The public information about the opening of the discharge procedure is indeed relevant for the purposes of effective discharge procedure and possibilities for the creditors to exercise their rights effectively. Public access to such information is particularly relevant in cross-border situations when creditors' possibilities to collect information are hampered by the mere fact that insolvency proceedings are opened

[60] *Ibid.*, para. 74.
[61] *Ibid.*, para. 77.
[62] *Ibid.*, para. 85.
[63] Judgment of the CJEU of 16 March 2023 in case C26/22 and C64/22, para. 94.
[64] *Ibid.*, para. 96.
[65] *Ibid.*, para. 99.

abroad. However, both the arguments from the perspective of lawful processing of personal data and a fresh start after discharge procedure support the approach that excessive access to such personal information after the discharge procedure hampers attainment of a fresh start.

After the discharge procedure, the debtor's reintegration into economic relations and conduct of business are the dominant goals.[66] The processing of personal data about the discharge procedure may have important implications as to whether a fresh start will be provided. The rationale by the Advocate General and the CJEU in the Schufa case suggests that a fresh start of the discharge procedure depends on the availability of the information about the discharge procedure. While the Schufa and previous cases addressed lawful data processing under the GDPR, they didn't consider whether six months of accessibility for discharge information in the German insolvency register, followed by longer private credit bureau access, violates Articles 5 and 6 (lawful processing) and the debtor's right to a fresh start. The court did not assess in detail whether the erasure of such personal data is also compatible with the requirements under EU law to provide a proper assessment of creditworthiness, since information about the opening and closure of the discharge procedure may have an impact on the creditors score of the debtor. This score plays an important role for the credit institutions when making decision whether to enter into the credit contract or not.

The judgment in the Schufa case reveals the problems of processing of personal data of a debtor after the discharge procedure, but it does not provide the answers how to find the proper balance between the competing lawful interests. First, the question remains how to properly balance the interests of a debtor to get a fresh start and the need for the creditors and courts to have information about the discharge procedure when it is accomplished. Second, the issue is whether removal of such personal information from the national insolvency register allows to fully comply with the requirement for the assessment of a person's creditworthiness under the EU law. EU policymakers' ongoing efforts to harmonize insolvency proceedings, including proposals for exchanging debtor bank account information and revising the discharge procedure, are likely to reignite these data privacy concerns. The proposed revisions might necessitate collecting even more personal data from debtors.

CONCLUSIONS

The EU insolvency law has clearly shifted towards the provision of a fresh start during and after the discharge procedure. However, there is lack of specific rules related to the processing of the debtor's personal data which is collected during this procedure and how the processing of such data should be compatible with a fresh start. The proper processing of such data during and especially after the discharge procedure has great importance to the possibilities of a debtor to enjoy a fresh start.

The general rules on the processing of personal data established in the Charter and the GDPR shall be applicable during and after the discharge procedure. Thus, the principles of lawful processing of personal data and minimisation of personal data should be applicable in the discharge procedure. Also, the broad notion of personal data suggests that all information which allows direct or indirect identification of a debtor in

[66] *Supra* note 6.

the discharge procedure should enjoy the application of the rules of protection of personal data in EU law.

The fundamental right of a data subject to erase personal information (right to be forgotten) under Article 17 of the GDPR should be also applicable after the discharge procedure regarding the personal information which is processed in the national insolvency register. When dealing with such request to erase personal information from the insolvency register, the competent governmental institutions or courts have to carefully balance the interests of the public for the access to the relevant personal information and the aim of a fresh start. The debtor in such case has the burden to prove that accessibility of such personal information hinders the proper exercise of the right to conduct business and (or) the right to private life.

The processing of personal data after the discharge procedure by the private credit assessment agencies which retrieve personal information from the governmental insolvency register could diminish the effectiveness of a fresh start after the discharge procedure. The CJEU's Schufa decision suggests that private credit bureaus processing a debtor's discharge data after removal from the national register risks violating data minimization principles and hindering attainment of a fresh start. This case reveals the problematic issues related to the need for a proper assessment of creditworthiness of persons seeking to conclude a credit contract under EU law and the right to lawful processing of personal data and a fresh start after the discharge procedure. Such issues require further attention of EU policymakers and could be also addressed in the Proposal for the Insolvency Directive which aims to harmonize certain aspects of processing of personal data and lays down further rules on the discharge procedure in EU insolvency law.

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