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New Consumer Bankruptcy in Poland – a New Start not only for the Consumer?

Abstract

In Poland, over the past four years, we have been witnessing liberalization of the laws on consumer bankruptcy, which results in an increased number of declared bankruptcies and there are many indications that both phenomena will only grow. This paper deals with some major manifestations of such a process and shows that a very significant effect of liberalizing the law and bankruptcy regime adopted in Poland is the fact that natural persons conducting business activity increasingly perceive consumer bankruptcy as a chance to get out of financial trouble. Taking advantage of such a solution is, among other things, hindered by the entrepreneur's failing to file a petition for bankruptcy declaration within 30 days of becoming „insolvent". As the findings of the conducted interviews show, entrepreneurs are not at all aware of the obligation to lodge petitions in a timely manner. In the light of the experience gained, it seems indispensable to stress the importance of educating natural persons about financial issues and insolvency procedures. The results obtained indicate the need to equalize bankruptcy proceedings for all natural persons, regardless of whether they are or are not entrepreneurs, and play an important role in the current discussion on the government's draft Act of 18 April 2018 on further liberalization of the bankruptcy law.

Key words: consumer bankruptcy, business bankruptcy, indebtedness and insolvency of households, household behavior, discharge of debts, bankruptcy law

JEL: K35, D12, D14, G33

Nowa upadłość konsumencka w Polsce – nowy start nie tylko dla konsumenta?

Streszczenie

W Polsce w ciągu ostatnich czterech lat byliśmy świadkami liberalizacji przepisów dotyczących upadłości konsumenckiej, co skutkowało wzrostem liczby ogłoszonych bankructw i wiele wskazuje na to, że rosnąca tendencja się utrzyma. Niniejszy artykuł pokazuje najważ-

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niejsze przejawy tej liberalizacji oraz wyjaśnia dlaczego osoby fizyczne prowadzące działalność gospodarczą coraz częściej postrzegają upadłość konsumencką jako szansę na wyjście z kłopotów finansowych. Przy obowiązujących przepisach Prawa upadłościowego przedsiębiorcy Ci tracą jednak tę szansę, jeżeli w ciągu 30 dni od pojawienia się stanu niewypłacalności nie złożyli wniosku o ogłoszenie upadłości przedsiębiorstwa. Jak pokazują wyniki przeprowadzonych wywiadów, przedsiębiorcy nie są świadomi obowiązku składania tego wniosku w odpowiednim czasie, przez co tracą również szansę na oddłużenie po zakończeniu działalności gospodarczej. Uzyskane wyniki wskazują na konieczność ujednolicenia postępowania upadłościowego dla wszystkich osób fizycznych, niezależnie od tego, czy są lub nie są przedsiębiorcami, stanowiąc głos w toczącej się dyskusji na temat rządowego projektu ustawy z 18 kwietnia 2018 r., którego celem jest dalsza liberalizacja prawa upadłościowego. Jednocześnie, w świetle zdobytych doświadczeń, uznano za konieczne podkreślenie znaczenia edukacji finansowej i prawnej osób fizycznych.

Słowa kluczowe: upadłość konsumencka, upadłość przedsiębiorcy, zadłużenie i niewypłacalność gospodarstw domowych, zachowania osób fizycznych, oddłużenie, prawo upadłościowe

Introduction

Over the past decades, the issue of consumer bankruptcy has been attracting more and more interest across Europe, as reflected by the fact that judicial proceedings concerning the bankruptcy of natural persons have been introduced in most European countries. The first state to do so was the Netherlands (1896), followed by Denmark (1984), the United Kingdom (1986), France (1989), Finland (1993), Austria (1995), Sweden (1994), Germany (1994 and Ireland (1998). The trend gained most intensity at the start of the 21st century. What is important, the exact bankruptcy model differs depending on the country – it can be more conservative (e.g. in Turkey, Italy, Hungary) or more liberal (e.g. in the USA, where consumers have been allowed to file bankruptcy petitions since 1800, the United Kingdom, or Russia) (Szymańska 2014, pp. 83–106). The bankruptcy model is considered liberal or conservative depending on who, and on what conditions, is allowed to be declared bankrupt and what benefits resulting from a court ruling on debtor's bankruptcy there are. A question about the optimal model is often asked and the pros and cons of liberalizing the bankruptcy law are broadly discussed. There is no easy answer, and in effect the bankruptcy law is often modified. Iain Ramsay points to the fact that a continuing cycle of reforms of the procedures addressing consumer overindebtedness could be observed in Europe in the last two decades of the twentieth century and at the beginning of the twenty first century and that those changes reflect the influence of the U.S. idea of the "fresh start". At the same time, the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act in the United States in 2005 is "the outcome of a long political battle over the terms on which consumers should be able to discharge debts" (Ramsay 2007, pp. 241–242).

Although there are many supporters of the right to the "fresh start", it is argued that liberalization of the bankruptcy law may trigger behavioral changes; in particular, it affects the financial discipline of households, which results in a growing debt rate and up-

ward trend of the number of bankruptcies. As Żywicki shows, the increased number of bankruptcies in the USA can not be explained by the trends in the phenomena declared as the causes of bankruptcies (medical expenditures, unemployment rate and other) (Zywicki 2005, pp. 1463–1541). In turn, Mian and Sufi present comprehensive research findings that indicate the negative effects of excessive citizen debt for the economy, especially its influence on the scale of economic recessions (Mian, Sufi 2014).

In recent years, a political battle concerning consumer bankruptcy law and the cycle of changes in the bankruptcy law has been taking place in Poland, too.[1] The direction of changes is unambiguous: is it about liberalizing regulations so that more people could and would like to get "a fresh start"? What is more, the legislators predict that it is not the end of changes and a Draft Act Amending the Act on the Bankruptcy Law and Some Other Acts has recently been presented.[2]

The aim of this article is to show the most important manifestations of the liberalization of the bankruptcy law which increasingly helps to get out of financial trouble. Particular attention is drawn to the issue of the entrepreneur and his path to debt reduction through the declaration of consumer baknkruptcy. Since the author aims to verify the hypothesis under which a separate juridical procedure, usually referred to as consumer bankruptcy, should relate to all natural persons without excluding entrepreneurs. The author hopes that the results of this empirical study will serve as a useful argument in the discussion on the direction of changes planned by the Ministry of Justice. The study was financed by the National Science Centre, Poland, as research project 2015/19/D/HS4/01950.

1. Consumer versus business bankruptcy in Poland

Consumer bankruptcy (CB), also referred to as personal bankruptcy, is most often understood as the state of indebtedness and insolvency of an individual (which, in the current legal situation in Poland, denotes a natural person that is non-entrepreneur) sanctioned by law by means of taking legal action. It enables the debtor or borrower to reorganize his debt (to enter into negotiations or a treaty with the creditor or the lender, and determine a new way of settling his or her debts and liquidating liabilities) and, ultimately and most importantly, to receive debt relief.

Consumer (personal) bankruptcy is clearly distinguished from business (company) bankruptcy. The attribute "consumer" may denote that the bankruptcy petition is lodged by an individual who primarily has "consumer debt", which may include, for example, mortgage loan, overdue utility bills, car credit, credit card overdraft or medical bills – incidentally, Austin shows that in the USA medical debt was the predominant factor in debtors' decisions to lodge bankruptcy petitions (Austin 2014, p. 22). A business bankruptcy petition can be lodged by a legal entity, such as a corporation,

[1] The projects drawn up in 2003–2010 are presented in: Szymańska 2014, pp. 125–130.
[2] Draftt date: 25-05-2018. See: http://legislacja.rcl.gov.pl/projekt/12312002

but it can also be filed by an individual who runs a business activity and, primarily, has "business debt". Business bankruptcy relates to enterprises, but enterprises take different legal forms – generally speaking, they can be partnerships (personal companies) or commercial companies. In Poland, small and medium size businesses take a very popular form of sole proprietorship, also known as the sole trader, as well as different types of partnerships (civil, registered or professional). Sole proprietorship is a type of enterprise that is owned and run by one natural person, while in partnerships there are at least two owners. Both sole business owners and partners guarantee their business debts such as SBA loans, leases, credit cards, or other bank loans, as lenders and landlords require such guarantees for business loans from individuals. In both cases, the owner bears unlimited financial responsibility for the obligations arising in connection with the business[3] – every asset of the business is owned by the proprietor and all debts of the business are the proprietor's. An often observed practice in sole proprietorships (and partnerships) is financing the business by means of private loans. Thus, business debt becomes personal debt which makes the criterion adopted at the beginning of this paragraph (differences between consumer bankruptcy and the business bankruptcy) not clear at all. If a business is not doing well, its owner may need personal relief from business debt to protect his personal assets. The existing differences between the two proceedings in Poland mean that, for the debtor, consumer bankruptcy is a better solution than company bankruptcy, but (as will be shown) not always available or achievable. This and many other issues mentioned later in this article raise the question whether the mere fact of running a business should be the main criterion for the choice of the type of bankruptcy proceedings, or, rather, should the criterion concerns the type of entity (natural or legal person).

Consumer bankruptcy, as a separate judicial proceeding, was introduced in Poland by means of amending bankruptcy and reorganization laws on 5 December 2008: the Act on Amending the Act on Bankruptcy and Reorganization, and the Act on Court Costs in Civil Cases[4] – see Diagram 1. The amendment took effect on 31 March 2009. This separate judicial proceeding was not formally called "consumer bankruptcy" but "bankruptcy proceedings against natural persons other than sole traders (entrepreneurs)", i.e. those who do not conduct economic or professional activity on their own behalf,[5] and this very term is still in use. For clarity, as consumer bankruptcy is dedicated to all natural persons who are not subject to bankruptcy proceedings on the general basis (general provisions of Title I), it is also dedicated to persons running a farm on condition that they do not conduct any other economic or professional activity (Adamus 2015, p. 35). However, consumer bankruptcy does not apply to partners in commercial partnerships, who are fully liable for the partnership's debts with all their assets, partners in professional partnerships, and board members of commercial companies.

[3] Art. 22 par. 2. Commercial Companies Code. In partnerships, each partner shall be liable for the partnership without limitations, with all his assets, jointly and severally, with the remaining partners and the partnership (…).

[4] Journal of Laws No. 234, item 1572.

[5] This definition of entrepreneur is based on Art. 43^1 of the Civil Code (Journal of Laws, 2018, item 1025).

Diagram 1. The history of changes in regulations regarding consumer bankruptcy in Poland

Bankruptcy Law of 1934 – Regulation of the President of the Republic of Poland of 24 October	→ Bankruptcy may be declared by entrepreneurs
↓	
The Law on Bankruptcy and Reorganization Proceedings of 2003 enacted on 28 February, enforced on 1 October 2003 – the B&R Law	→ Bankruptcy may be declared by entrepreneurs, with a legal definition of entrepreneur also included (Art. 5.1)
↓	
Amendment of the B&R Law of 2008 The Act of 5 December 2008 on Amending the Act – Bankruptcy and Reorganisation Law and the Act on Court Costs in Civil Cases, enforced on 31 March 2009	→ Consumer bankruptcy becomes a separate judicial proceeding as the bankruptcy of a natural person that is not an entrepreneur (Part 3, Title 5 of the B&R Law)
↓	
Amendment of the B&R Law of 2014 The Act on Amending the Act – Bankruptcy and Reorganisation Law, the Act on the National Court Register and the Act on Court Costs in Civil Cases enacted on 29 August, enforced on 31 December 2014	→ The so called „new consumer bankruptcy" is introduced, which results in increased numbers of bankruptcy lodgings
↓	
The Restructuring Law – enacted on 15 May 2015, enforced on 1 January 2016 **Amendment of the B&R Law of 2015** – on the base of art. 428 of the Restructuring Law, enforced on 1 January 2016 **The Bankruptcy Law (BL)** becomes the new name of the B&R Law	→ Division 4 of the B&R Law (Reorganization Proceedings in the Case of Insolvency Threat) is revealed as the Restructuring Law is enforced The BL increases the chance to reduce the debt of reliable entrepreneurs and shortens the period after, which the former entrepreneur acquires consumer bankruptcy capacity
↓	
The Draft Act Amending the Act – Bankruptcy Law and Some Other Acts prepared by the Ministry of Justice on 25 May 2018	→ Almost automatic declaration of insolvency of natural persons, including former entrepreneurs? Active participation of creditors in bankruptcy proceedings becomes the main barrier to the discharge of the dishonest debtor?

Source: The author's own elaboration.

The changes introduced in 2008 did not bring the expected results: despite social expectations, there was no mass shaking of debts despite the austerity suffered by a part of the society (Adamus 2015, p. 10). The regulations introduced clear barriers to debtors which limited access to "the new start".[6] As a result, more changes were introduced (see Diagram 1) through the amendment to the B&R Law of 29 August 2014 – the Act on Amending the Act – Bankruptcy and Reorganization Law, the Act on the National Court Register and the Act on Court Costs in Civil Cases, which entered into force on 31 December 2014.[7] Following its enactment a new phrase was coined: the so called „new consumer bankruptcy".

As the new solutions are much more liberal, the group of individuals who can now resort to consumer bankruptcy as a means of resolving financial problems of their households has grown in numbers considerably (see Graph 1). This group includes not only non-entrepreneurial individuals, but also entrepreneurs. The reason for this can be found in another milestone in bankruptcy law history: the enactment of Restructuring Law (the RL) on 15 May 2015, enforced on 1 January 2016. Article 428 of this act introduced important changes to the B&R law. It repealed Title 6 of Part 1: "Arrangement" and Part 4: "Reorganizing Proceedings in Case of a Threat of Insolvency" as the new regulations were enacted in the RL. It also changed the name of the former Act to "Bankruptcy Law" (BL) and, yet more importantly, it made Bankruptcy Law again more liberal due to the changes concerning the status of entrepreneurs as natural persons. To understand the changes, it must be clarified that in order to be allowed to acquire the capacity for consumer bankruptcy, the entrepreneur (natural person) must terminate their business activity, including deletion from the relevant register (the Central Register and Information on Economic Activity). Prior to January 1 2016, the capacity for consumer bankruptcy was obtained after one year from the date of deletion from the register. Under the BL, since 1 January 2016, a former entrepreneur can lodge petition for consumer bankruptcy one day after having data deleted from relevant register (consumer bankruptcy proceedings will be applied even if the bankruptcy petition is lodged by the creditor). Such considerable shortening of "waiting time" results from the desire to equalize the chances of entrepreneurs and consumers in getting a "new start". However, these chances remain unequal due to three persisting crucial differences between business and consumer bankruptcy proceedings.

Since 31 December 2014, the first of the crucial differences between the two proceedings lies in the principle of optimality. According to Art. 2 of the B&R Law, in case of company bankruptcy the proceeding should be conducted in a manner which provides for maximum satisfaction of creditors' claims and, when rational, for the preservation of the debtors' enterprise. In contrast, proceedings against natural persons, who do not perform business activity, should be conducted in a way that allows the bankrupt's liabilities not completed in bankruptcy proceedings to be remitted and, if possible, to satisfy the claims of creditors to the highest extent

[6] Only as few as 120 consumer bankruptcies were declared in 2009–2014 (see Graph 1).
[7] Journal of Laws No. 2014, item 1306.

possible. Therefore, depending on the procedure, the creditor's or debtor's best interest is placed first. From this point of view, consumer bankruptcy is a better solution for an insolvent individual, despite the fact that, theoretically, a possibility to discharge an entrepreneur (being a natural person) of debt existed since 2003 (under Art. 369 of the B&R law). However, it must be explained that such a possibility of discharge gained more practical significance as late as on 1 January 2016, following the enactment of the RL amendment to the B&R law. At that time, the aforementioned Art. 2 was changed by adding a clause under which any proceedings governed by the act, conducted with respect to natural person being an entrepreneur, should also be conducted in such a manner as to provide a reliable debtor with the possibility of debt reduction.[8] Furthermore, an amendment to Art. 368 of the B&R law liberalized the commitments faced by the entrepreneur (being a natural person) to allow the court to accede to a repayment plan petition and discharge a part of the debtor's liabilities that were not satisfied in the bankruptcy proceeding – the conditions have now become similar to those under which the consumer can declare their bankruptcy. However, this does not change the fact that as regards the entrepreneur the creditor's interest is still placed first.

The second fundamental difference between entrepreneurial (business) bankruptcy and consumer bankruptcy in Poland results from Article 13 of the B&R Law (also, the BL), which still concerns enterprises, but since 1 January 2016 does not apply to the natural person not conducting business activity. Under this article, the court shall dismiss on substantive grounds a bankruptcy petition if the insolvent debtor's assets are insufficient to cover the costs of proceedings, or are only sufficient enough to cover such costs, or if it finds that the debtor's assets are encumbered with a mortgage, pledge, registered pledge, treasury pledge or maritime mortgage to such an extent that the remainder of these assets is insufficient to cover the costs of proceedings. The number of applications dismissed on the grounds of Art. 13 accounted for 72.3% – 84% of the number of all dismissed business bankruptcy petitions in the years 2013–2017.[9] Moreover, even after declaration of bankruptcy, in the light of Art. 361 of the BL, insufficient assets and the lack of payment of advances on the costs of proceedings give grounds for discontinuation of bankruptcy proceedings only in the case of entrepreneurs.

The third crucial difference between personal and business bankruptcy proceedings regards the obligation to lodge a petition to declare bankruptcy – this obligation applies only to entrepreneurs. In both types of the proceeding, the grounds for declaring bankruptcy are the same – it is declared with regard to a debtor, who has become insolvent (Art. 10). However, according to Art. 21, the debtor (entrepreneur) shall file a petition with the court to declare bankruptcy no later than within 30 days (before 1 January 2016 as soon as within two weeks) of the date on which the grounds for declaring bankruptcy occurred – this obligation also rests on mem-

[8] Also, the content of Art. 369 has been liberalized, which is discussed further on.

[9] The author's own calculations based on data of the Ministry of Justice provided by the Statistical Department of Management Information.

bers of the management board of capital companies. On the contrary, the non-entrepreneur is not obliged by any dates. The above-mentioned issue of obligatoriness is associated with a very important negative premise concerning the declaration of consumer bankruptcy against a former entrepreneur: under Art. 491(4), the court shall reject a petition for consumer bankruptcy if in the period of ten years prior to the date of submission of the petition the debtor, in spite of such an obligation, failed to timely submit a petition for bankruptcy, contrary to the provisions of the Act.[10] As it will be shown, currently, such legal regulations constitute a very important barrier on the way of the former entrepreneur to debt relief and to other privileges that are granted to insolvent natural persons following the liberalization of the bankruptcy law, in particular by introducing the so-called "new consumer bankruptcy".

2. Main stages of consumer bankruptcy proceedings

According to Art. 1, the Bankruptcy Law shall govern:

1) collective pursuit of claims by creditors against insolvent debtors who are entrepreneurs (which relates to business bankruptcy);
2) pursuit of claims against insolvent debtors who are natural persons who do not run a business (which relates to consumer bankruptcy);
3) the effects of declaring bankruptcy (which relates to both consumer and business bankruptcy);
4) redemption of liabilities of the bankrupt who is a natural person (which relates to consumer bankruptcy).

This general declaration concerning consumer bankruptcy is currently realized under the provisions of Part 3, Title 5 of the B&R Law (Art. 491(1)–491(23)).[11] Despite a growing trend in this respect, a number of studies point to the society's unchanged low awareness in terms of those legal regulations. Among the studies most up-to-date, it is worth presenting the findings of the questionnaires conducted by Joanna Podczaszy, published in 2016 (Podczaszy 2016, p. 179): even though as many as 57% respondents have heard about consumer bankruptcy,[12] 91% of them can not refer to any legal acts that regulate the proceedings, and more than 88% have no idea what the proceedings look like. The whole path to debt relief is divided into the following major stages:

1) proceeding for declaration of bankruptcy (STAGE I),
2) actual bankruptcy proceeding, that is, proceeding following declaration of bankruptcy (STAGE II), which, in the current legal state, can take the form of either

[10] For translation purposes the author used: *The bankruptcy Law. The Restructuring Law, Bilingual edition*, translated by Rucińska A., Kochański Zięba & Partners Sp. k. and Wydawnictwo C. H. Beck, Warsaw 2018.

[11] Consolidated text, Journal of Laws of 2017, item 2344, as amended.

[12] For comparison, according to a 2011 questionnaire by Anna Szymańska, the proportion was 28% (Szymańska 2014, p. 138), and in 2006, according to a survey by Beata Świecka, only as few as 17% respondents had heard or read of consumer bankruptcy (Świecka 2009, p. 186).

liquidation or arrangement model, where the liquidation model is the basic and most often used one, and it includes:
- determination of the composition and liquidation of the bankruptcy estate by bankruptcy trustee,
- filing claims by creditors and establishing the list of claims,
- establishment and implementation of distribution plan,
- establishment of creditors' repayment plan,

3) implementation of creditors' repayment plan (unless the arrangement model was selected),
4) discharge of remaining liabilities that have not been satisfied in the bankruptcy proceeding.

Stage I is aimed at determining the possibility to declare bankruptcy of the given entity, and the activities are mostly of control (verification) nature. The proceeding is opened after lodging a motion[13] by the debtor, and if the debtor runs a business activity, the motion can also be lodged by the creditor. The motion, a special form of which was introduced on 1 January 2016, should, among other things, set out the facts in support of the petition and substantiation of this fact, contain an up-to-date and complete list of assets with their estimated value and a list of creditors showing their addresses and amounts of claims. Interestingly, the findings of a survey by the Institute of Justice on the proceedings opened in 2015 show that the biggest proportion of the liabilities revealed in bankruptcy motions concerned loans from banks and the shadow banking system.[14]

The court[15] examines whether it is the due one to investigate the motion, whether the motion meets formal and fiscal requirements, and, optionally, it may request providing missing data. However, most importantly, the court investigates whether the entity is indeed entitled to bankruptcy capacity, and whether there is any ground to declare bankruptcy. At this stage, with regard to the consumer, the court secures ex officio the debtor's assets. Finally, still at this stage, the motion can be returned (e.g. due to formal defects), dismissed (e.g. when there is no ground to declare bankruptcy due to untrue data provided by the debtor, or if the debtor's obligations were discharged within ten years prior to the filing of petition), or, alternatively, the court issues a bankruptcy order in which the bankruptcy is declared.

The court's orders and announcements made in the proceedings for declaration of bankruptcy (and also at subsequent stages) ought to be published in the so called Register,[16] i.e. a specially dedicated web portal known as the Central Register for

[13] Since 1 January 2016 motions must be lodged using a new special form.
[14] As many as 88% of liabilities reported in motions are bank loans. See: Fiedorowicz, Popłonyk 2016. The survey analyzed 240 cases from nine District Courts, p. 20.
[15] Bankruptcy cases shall be heard by a district court – a commercial court.
[16] The register is defined by Art. 5 of the Act on Restructuring Law of 15 May 2015.

Restructuring and Bankruptcy,[17] with the proviso that before the Register becomes fully functional,[18] they are published in the Court and Commercial Gazette.

The bankruptcy order in which the bankruptcy is declared (or dismissed) should be issued within two months after filing the petition (instructional term), but, as the data obtained by the author from the Ministry of Justice show – effectively, CB proceedings took 2.1 months in 2009, 3.4 months in 2011–2013, and 4.1 months in 2017.

When granting a bankruptcy petition, the court issues a bankruptcy order in which, among other things, it appoints a judge-commissioner and bankruptcy trustee who play key roles in subsequent proceedings. At the same time, the court summons the bankrupt's creditors to file claims within 30 days after a notice of the bankruptcy order is published in the Register. Importantly, upon declaration of bankruptcy, the spiral of bankruptcy is stopped (penal interest is no longer charged), and executive proceedings are suspended, and, ultimately, discontinued.

The proceedings at Stage II are run by the judge-commissioner, who supervises the work of the bankruptcy trustee. The task of the bankruptcy trustee is to determine bankrupt's property that shall become the bankruptcy estate that is used to satisfy claims of the debtor's creditors. A bankruptcy trustee takes possession of, administers and secures the bankrupt's assets against destruction, deterioration or appropriation by third parties and shall proceed with liquidating the assets. What is important, the bankruptcy estate does not comprise a part of earnings, as well as a part of assets, that are, in general, necessary to satisfy the basic needs of the debtor and his dependents. The debtor is obliged to cooperate closely with the trustee and should provide him with due explanations regarding his entire estate.

The bankruptcy trustee shall give notice of the declaration of bankruptcy to those creditors whose addresses are known to him. Upon expiry of the time limit to file claims and examination of the filed claims, the bankruptcy trustee shall prepare a list of claims forthwith, but not later than within two months after expiry of the time limit to file claims. He establishes a plan of distribution of the bankruptcy estate that requires the approval of judge-commissioner. The distribution plan shall be implemented promptly upon its approval.

As regards the entrepreneur, unlike the consumer, after finally implementing the distribution plan the court shall order termination of bankruptcy proceedings (Art. 368), but this is not the end of the path to "the new start". Within 30 days of the order's announcement, a solo trader can lodge a motion for the establishment of creditors' repayment plan and become discharged of remaining liabilities that have not been satisfied in the bankruptcy proceedings (Art. 369). On the other hand, as

[17] Under Art. 5 of the Restructuring Law, which was to take effect on 26 June 2018, the Register shall be run in the ICT system administered by the Minister of Justice, and shall be used for an array of functions such as hosting and announcing decisions, orders, documents and information regarding restructuring and bankruptcy proceedings, and making the above data available publicly.

[18] Alas, despite the previous announcements, as of 26 June 2018 the Register is still not functional, and the date of its establishment is unknown, which falls under a lot of criticism.

regards the consumer, the establishment of repayment plan is ex officio the next stage of bankruptcy proceedings. The court establishes a repayment plan including the extent and the time limit within which the bankrupt is liable to repay liabilities, and establishes this portion of bankrupt's liabilities that arose prior to the declaration of bankruptcy that shall be discharged following implementation of the creditors' repayment plan. A final decision establishing the repayment plan discontinues the proceedings. Unless the bankrupt fails to meet all the obligations under the repayment plan, he obtains debt discharge and is given "a new start".

The described procedure is a standard, however, in exceptional situations it is possible that the court discharges the bankrupts' liabilities without establishing a repayment plan, which discontinues proceedings. This may happen when due to personal situation the bankrupt would not be capable of making any repayments (Art. 491). The findings of a study on the proceedings opened in 2015 show that in 52% of cases (Fiedorowicz, Popłonyk 2016, p. 28) the court discharged the bankrupts' liabilities without establishing a repayment plan. The findings also show that, typically, after declaring bankruptcy it takes a year or more before a repayment plan is finally established, and in only 8% of the cases under investigation the procedure took less than six months (Fiedorowicz, Popłonyk 2016, p. 25).

Finally, it ought to be stressed that an individual should behave like an honest debtor all along his way to "a new start". It is important – as all attempts to act to the detriment of creditors, concealment of assets, non-performance of obligations that are defined by the Law may constitute a reason for dismissal of bankruptcy petition or discontinuation of bankruptcy proceedings.

3. New consumer bankruptcy in Poland – major manifestations of liberalization

As mentioned before, a real breakthrough in the history of consumer bankruptcy in Poland was the amendment to the B&R Law of 29 August 2014, which entered into force on 31 December 2014.[19] After its enactment a new phrase was coined: the so called „new consumer bankruptcy", and the number of lodged and declared consumer bankruptcies increased rapidly (see Graph 1).

According to the argumentation behind the draft act, the main reason for introducing and liberalizing the provisions on consumer bankruptcy was the need to ensure the possibility of debt relief for those natural persons who are indebted to such an extent that makes them incapable of repaying their debts. It was expected that such an opportunity would bring social and economic benefits:

- reduction of social exclusion and limiting the mechanism of inheriting helplessness by the next generations;

[19] The consolidated text, Journal of Laws of 2015, item 233, as amended.

- possibility of debtors' return to normal management, ultimately limiting the so -called gray zone and causing a decrease in crime,
- exerting a positive impact on the financial sector by speeding up the resolution of bad debts, and, in the long term, enables debtors to re-use the services of financial institutions.

As before, consumer bankruptcy can be declared (overall, once in ten years) on a natural person not conducting any business activity (a substantive premise), who is insolvent, i.e. is incapable of performing his or her due cash obligations.[20] The basic difference between "new consumer bankruptcy" and the previous regulations insists in the so called negative substantive premises of declaring bankruptcy. The major change is the issue of the so called payment morality of the debtor, the lack of which was and still is the grounds to dismiss a CB motion. Under the provisions of older regulations, the court would reject a petition for bankruptcy if the insolvency of the debtor was not a result of exceptional circumstances beyond his/her control; in particular, when the debtor incurred an obligation while being insolvent, the debtor's employment relationship was terminated for reasons attributable to the employee or with his consent. Whereas, as regards the "new consumer bankruptcy", the court shall reject a petition for bankruptcy if the debtor has caused their insolvency or significantly increased its extent intentionally or as a result of gross negligence.[21] Such a change resulted in the increasingly growing number of individuals, whose bankruptcy could be declared – it also gave former entrepreneurs greater chance to obtain debt relief. As shown by Jaślikowski (2011, p. 72), who analyzed the decisions and grounds taken by courts in CB cases between 31 March 2009 and 1 June 2009, courts pointed out that "such issues as untimely paying liabilities by contractors, unfair competition, and the need to vindicate debts in court, are all part of the risk involved with conducting a business activity. Debtors as entrepreneurs could and should have considered those issues, get ready for their occurrence by amassing cash beforehand, or insure against such risks".[22] This quote is taken from an argumentation for dismissing a motion for bankruptcy. Hence, it is easy to assume that dealing with former entrepreneurs in such a strict way did not encourage entrepreneurship, but inactivity and fear of taking risk in the future.

To demonstrate the significance of the change of the negative premise for declaring bankruptcy it is also worth showing another example: it is commonly argued that one of the major reasons behind consumer bankruptcy is the deteriorating health of the debtor or the demise of his or her spouse, which results in the household's lower income and a difficulty to keep up the previously incurred liabilities. Prior to

[20] Now a debtor shall be presumed to be no longer able to pay his liabilities as they fall due if the delay in the payment of liabilities exceeds three months (Art. 11. point. 1a).

[21] Changes of similar nature, conditioning debt relief of all natural persons including those running a business, were enforced later, i.e. on 1 January 2016, along with the amended Art. 369 of the Bankruptcy Law Act.

[22] At the same, it shows that in practice the assessment of insolvency was different with regard to former entrepreneurs as in some cases the circumstances were yet considered exceptional and independent.

the introduction of "new consumer bankruptcy", sometimes courts decided that the passing of the spouse was an independent circumstance, but not exceptional at all, especially if the spouse was not a young person, and based on that would dismiss CB petitions. Another line of argumentation would be: "health is not an exceptional circumstance as many people at the age of the debtor, sometimes with some being even younger, do complain of bad health" (Jaślikowski 2011, p. 72).

What is more, the "new consumer bankruptcy" extends the grounds for bankruptcy and removes the barrier to debt relief through a clause, according to which the court can make decisions in favor of the debtor if it is justified by equity or humanitarian reasons. Relying on equity or humanitarian reasons, the court may waive the dismissal of bankruptcy petition even in the following, provided by the provisions of the Law (Art. 491(4)), cases:

- if within ten years prior to the filing of petition consumer bankruptcy proceedings were conducted with regard to the debtor and
  a) such proceedings were discontinued otherwise than upon the debtor's motion,
  b) all or some of the debtor's obligations were discharged regardless of whether the debtor became again insolvent or the extent of the debtor's insolvency increased despite or because of the debtor's due diligence,
  c) a repayment plan established for the debtor was set aside because the bankrupt failed to fulfill the obligations,
- if within ten years prior to the petition filing, an act in law performed by the debtor was declared detrimental to the creditors by a final and non-appealable judgment,
- if within ten years prior to the petition filing, an act in law performed by the debtor was declared detrimental to the creditors by a final and non-appealable judgment the debtor failed to timely file a bankruptcy petition, although he was obliged to comply so (referring to entrepreneurs),
- if the details provided by the debtor in the petition are significantly inaccurate or incomplete.

Equity or humanitarian reasons may be also applied during bankruptcy proceedings following declaration of bankruptcy – this occurs in cases in which the law provides for discontinuation of proceedings or makes the discharge of debtor's liabilities impossible. In particular, such reasons may be applied if the bankrupt blatantly fails to disclose or deliver all his assets or necessary documents to the bankruptcy trustee or otherwise fails to keep his commitments connected with a phase of determination of the composition, liquidation and distribution of the bankruptcy estate. They may be also applied while taking decisions connected with setting aside the creditors repayment plan (when the bankrupt blatantly fails to fulfill the obligations, e.g. failing to reveal earned income or acquired assets that he should timely disclose in the annual report upon the implementation of the repayment plan).

Another fundamental change introduced along with the arrival of "new consumer bankruptcy" is removing the barrier, which constitutes the costs of bankruptcy proceedings incurred by the debtor. The change:

- abrogates the possibility to dismiss the motion on the grounds of Art. 13 and discontinue the proceeding on the grounds of Art. 361, i.e. the change abrogates the obligation for the debtor to have sufficient assets to cover the costs of the proceeding – it is a very important change indeed as Art. 13 was the major reason for dismissing motions (it was one of the reasons for dismissing 77% of cases under the analysis of Jaślikowski, and in 44% of cases Art. 13 was the sole reason for dismissal) (Jaślikowski 2011, pp. 70–71),
- introduces the principle under which if the assets of the insolvent debtor are insufficient to cover the costs of proceeding, the costs are covered temporarily by the State Treasury[23] – the debtor later covers the costs paying them under creditors' repayment plan; whereby, if it clearly appears from the personal situation that the debtor would not be capable of making any repayments, the court can discharge the bankrupt's liabilities without establishing a repayment plan, and then the costs of proceedings are incurred by the State Treasury,
- reduces the costs of the petition filing, and the costs of court announcements made during the course of the proceedings – following the change, costly announcements in the national press are not longer necessary, they are now made in the Register instead, and free of charge.

The most important changes following the introduction of "new consumer bankruptcy" also concern the housing situation of the debtor during the bankruptcy proceedings, and the maximum time allocated to settle creditors' repayment plan. Now, following the changes, if the bankruptcy estate comprises residential premises or a single-family house, in which the bankrupt resides, and if it is necessary to satisfy housing needs of the bankrupt and his dependents, an amount equivalent to the average rent for residential premises in the same or adjacent locality, payable for the period between twelve and twenty-four months, shall be allocated for the bankrupt from the proceeds of the sale thereof. This social privilege used to take a similar form under the previous regulations too (in force since 31 March 2009), with the difference that the period of "satisfying housing needs" was restricted to 12 months.[24]

The time limit, within which the bankrupt is obliged to repay the liabilities under the creditors' repayment plan, was shortened when the "new consumer bankruptcy" law was enforced. Now, the time limit must not exceed 36 months, while previously (till the end of 2014) it could not exceed 60 months.[25] What is more, if the bankrupt is incapable of fulfilling the obligations under creditors' repayment plan, the court can extend the time limit for the repayment of claims, but now this extra period must not exceed 18 months, while under former regulations it could not exceed 24 months.[26]

[23] It was regulated by Art. 491(3c), now it is Art. 491(7).
[24] It currently ensues from Art. 491^13 point 1; previously from Art. 491^6 point 1.
[25] It currently ensues from Art. 491^15 point 1; previously from Art. 491^7 point 1.
[26] It currently ensues from Art. 491^19 point 1; previously from Art. 491^10 point 1.

4. Main manifestations of planned liberalization of the BL that relate to natural persons – both entrepreneurs and consumers

In April 2018, the Ministry of Justice submitted for consultation another draft amendments to the Bankruptcy Law. It is necessary to mention it because enactment of that act would mean that Poland joins the countries with the most liberal solutions in the field of bankruptcy law. According to the declaration of the project promoter of this act, the changes are aimed at:

- increasing the possibility of debt relief in bankruptcy proceedings, due to the still serious problem of over-indebtedness of individuals, and preventing discrepancies in judicial decisions,
- striving to unify the legal situation of all natural persons, both current and former entrepreneurs as well as non-business people,
- shortening and streamlining the bankruptcy procedure, due to the growing number of proceedings (for example, by increasing the competence of bankruptcy trustees and court referendaries).

It is not a purpose of the author to accurately present and discuss all proposed changes, as this would require a separate and extensive study. However, it is worth pointing out at least some of the most key changes, especially those that seem highly controversial as shown by the opinions of judges and will result in a significant increase in the number of bankruptcy applications.[27] The most controversial is that, under the draft Act Amending the Act – Bankruptcy Law of 18 April 2018, the premise of intentionality and gross negligence shall be abolished, and consumer bankruptcy shall be declared as if automatically. The official justification for the change of the Law indicates that the declaration of insolvency should be primarily determined by the state of insolvency (both in the company and consumers' case), and the grounds for dismissing the application should be clearly defined. According to the planned amendment, the debtor's extent of guilt will be assessed at the stage of establishing repayment plan (with more creditors' involvement) and will determine the time limit of its settlement – if it would be proved that the debtor had led to insolvency or increased its degree intentionally or as a result of gross negligence, the repayment plan would be established for a longer period then in honest debtor's case, i.e. for a period of 36 months to 84 months. Having been proven

[27] The excessive liberalism of the planned amendment is strongly criticized in the opinions submitted as a part of review of the Act by judges from districts of Poznań, Warsaw, Wrocław and Częstochowa (opinions of R. Rakower, A. Januszewski, W. Stenke, Ł. Lipowicz, P. Nowacki, E. Klimowicz-Przygódzka, K. Wytrykowski, J. Horobiowski, R. Olszewski and others). They all express fears that the new regulations will decrease the level of payment morality of Poles and maybe even support pathological behaviors. They are also sure that the number of applications for bankruptcy will increase rapidly, and due to staff and organizational shortages there will be serious problems with handling the cases. Opinions that do not raise this type of negative comments constitute a decided minority. Positive opinion about liberalizing the access to debt discharge was presented by the Commissioner for Human Rights, Adam Bodnar. The opinions are published on: http://legislacja.rcl.gov.pl/projekt/12312002

self-responsible for becoming insolvent does not, however, mean that debt relief is impossible. It will be impossible only if the debtor's actions are legally recognized as criminal offenses under the applicable law. These new regulations would apply to all natural persons, regardless of whether they are entrepreneurs or not.

According to the authors of the planned amendment, the abolition of the premise of intentionality and gross negligence should eliminate the risk of wrong court decisions. Consequently, the discusses draft of the act does not change the majority of existing, clearly defined in Art. 491(4)), substantive grounds for the dismissal of the consumer bankruptcy petition (that were presented in the previous point of the paper). However, one of them that regards to former entrepreneurs, is going to be abolished: a consumer bankruptcy petition would not be dismissed due to the fact that within ten years prior to the filing of the petition the debtor failed to timely file the bankruptcy petition, in violation of the Act, although they were obliged to comply so. This change can be seen as a manifestation of the striving to unify the legal situation of the consumer and the former entrepreneur. However, we should at the same time notice that instead of that premise for dismissal another ones are going to be introduced. According to the planned amendment, the court will dismiss a consumer bankruptcy petition if within ten years prior to the filing of the petition the debtor was lawfully forbidden to conduct business activity[28] under Art. 373 of the BL or if the debtor has been convicted by a valid judgment under Art. 300, Art. 301 or Art. 302 of the Penal Code (they refer to crimes against property and the security of trade, i.e. to inappropriate and prohibited behaviors in the face of insolvency, such as hiding property, obstructing the satisfaction of creditors claims) or under Art. 586 of the Code of Commercial Companies. The last one states that "any person who, while acting in the capacity of a member of the management board or a liquidator of a commercial company, fails to file a petition in bankruptcy of the commercial company despite the occurrence of circumstances, which give grounds for bankruptcy of the company or partnership under legal regulations shall be liable to a fine, penalty of restriction of freedom or imprisonment of up to one year"[29]. This change means that negative consequences of failing to timely file the bankruptcy will still apply to insolvent board members of commercial companies.

Finally, it is also worth mentioning that despite a few other important changes, aimed at unifying the situation of all individuals in the face of bankruptcy (like those concerning the housing situation of the debtor during the bankruptcy proceedings or those introducing the conditional debt discharge), the legal situation of the entrepreneur and non-entrepreneur would be still different. The most important difference between entrepreneurial (business) bankruptcy and consumer bankruptcy in Poland will result from unchanged Art. 13 and Art. 361 – the poverty barrier on a way to debt relief will still exist.

[28] In the judges' reviews to the draft Act, cited already, we find a remark that in practice such a ruling is issued very seldom.

[29] Art 586 of the Act of 15 September 2000 – Code of Commercial Companies consolidated text, Journal of Laws of 2017, item 1577 (as amended).

The manifestations of liberalizing the regulations, especially the most controversial one, must be considered along with another assumption of the new regulations, i.e. creditors' increased engagement throughout bankruptcy proceedings. To a large extent, insolvent debtor's debt relief shall depend on creditors' active involvement. If the court finds evidence that the debtor prejudiced creditors' interests intentionally, the grounds for dismissal of the consumer bankruptcy petition will become apparent after the declaration of bankruptcy, the proceeding may be discontinued with very negative effects to the debtor – not only he is not granted debt relief, but also deprived of the possibility to file another petition over the next ten years. In order to increase creditors' active involvement, the proceedings shall be more transparent by making it possible for all parties to look into documents – to that end, the long-promised Online Central Register would have to become functional at last.

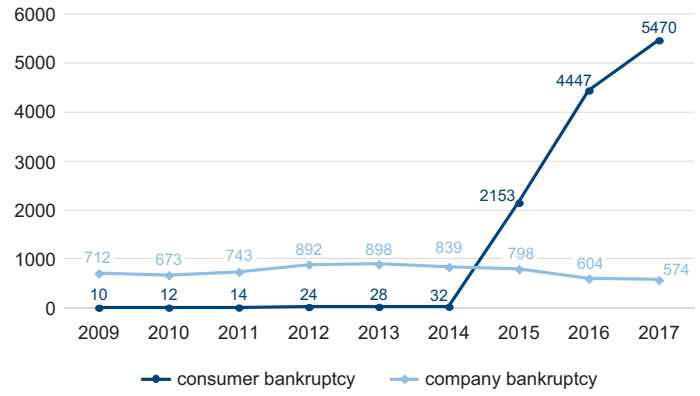
5. Changes in the number of bankruptcies as a result of liberalizing the bankruptcy law

The liberalization of consumer bankruptcy law was aimed at enabling debt reduction for a wider range of insolvent citizens. As illustrated in Graph 1, the aim was achieved. When older regulations were in force, in 2009–2014, there were only a total of 120 consumer bankruptcy notices recorded. Meanwhile, since "the new consumer bankruptcy" came into force, a clear increase in the number of declared bankruptcies of natural persons has been observed. The number of declared consumer bankruptcies in 2015 was 67 times bigger than the 2014 figure. In 2015 the number doubled. At the same time, the number of company bankruptcies remained stable – in 2009–2017 it oscillated around 748 cases annually. Taking into account the fact that by the end of September 2018, 4464 consumer bankruptcies and 445 company bankruptcies were announced[30], it can be predicted that at the end of 2018 the number of bankruptcies will be around 6 000 (consumers) and around 600 (companies).

What is more, while the number of lodged company bankruptcy petitions was stable, as regards consumer bankruptcies the number of filed petitions was decreasing until 2014, which means that an increasingly growing number of debtors was becoming aware of the then existing barriers to declare bankruptcy (see Graph 2). Sure enough, this trend was reversed upon introduction of new consumer bankruptcy.

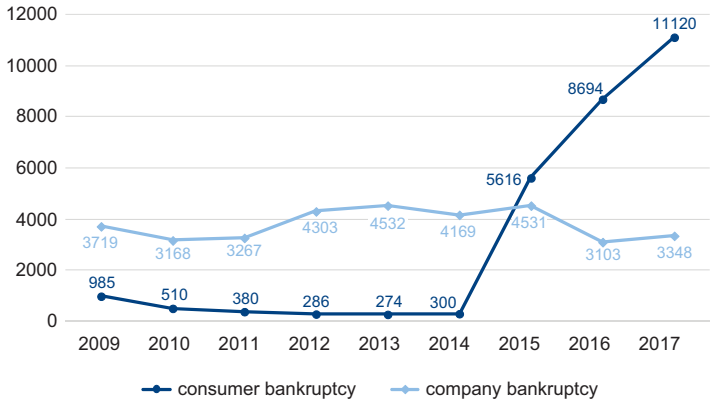
[30] According to data of the Ministry of Justice, in the first half of 2018 it was it was: 4464 and 307.

Graph 1. Number of consumer bankruptcies and company bankruptcies in Poland in 2009–2017



Source: The autor's own elaboration based on data obtained from the Ministry of Justice.

Graph 2. The number of filed petitions for consumer bankruptcies and company bankruptcies in Poland in 2009–2017



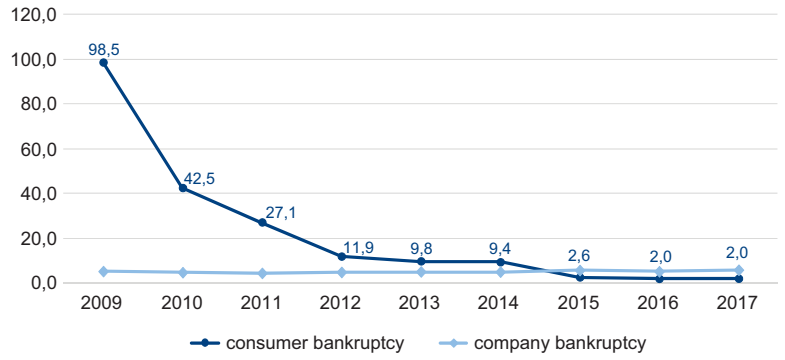
Source: The author's own elaboration based on data obtained from the Ministry of Justice.

Another effect of the liberalization of the consumer bankruptcy law is the decreasing ratio of the number of filed requests for consumer bankruptcies to the number of declared bankruptcies (Graph 3) – in 2009, only one out of nearly 99 applications obtained the court's approval, while in 2017 it was one out of two. The decrease of the ratio could be observed even before the new consumer bankruptcy law was enforced, which may again imply that consumers' knowledge concerning the conditions that must be met to be declared bankrupt increased; requests for bankruptcy declaration were prepared in a better way, and the proportion of returned or rejected petitions decreased. It is worth adding that during the regime of

"the new consumer bankruptcy", in 2015–2017, the average percentage of dismissed petitions was 14.4% (oscillating between 11.4% and 17.4%), while during the previous regime it oscillated between 34% and 65%, with the mean at 47.8%.

In turn, the ratio of the number of filed requests for company bankruptcy to the number of declared company bankruptcies at the time of both regimes remained relatively stable, which only confirms the lack of liberalization of provisions regarding company bankruptcy. On average, bankruptcy is declared for one in about six petitions, which at the same time means that in about five out of six cases petitions were either dismissed or returned, or the proceedings were discontinued, or the case was settled in another way. What is more, unlike in the case of consumer bankruptcy, compared to 2009–2012 the proportion of dismissed petitions for company bankruptcies doubled in the years 2013–17, (in 2009–2012 about 27.25% of petitions were dismissed, while in 2013–17 the figure was about 54.8%). As mentioned before, the predominant basis for dismissal was Art. 13.

Graph 3. The ratio of the number of filed petitions for consumer and company bankruptcy to the number of declared bankruptcies in 2009–2017 in Poland



Source: The author's own elaboration based on data obtained from the Ministry of Justice.

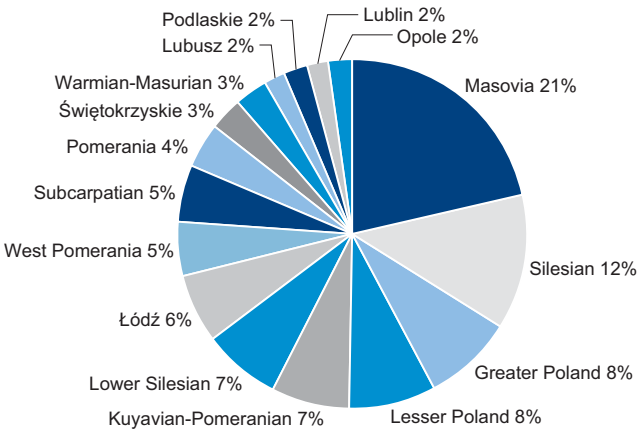
Considering the reasons for the growing number of consumer bankruptcies it is also worth having a look at the regional statistics on CB which are presented in Graph 4. It shows that Masovian Province accounts for 21% of consumer bankruptcies declared in Poland in 2009–2017, and the next provinces in the ranking are Silesia and Greater Poland. The lowest number of CBs was declared in Opole and Lublin provinces – each accounts for approximately 2% of all cases.

Regional statistics on consumer bankruptcy cases become even more interesting when they are gathered and compared to the value of overdue liabilities[31] of Po-

[31] Overdue liabilities, i.e. at least 60 days overdue.

les in provinces, as provided in InfoDług reports[32] by BIG InfoMonitor[33] – data for 2017 is presented in Graph 5. It must be noticed that Masovia and Silesia account not only for the highest proportion of declared bankruptcies, but also for the highest value of overdue liabilities in 2017. At the same time, at the bottom of both rankings are Opole and Podlaskie Provinces. At the same time, comparing reports covering different years, one can notice that over the past few years there have been no significant changes in the ranking of provinces in terms of the overall volume of liabilities and debt. These findings indicate that the phenomenon of over-indebtedness of households is related to consumer bankruptcy – if the indebtedness of households continue to increase, as it could be observed in the past,[34] we should expect a growing number of bankruptcy petitions even if there is be no significant changes made in the Bankruptcy Law.

Graph 4. Share of provinces in the total number of consumer bankruptcies in Poland in 2009–2017



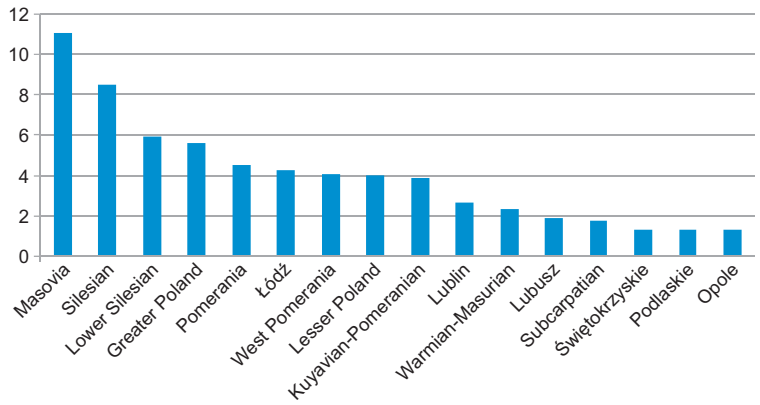
Source: The author's own elaboration based on reports provided by the Central Economic Information Center on http://www.coig.com.pl

[32] It is a nationwide report on overdue liabilities and unreliable debtors. Before 2018 it was the nationwide report on overdue liabilities and high-risk clients.

[33] Central Economic Information Center InfoMonitor S.A.

[34] According to reports by InfoDług, at the end of 2015 the joint volume of overdue liabilities was 42.76 bn PLN, 53.69 bn at the end of 2016, 64.49 at the end of 2017. At the same time the number of unreliable debtors grew from 2.06 m to 2.52 m Poles.

Graph 5. The total value of overdue liabilities (in PLN billions) in provinces in Poland in 2017



Source: The author's own elaboration based on data provided by BIG InfoMonitor in the 2018 annual report "InfoDług" available on https://media.bik.pl/publikacje/4315?offset=0

Assumably, if the changes in the Bankruptcy Law preannounced by the Minister of Justice are finally introduced, the number of petitions and the number of bankruptcy proceedings shall grow considerably – many experts predict paralysis of courts due to staff shortages and lack of organizational preparation.[35] An increasing number of bankruptcies is also very probable considering that in many countries bankruptcy rates are much higher than in Poland.

6. Empirical evidence on Polish sole traders' capacity for bankruptcy

This empirical study was based on the data obtained from 82 natural persons, who contacted a law office in the first half of 2016 with a request to assess their capacity for bankruptcy – further be referred to as respondents. The law firm known as "consumerbankruptcy.pl" (pol. "upadłośćkonsumencka.pl") specializes in giving legal assistance to insolvent individuals – entrepreneurs and non-entrepreneurs. Even though the firm is based in Poznań, Greater Poland, it can provide services to people from all over Poland via its website (http://upadlosc-konsumencka.pl/pl/strona-glowna). In order to obtain legal advice, individuals must answer a number of questions concerning their legal status, the cause and date of insolvency, the types and amount of debts, their assets and any other information that is helpful in the process of assessing their capacity for bankruptcy. They were also asked about

[35] See: opinions to the project presented by judges: R. Rakower, A. Januszewski, W. Stanke, Ł. Lipowicz, P. Nowacki, J. Horobiowski, E. Klimowicz-Przygódzka and by Comissioner of Human Rights, A. Bodnar; http://legislacja.rcl.gov.pl/projekt/12312002

their awareness of the obligation to timely lodge company bankruptcy petition, the sources of legal information, and their experience in using legal advice.

Data presented in Table 1 show that all of the respondents were natural persons, but only 6.1% of them were consumers (never involved in any economic activity). Most of them were entrepreneurs that conducted business in the form of sole proprietorship.[36] It must be explained, however, that the structure of respondents does not prove that the problem of insolvency more often affects entrepreneurs – according to an elaboration of the Institute of Justice, in 2015, 64% of petitions for consumer bankruptcy were submitted by consumers and only 36% by former entrepreneurs (Fiedorowicz, Popłonyk 2016, p. 14). A different structure of respondents may result from the specifics of the research period: at the beginning of 2016 the period after which the former entrepreneur obtains consumer bankruptcy capacity was shortened.

Table 1. Legal status of respondents

Legal status	Number of cases	Percentage
sole proprietorship (SP)	65	79.3%
non-entrepreneurial person	5	6.1%
civil partnership	4	4.9%
registered partnership	3	3.7%
civil partnership + SP	2	2.4%
chairman in Ltd company with management contract	1	1.2%
chairman in Ltd company + SP	1	1.2%
registered partnership + SP	1	1.2%
Total	82	79.3%

Source: The author's own work

As insolvency was, in most cases, a result of business activity that despite its failure was not legally terminated, most respondents should file a petition for company – rather than consumer – bankruptcy. However, the capacity for bankruptcy as entrepreneur depends on the capability to cover the costs of bankruptcy proceedings. Due to some shortcomings in the responses, in 67 cases this capacity was assessed by an experienced analyst (a lawyer in that law firm). It was revealed that 87% of them did not own assets to cover the costs. On the basis of the results obtained, it can be concluded that due to the austerity of the bankruptcy estate, natural persons conducting economic activity have little chance to effectively declare business bankruptcy.

[36] This category also includes individuals, who do not conduct business activity any more (e.g. due to an illness), but failed to notify this fact in the due register, and only suspended their activity.

An important juridical obligation imposed on entrepreneurs is the commitment to lodge with the court a petition to declare bankruptcy within the period defined the provisions of law. The entrepreneur is obliged to meet this requirement, regardless of the fact if they own sufficient assets or not. To recognize that period correctly, the entrepreneur must realize that they have become insolvent. Having said that, only 51% of respondents (i.e. 31 individuals) responded positively to the question: "Do you know when you became an insolvent person?", while 49% responded negatively (seven individuals failed to give an unambiguous answer). This result can serve as an argument that natural persons conducting business activity are not sufficiently aware of the financial situation of their own business (or household). They often experienced penetration (mixing) of their household's budget, and enterprise budget surely is not conducive to a better assessment of financial conditions and debt management.

The finding that gives a lot of food for thought, an alarming one indeed, is a very small proportion of entrepreneurs, who are aware of the obligation to submit their bankruptcy petition in a timely manner (Table 2).[37] It is alarming as "ignorantia juris nocet": the debtors who do not meet the obligation are recognized as dishonest ones, which is the reason for dismissing their petitions for consumer bankruptcy submitted after the closing down their businesses (as former entrepreneurs).

Table 2. The answers to the question: "Do you know that you as entrepreneur were obliged to file a petition for company bankruptcy?"

Answer	Number of cases	Percentage
Yes	7	10%
No	63	90%
It doesn't concern me: 5 cases		
Not determined in 7 cases		

Source: The author's own work.

The previously presented findings reveal ignorance on the part of entrepreneurs (including former entrepreneurs). It also prompts a next question about the sources of financial and legal knowledge of natural persons. On the basis of the answers it can be definitely concluded that a vast majority of people regards the internet as the main source of knowledge needed to assess their legal situation. Only in 12 cases it was declared that lawyers' advice had been used. In all cases, the decision to ask for legal advice was prompted by bad financial situation of the individuals. Details concerning legal advice are presented in Table 3.

[37] What is more, it was only in two cases that the insolvency date did not exceed more than 30 days.

Table 3. Content and quality of legal advice

Details concerning legal advice	Number of cases	%
I was not informed about the obligation to file a petition for bankruptcy, even though I signaled difficult financial situation	6	83%
I was given wrong advice: filing a petition for bankruptcy declaration was discouraged due to lack of property	4	
I received help in preparing an application for declaring bankruptcy (the application was dismissed due to lack of property)	1	17%
I was informed about the obligation to file a petition for bankruptcy	1	

Source: The author's own work.

Presented data is intimidating – it shows that not only natural persons require education in the field of the bankruptcy law, also professionals, who do not necessarily keep up with legal changes. In 83% cases, the respondents failed to obtain appropriate legal advice. It is quite probable that the reason behind such a state of affairs is the common belief that lack of property relieves debtors of the obligation to submit bankruptcy petition in a timely manner (as they consider themselves "too poor to be bankrupt").

7. Discussion

The Polish and foreign literature points to the fact that the basic reason for the growing number of consumer bankruptcies is the ever increasing indebtness of households (Szymańska 2014; Świecka 2009). Excessive indebtness results from the increased consumption of goods and services accompanied by the lack of any savings plans and the consumers' poor awareness of financial mechanisms (Ramsay 2007). According to a study by the Institute of Justice, in 2015–2016, a dismissal of bankruptcy petition most typically used the following argumentation: "by taking out more and more loans and credits the debtor became indebted above their actual capacity to repay them, as the joint amount of installments exceeded or equaled the debtor's income capacity" (Fiedorowicz, Popłonyk 2016, p. 17). The situation proves even worse due to aggressive and irresponsible lending provided by lending institutions (Szymańska 2014; Zalega 2014; Szpringer 2006). The problem was recognized by a district court in Warsaw – the blame for excessive borrowing by less qualified natural persons was put on professionals, i.e. banks, rather than on the carelessness of individuals.[38] In this context, it is worth adding that among the bankrupt consumers there are also individuals, who have housing loans indexed and denominated in the Swiss franc and fail to keep up with unfavorable exchange rate changes. This type of loan was actively granted by banks in 2005–2013, and, as can

[38] However, such interpretation is not common; see: Fiedorowicz, Popłonyk 2016, pp. 17–18.

be read in the 2018 report by the Supreme Audit Office, banks obtained an array of benefits by taking advantage of a number of prohibited contractual provisions. What is more, the Office negatively assessed the effectiveness of the consumer protection system against the problem of those loans: the audited entities of the public administration failed to ensure proper enforcement of the borrowers' rights, and too late, or to an inappropriate extent, attempted to counteract the threats resulting from the nature of those loans and unfair practices of banks.[39]

Naturally, consumer bankruptcy can also be sparked by an array of misfortunes and random situations such as the demise of a household member, illness, accidents, loss of major assets (due to a fire, flooding, burglary, etc.) (Szpringer 2006). However, all of these reasons do not explain the observed rapid increase in the number of the filed consumer bankruptcy petitions in Poland in 2015. Apparently, the increase is a consequence of the liberalization of the bankruptcy law: the enforcement of so called "new consumer bankruptcy law".

However, the term "consumer" does not necessarily mean that the debtor has become indebted through the consumption of goods and services. It only means that the debtor is not conducting business activity at the time of filing. A quick analysis of court decisions from the first month after the introduction of a separate bankruptcy proceeding, presented by Jaślikowski, reveals that financial problems arising in connection with economic activity are, only preceded by illness and death of a family member, one of the common reasons for consumer bankruptcy in Poland (Jaślikowski 2011, p. 72). Therefore, as far as the introduction of the "new consumer bankruptcy law" at the end of 2014 proves that the legislator wants to support individuals in dealing with the negative effects of excessive indebtedness, the changes introduced in the Bankruptcy Law in 2016 indicate that regulators recognize the need to improve the regulation concerning bankruptcy of natural persons whose debt arises as a result of their business operations.

The most important conclusion based on the findings of the interviews with the clients of a law company specializing in bankruptcy cases is that due to the austerity of the bankruptcy estate, most natural persons conducting economic activity have no chance to declare company bankruptcy due to the lack of assets. In view of this fact, the new consumer bankruptcy is perceived as merely a chance for „a new start" not only by consumers, but also entrepreneurs: the majority of those turning for legal guidance on CB were current or former business people.

This observation prompts a question about the sense of differentiating the barriers which natural persons are to overcome on their way to debt discharge. However, the barrier is not merely the cost of proceedings to be covered by natural persons, who run a business. It is also about the extra premises for dismissing petitions with regard to former entrepreneurs. As research findings show, these premises are equally often used as the premise of "intentionality or gross negligence", which

[39] The Supreme Audit Office, 2018, The Franchise loans: The state has allowed banks too much, https://www.nik.gov.pl/aktualnosci/kredyty-frankowe-panstwo-pozwolilo-bankom-na-zbyt-wiele.html

accounts for 50% of dismissals. A report by the Institute of Justice shows that in the remaining 50% of cases the reason for dismissing a natural person's petition is untimely filing of petition or, optionally, the lack of consumer bankruptcy capacity (the motion was lodged too early considering the date of closing down the business) (Jaślikowski 2011, p. 72). The findings obtained by the author, also show that the major problem natural persons face is their unfamiliarity with the binding legal obligations. The lack of due knowledge still constitutes a major barrier on the way to debt discharge. The same conclusion can be found in the final report from the Chance 2.0 project, which was realized by the Allerhand Institute (Sobota, Mróz, Koczwara, Alwasiak, Gruca, Pitra 2016, p. 49).

Whether it makes sense to require natural persons to meet any extra obligations in the bankruptcy law can also be undermined by the findings of the "Report on the Treatment of the Insolvency of Natural Persons", by the Working Group of the World Bank (the World Bank's Report – the WBR). An important premise of the WBR is that "insolvent natural persons face a shared core of key issues, whether or not business activity is a part of the context of the insolvency" (The Word Bank 2013, p. 14). It also includes psychological aspects related to insolvency (various types of diseases resulting from stress, fear of the stigma, the feeling of failure, demotivation, loss of vitality and desire to live, decrease in productivity). According to the Report, this "human factor", inherent in insolvency of each natural person, should be taken into account when devising bankruptcy systems. What is more, business insolvency rules are often crafted on the – usually unstated – assumption that the actors involved, including the debtor, are fully rational economic actors, who take on debts having full and adequate information. However, the Report points to many behavioral studies, which make it clear that this foundational assumption is wholly inappropriate in the context of most natural persons, who seldom behave in a way consistent with the classical economic ideals (The Word Bank 2013, p. 17). Likewise, the incentives, both positive and negative, benefits and sanctions, built into business insolvency systems most likely exert different impact on natural persons than on sophisticated commercial entities. Announcing one's failure is a deeply embarrassing and stigmatizing event, which makes many natural persons continue to avoid seeking help through the bankruptcy system, or they seek it far too late than would be optimal (The Word Bank 2013, p. 43). This thesis may justify the findings of the surveys presented in point 5: respondents decided to seek assistance too late – only two of them turned for help before the lawful 30 days passed since the date of becoming insolvent.

It is also difficult to disagree with the thesis of the WBR that there is little salient difference between a wage earner and a sole trader, who earns his living by providing services to a small number of different clients. They both can be artisans, craftsmen, traders, or drivers, etc. The transformation of the labor market over the past few decades has resulted in turning many providers of services from employees into self-employed service providers (The Word Bank 2013, p. 16).

In the author's opinion, the support (privileges) offered to natural persons running a business or former entrepreneurs should be commensurate with what consumers receive by means of consumer bankruptcy relief).[40] The possibly increased barriers in seeking debt relief, in case of a failure, would not encourage individuals to take the risk of running a business again in the future. Such a solution was also formulated by the WBR: "artificial entities need not be "incentivized" to remain productive; their human owners can simply shut down and restart their business activity somewhere else (…). If the entrepreneur is ruined with no access to personal insolvency relief, the opportunity for accessing future productive, entrepreneurial energies is lost. Only a regime of insolvency relief for natural persons can get to the heart of this problem".[41]

Final recommendations

The findings of the conducted surveys and the literature sources cited above show that we must consider seriously where the boundary line should be drawn in the Polish bankruptcy law: between businesses (including sole traders) and consumers, or rather between legal entities and natural persons. Even though the pending reform of the bankruptcy law is meant to equalize the chances for debt discharge for entrepreneurs, former entrepreneurs and consumers, it does not move the boundary line. Despite the efforts, the availability of debt relief will still not be the same. To prove this, it is enough to mention that in the case of an entrepreneur the poverty of bankruptcy estate still will be the ground for dismissal of bankruptcy petition (under Art. 13) or for discontinuance of bankruptcy proceedings (under Art. 361). As a consequence, natural persons will keep on double-filing petitions – first as entrepreneur, next as former entrepreneur – which definitely will not stop the growth of a number of proceedings and is not a solution for the problem of expected excessive court workload (especially in the situation of staff and organizational shortages, which are raised in opinions to the draft amendment, promoted by the polish Minister of Justice).

As shown, there are many indications of low level of economic and legal knowledge of natural persons so there is a clear need to educate natural persons (not excluding entrepreneurs) about key legal issues and how to deal with financial problems. The outcomes of the interviews suggest that an important role in this education could be played by the Internet as the vast majority of respondents said that the Web is the basic source of knowledge about their legal situation. However, it is not advisory to merely put information on the webpage of the Ministry of Justice – according to a control procedure by the Supreme Audit Office (*Pol.* Najwyższa Izba Kontroli, NIK) such activities are not fully effective (The Supreme Audit Office 2018). The report

[40] Not everyone will agree with it – for example according to the presented opinion to the draft Act of 18 april 2018 Amending the Act – Bankruptcy Law, the Supreme Court of the Republic of Poland still perceives entrepreneurs (including natural persons) as professional units while consumers as weaker and requiring more protection (p. 8).

[41] Ibidem, p. 17

findings point to common lack of legal education and the need to expand and enhance the existing system of providing free legal assistance.

Referring to the plans to further liberalize the law, the author appreciates the tendency to harmonize the legal situation of all insolvent natural persons. On the other hand however, it is worth presenting the findings of the 2017 report "Financial Morality of Poles" according to which if respondents at all have any knowledge about the consumer bankruptcy law, they perceive the existing regulations as liberal enough or even too liberal – Poles still commonly believe in repaying debt (Lewicka-Strzałecka 2017). Appreciating and understanding the need to help individuals in a difficult life situation, especially as regards honest, but misfortunate debtors, as such help is expected to additionally bring major social and economic benefits, it is worth remembering that excessive consumer protection may result in increased claims and lack of responsibility for the decisions made and, in extreme cases, moral hazards. At the same time, the author acknowledges the opinion of those, who argue that the current regulations are lacking in educational values or prevention mechanisms that would deter debtors from more excessive borrowing (Reczuch 2015, p. 50). Therefore, the legislator had better consider whether another amendment to the bankruptcy law should oblige the bankrupt to participate in a financial education program to prevent a relapse of inappropriate behavior in the future. What is more, if the legislator thinks that debtor fraud and improper gaining advantages of the bankruptcy regime can be prevented thanks to creditors' vigilance and intensified activity, we must again stress the importance of education. Alas, the wording and the construction of law in Poland is so intricate that without adequate support the legislator's intentions may be misinterpreted.

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