

Consumer bankruptcy and the Western Balkan countries: Why do they need it?

Marinela Majnova, winner of the Richard Turton Award 2023, presents a summary of her article



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This article is a summary of the full paper written by the 2023 Richard Turton Award winner, Marinela Majnova from North Macedonia.

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You can read the full version of the award-winning paper on our website: www.insol-europe.org/richard-turton-award



“And forgive us our debts as we have also forgiven our debtors” (Luke 6:37)



In the last three decades, consumer debt and credit, which have deep historical roots, have seen significant changes in Europe, particularly in the context of consumer bankruptcy legislation. While consumer bankruptcy was not a topic of discussion in most European countries 30 years ago, various factors, such as increased consumer credit accessibility, the rise of consumerism, economic shifts, and welfare system transformations, have led numerous European nations to reconsider their stance on consumer bankruptcy laws.

However, despite the global proliferation of consumer bankruptcy legislation, 11 European countries still lack such regulations, down from 13 just nine months ago, as Uzbekistan and Kazakhstan recently adopted consumer bankruptcy legislation following the Russian framework. This eastward wave of legislation seems to have overlooked some central and eastern European countries that were also part of the socialist and post-communist bloc. Unfortunately, there has been limited academic attention on the reasons behind the absence of consumer bankruptcy laws in these jurisdictions. In this context, the author, who has practical experience in one of these jurisdictions, seeks to address two fundamental research questions:

- (1) *Why are policymakers in developing countries, such as those in the Western Balkans, hesitant to adopt consumer bankruptcy regimes?;*
- (2) *Why do these countries need consumer bankruptcy legislation in the first place?*

Countries without consumer bankruptcy regulation: The case of the Western Balkans

The Western Balkans, with its post-socialist history, presents a unique case in the absence of consumer bankruptcy regulations. The region faced economic challenges in the early 1990s, including hyperinflation, which eroded savings and confidence in the banking system. While some countries in Central and Eastern Europe adopted consumer bankruptcy legislation, others in the Western Balkans remained excluded, with little academic discussion about the reasons behind this exclusion. These countries are not immune to modern diseases after all, which makes it quite challenging to understand why they appear resistant to contemporary remedies for excessive over-indebtedness, like consumer bankruptcy legislation. The reasons can be grouped depending on the costs and the benefits from its implementation, on social and administrative aspects or institutional and procedural design.

One of the challenges these countries face is skepticism about the benefits of consumer bankruptcy legislation. Some argue that consumer over-indebtedness in these countries has not reached a level that justifies the cost of implementing such legislation. Additionally, setting up the infrastructure for an effective personal insolvency system can be expensive, which may deter policymakers in emerging economies. Choosing the appropriate institutional framework for consumer bankruptcy legislation is another challenge. Transplanting complex procedures from wealthier countries may not be advisable, as it could overwhelm the judicial systems

in these countries, which may lack administrative and financial capacity. Hence, building on existing institutional infrastructures and keeping procedures simple is often recommended. The diversity of legal traditions across Europe makes it challenging to determine a one-size-fits-all approach to consumer bankruptcy legislation.

Western legal traditions have influenced Central and Eastern European legal systems, but differences persist. Policymakers in these countries may have varying views on the most effective methods and approaches to regulate behaviour through social or economic means. Many countries have only recently, since 1990, implemented insolvency procedures exclusively for individuals, which means they do not have an extensive legal history of managing the challenges of such proceedings. This absence of established tradition has given rise to diverse and innovative procedural approaches that differ from one country to another. The complexity escalates further when policymakers in these nations face even more formidable challenges, as they lack a foundation or an existing model for reference or comparison.

The need for regulation in Western Balkan countries

Bankruptcy, as practiced in market economies, was unknown and unneeded in centrally planned ones. After the fall of the Berlin Wall, there is almost no Eastern European country that has not implemented a new consumer bankruptcy law. In light of the special needs in Eastern and Central Europe (and in the former Soviet Union), it is questionable whether the initial

bankruptcy laws for these countries should have followed so faithfully the laws of a developed country.

However, they did and new consumer bankruptcy laws were enacted in Estonia in 2004, the Czech Republic and Slovakia in 2006, Slovenia and Latvia in 2008, Poland in 2009, Lithuania in 2013, Hungary, Croatia and Russia in 2015, Romania in 2018, Bulgaria in 2019 and, finally, Kazakhstan and Uzbekistan the latest members to join the group in January and March 2023.

Despite the differences between the law on the books and the law in action, evidence shows that these countries, many of them historically sharing similar economic, social, and legal backgrounds as former members of the communist bloc, are positive examples of bankruptcy law implementation. Even in the face of various challenges (administrative complexity and compliance costs, system administration and filing fees, case administration and trustee compensation, and private advisor fees for guidance in preparing and pursuing a relief application.), they seem to be successfully managing. The slowly established practice in the last decade presents the functionality of consumer bankruptcy as a remedy for over-indebtedness in these countries.

The need for consumer bankruptcy legislation in the Western Balkan countries is rooted in economic, socio-cultural and legal considerations. The link between bankruptcy and economic factors, such as GDP, inflation, interest rate, household debts and credit markets has been examined many times in the literature and the effects of the so-called economics of bankruptcy have already been carefully elaborated by many authors. When it comes to microeconomic aspects, the most common factors include age, education, gender, homeownership, type and number of debts, income and number of dependent children. The existing literature also offers various evidence that social, moral and cultural factors such as moral hazard, stigmatization, resocialization, culture influence, unemployment, divorce and illness are very highly related to the need for consumer bankruptcy and its implementation.

Some attempts and failures to regulate

The case of Macedonia can be highlighted, where the absence of consumer bankruptcy legislation led to the adoption of an enforcement law, resulting in thousands of debt cases and blocked bank accounts for debtors. Serbia shares a similar challenge, with over 4 million enforcement requests submitted since the establishment of the enforcement system in 2012. Macedonia, Serbia and Montenegro are currently the only countries that are operating with private enforcement and have established private enforcement agents appointed by the Ministry of Justice. In Bosnia and Herzegovina, as well as Albania, from the aspect of valid bankruptcy regulations, bankruptcy is still carried out almost exclusively over the assets of legal entities. An exception exists in terms of the liability of members of companies that are unlimited and jointly responsible for the company's obligations, in the way that its property can be covered by bankruptcy proceedings. As we see, provisions of bankruptcy regulations do not apply to all natural persons, so the institution of consumer bankruptcy in the Bosnian and Albanian legal systems is currently unknown.

In contrast to its Western Balkan counterparts, Montenegro enacted consumer bankruptcy legislation in 2015. However, the happiness did not last very long, because only three months later, on 11 December 2015, the validity and constitutionality of the law were challenged by two lawyers from Podgorica who submitted a request for judicial review to the Constitutional Court. A year later, on 30 November 2016, the Constitutional Court decided that there were enough arguments for further investigation and decided to start a procedure for examining the constitutionality of the consumer bankruptcy law. Finally, on 24 February 2017, the court adopted a final decision by majority vote repealing the law as unconstitutional. The overgeneralized, ultra-formalistic, and senseless argumentation of the

petitioners and its acceptance and poor interpretation by the court makes this case very interesting, important and dangerous at the same time, because of the possible consequences and future implications to the other Western Balkan jurisdictions. It demonstrates the challenges faced by countries attempting to implement consumer bankruptcy laws and underscores the need for legal clarity.

Conclusion

The rapid expansion of the consumer credit market, along with the issue of consumer over-indebtedness, is a subject that warrants increased scholarly attention, particularly in regions where there is no existing remedy for this problem. The exclusion of Western Balkan countries from this trend is both challenging to accept and comprehend. This paper represents a modest step in the ongoing discourse aimed at removing Western Balkan countries from this list. Equally important is the task of developing the appropriate institutional framework for these nations, which currently stands as an unexplored area within academic research.

The view of the Constitutional Court of Montenegro is a challenge for all other Western Balkan countries and their constitutional courts and judges who undoubtedly will be more than interested in the case of their Montenegrin colleagues. Re-examining the historical evolution of bankruptcy is not only absurd but also dangerous. The metamorphosis from “punishment” to “rehabilitation” is a hard-won battle through the centuries. The last thing that these countries need today is constitutional courts that will open questions and debates that were closed several decades ago. Instead of negotiating the best practices and frameworks for consumer bankruptcy implementation, ten steps backward were made. This can and has to be changed, and is also one more reason and argument about why the Western Balkan countries need consumer bankruptcy. ■



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