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BELGIUM'S EXTRAJUDICIAL RECOVERY OF UNCONTESTED MONEY DEBTS: CAN AN EXTENSION TO CONSUMER DEBT BE ENVISAGED?

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ABSTRACT: Consumer debt is a pervasive issue that imperils both debtors and their creditors. Belgium has in the past created an out-of-court gateway for creditors to recover debt in business to business relationships. Discussions on whether to extend that scheme to consumer debt are ongoing. European Union law and the case law of the European Court of Justice on consumer protection should be taken into account in devising such scheme but are not an insurmountable obstacle. Belgium could prove an innovative testing ground for similar schemes elsewhere.

KEYWORDS: consumers; consumer protection; debt recovery; extrajudicial debt recovery; European Union; consumer contracts; unfair terms; ex officio control.

1. INTRODUCTION

Being faced with debt is a day-to-day reality for many people. A statistic from the National Bank of Belgium shows that hundreds of thousands of Bel-

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gians are facing an overdue credit agreement[1]. Excessive credit is one of the causes of arrears, but in addition, citizens also have many other payment obligations. Some of these are periodic such as paying rent, energy, school bills, water, telecom, etc[2]. The increasing diversification of consumption modes is also causing more debtors to face a wide array of limited debts such as unpaid mobile phone and fitness subscriptions, parking fines, traffic violation fines, utility bills, healthcare debts, etc. In many cases, these are undisputed money debts[3].

In 2016, Belgium had to deal with a two-sided problem: its legal regime for the recovery of small claims was considered insufficient by the European Commission[4] and it saw its judiciary being overburdened by a large amount of small claims-proceedings resulting in default judgments[5]. In an attempt to kill two birds with one stone, the legislator created IOS. IOS, an abbreviation of "Invordering Onbetwiste Schulden", offers the possibility to recover uncontested money debts between companies (B2B relations) via an extrajudicial procedure. This mechanism was inserted in articles 1394/20 to 1394/27 of the Belgian Judicial Code (JC)[6].

The experiences with IOS have ignited a debate on its extension to consumer debt recovery. Draft proposals have been circulated accordingly. By reporting on this debate, which is still ongoing and touches on European Union consumer protection concerns, we aim to offer a source of reflection for other jurisdictions facing similar issues. Let us begin by providing a brief overview of recovery under the current IOS scheme.

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[1] Nationale Bank van België. (2021). *Statistieken. Centrale voor kredieten aan particulieren – 2020. www.nbb.be/doc/cr/ccp/publications/bro_ckpstat2020n_26012021.pdf, p.* 10.

[2] Kamer. (2019-2020). *Wetsvoorstel houdende diverse bepalingen met betrekking tot de betaling van schulden en tot wijziging van de wet van 20 december 2002 betreffende de minnelijke invordering van schulden van de consument*. Nr. 55-0267/010, p. 3. For ease of reference, Belgian legislative draft proposals are referred to in their original language. They can be found by using the document number (e.g. in the case at hand document number 267 of session 55) at *De Belgische Kamer van volksvertegenwoordigers (dekamer.be)*.

[3] Kamer. (2008-2009). *Wetsvoorstel tot wijziging van de wet van 20 december 2002 betreffende de minnelijke invordering van schulden van de consument wat de invordering door advocaten, ministerieel ambtenaren en gerechtelijke mandatarissen betreft*. Nr. 52-1704/001, p. 3.

[4] The benchmark being Belgium's duties of transposition under the directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast), *OJ* L 48, 23.2.2011, p. 1.

[5] Kamer. (2014-2015). *MvT bij het Wetsontwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 54-1219/001, 24-26; Voet, S. & Allemeersch, B. (2016), p. 1-3, n° 1 and 2. In July 2014, the jurisdiction of the Enterprise Courts was expanded, making them competent to adjudicate all disputes between enterprises, regardless of the amount in dispute (amended Article 573, paragraph 1 JC). As a result, the courts experienced a significant increase in workload, as they became inundated with requests for enforceable titles for uncontested commercial debts. To alleviate this workload, the administrative IOS was introduced, allowing the processing of uncontested commercial debts to take place largely outside the judicial system.

[6] Wet van 19 oktober 2015 houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie, *Belgisch Staatsblad* 22 oktober 2015: Loi du 19 octobre 2015 modifiant le droit de la procédure civile et portant des dispositions diverses en matière de justice, *Moniteur belge* 22 octobre 2015.

2. RECOVERY UNDER IOS

Using IOS requires that three conditions are met, one relating to the nature debt, one relating to the status of the parties and one relating to the value of the claim. First, the claim must concern an undisputed sum of money that is fixed and due on the day of the demand for payment[7]. Secondly, the amount of the debt that can be recovered with IOS is limited to the principal sum, which can at the most be increased by the statutory fixed compensation of EUR 40[8] and the contractual interest and damages clause amounting to a maximum of 10% of the principal sum[9]. Finally, the scope of the procedure is limited to debts between companies (B2B) and the debt must relate to their professional legal business.

The creditor's lawyer acts as 'first judge'. Only at his request can IOS be initiated[10]. It is his responsibility to verify whether the claim meets all legal requirements. Specifically, the lawyer must verify whether the parties are registered in the Crossroads Bank for Enterprises, whether the claim is a monetary debt and actually exists, whether the claim is uncontested and whether the claimed interest and damages do not exceed 10% of the principal sum[11].

IOS is an instrument to be entrusted only to public and ministerial officials who offer the necessary guarantees of competence and independence[12]. That is why bailiffs (in Dutch: *"gerechtsdeurwaarders"*, in French: *"huissiers de justice"*)[13] as judicial officers appointed by the King have been exclusively tasked with recovery under IOS[14]. In doing so, they must take into account both the interests of the creditor and the debtor[15].

IOS recovery proceeds in four stages. When the bailiff is instructed with a recovery order by a lawyer, he will proceed, after a solvency check of the debtor, to serve the notice for payment on the debtor[16]. Efforts will be made to meet the debtor in person so that an explanation can be provided, both on

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[7] Art. 1394/20 JC.

[8] Art. 6 wet 2 augustus 2002 betreffende de bestrijding van de betalingsachterstand bij handelstransacties, *Belgisch Staatsblad* 7 augustus 2002. Art. 6 Loi 2 aout 2002 concernant la lutte contre le retard de paiement dans les transactions commerciales, *Moniteur belge* 7 aout 2022.

[9] Art. 1394/20 JC.

[10] Art. 1394/20 JC.

[11] Kamer. (2014-2015). *Verslag van de eerste lezing namens de Commissie voor de Justitie bij het wetstonwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 54-1219/005, p. 82.

[12] Art. 519, §1, second paragraph, *1bis* JC and Kamer. (2015-2015*). MvT bij wetsontwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 2014-15, nr. 54-1219/001, p. 26.

[13] *https://www.gerechtsdeurwaarders.be/*.

[14] Kamer. (2014-2015). *MvT bij wetsontwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 54-1219/001, p. 26.

[15] GwH 31 May 2018, 62/2018, 154, at par. B.80.2, *https://www.const-court.be/nl* (judgment available in Dutch and French).

[16] Art. 1394/21, first paragraph JC.

substance and procedure[17]. The notice has to contain a number of specific entries under penalty of nullity, including a response form that allows for a low-threshold means of contestation, as well as for requesting an instalment plan[18]. Solvency of the debtor is frequently checked, so that service will only be done when there is a real prospect of recovery.

After service of the notice, the debtor has one month to respond and thus pay the claimed sums in full (1), request an instalment plan (2) or state his reasons for contesting the claim (3)[19]. The recovery under IOS will take an end when the debtor pays his debt in full within the one-month period following the notice for payment[20]. If the debtor does not pay immediately, it is possible to negotiate an instalment plan with the creditor, which ensures a temporary suspension of the recovery[21]. The debtor also has the possibility to dispute the debt. This is done by means of a standard response form attached to the notice letter[22]. In case of a substantiated contestation, whether well-founded or not, this will in any case terminate the IOS recovery as the undisputed nature of the commercial debt claim then disappears[23].

After the period of one month following the service of the notice for payment, there is an additional waiting period of eight days to allow *in extremis* negotiations between the parties, or to follow up on the agreed instalment plan[24].

When the company-debtor abstains from any response, a presumption of tacit acceptance is inferred from this and the next stage of IOS will be initiated. The bailiff will draw up a report of non-contestation of the claim[25]. Subsequently, this report is then sent digitally to the Central Register for Recovery of Uncontested Debts (CROS-Register) where a magistrate can declare it enforceable by electronic signature. The legislator has specifically entrusted this declaration of enforceability to the magistrates[26] of the Management and Supervision Committee at the Central Register of Notices of Attachment, Delegation, Transfer, Collective Debt Settlement and Protest as referred to in Article *1389bis* of the Judicial Code (magistrate of the CBB Committee), who receive the report digitally, apply a marginal check on compliance with the legal formal requirements and then ensure its approval and declaration of enforceability[27]. Digitalisation allows these magistrates to declare the report

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[17] De Mol, L., & Rodriguez y Canteli, J. (2020), p. 58.

[18] Art. 1394/21, first and second paragraph JC.

[19] Art. 1394/22, first paragraph JC.

[20] Art. 1394/23, first paragraph JC.

[21] Art. 1394/23, second paragraph JC.

[22] Art. 1394/21, third paragraph, 2° and 1394/22, first paragraph JC.

[23] Art. 1394/23, first paragraph JC.

[24] Kamer. (2014-2015). *MvT bij wetsontwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 54-1219/001, p. 31.

[25] Art. 1394/24, §1, first paragraph JC.

[26] There are four magistrates on the Management and Supervisory Committee, two of them Dutch-speaking and two French-speaking.

[27] Art. 1394/24, §2, first paragraph JC.

enforceable at short notice, often within 48 hours[28]. An enforcement form is then attached to the non-contestation report, converting the report into an enforceable title that can be enforced in accordance with the fifth part of the Judicial Code[29]. This process is fully digital via the CROS-Register, which ensures efficient and swift processing[30].

By means of an ultimate safeguard after the declaration of enforceability and in order to guarantee access to justice by the debtor, the latter can obtain the suspension of the enforcement of the non-contestation report by instituting legal proceedings within one month of service of the non-contestation report which has been declared enforceable[31]. This provision amounts to an *"inversion du contentieux"*[32]. The logic of ordinary court proceedings is thereby reversed in case of recovery under IOS. The creditor can obtain an enforceable title fairly simply and ordinary civil proceedings will only ensue if the debtor objects to this extrajudicial title[33].

A statistical analysis of the first 100,000 files clearly showed that IOS was a success in several ways. For example, only 1.28% of recoveries under IOS were contested[34]. In 42% of cases, a solution was reached to obtain an enforceable title and even in 12% of cases, such a solution was achieved within the week[35]. Putting the bailiff at the centre of the IOS allows for the quick processing and easy settlement of uncontested claims. Moreover, the bailiff's intervention will ensure that the cost of recovery will be lower than that of recovery through court proceedings, benefiting both the creditor and the debtor[36]. In addition, IOS illustrates the possibilities of digitalisation in civil justice. Former Justice Minister Koen Geens said that if the IOS procedure between businesses was successful, a similar alternative could be envisaged for consumers[37]. Preliminary draft proposals have been circulated since. But before we analyse those, we need to address the European Union consumer protection concerns that IOS-type schemes may raise.

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[28] De Mol, L., & Rodriguez y Canteli, J. (2020), p. 63.

[29] Art. 1394/24, §2 JC.

[30] SAM-TES. (2017). *Snel & goedkoop onbetwiste B2B-schulden innen*, *https://issuu.com/sam-tes/docs/20161017_brochure_onbetwiste_geldsc*, p. 3.

[31] Art. 1394/24, §3 JC.

[32] Kamer. (2014-2015). *MvT bij wetsontwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 54-1219/001, p. 28.

[33] De Mol, L., & Rodriguez y Canteli, J. (2020), p. 56.

[34] De Mol, L., & Rodriguez y Canteli, J. (2020), p. 65-70.

[35] Interview kanaal Z : *https://trends.knack.be/kanaal-z/events-webinars/debatten-panelgesprekken/z-extra-round-table-sam-tes-ondernemingen-11-03-24/*

[36] Kamer. (2014-2015). *MvT bij wetsontwerp houdende wijziging van het burgerlijk procesrecht en houdende diverse bepalingen inzake justitie*. Nr. 54-1219/001, p. 27.

[37] Justaert, M. (8 May 2015). Geen rechter meer nodig om onbetwiste schulden te innen. *De Standaard*, *www.standaard.be/cnt/dmf20150508_01670343*.

3. EUROPEAN BARRIERS?

The consumer is traditionally considered a 'weaker party' in need of legal protection at both the national and European level. Consumer protection is therefore of paramount importance within the European Union. This has ignited debate in legal doctrine as to whether an extension of the current IOS recovery to consumer debts is desirable. The focus of the debate is on the lack of *ex officio* judicial review of unfair terms in the IOS procedure[38].

Guiding in that regard is the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, which provides for the protection of consumers in the European Union against unfair contract terms[39]. It follows from Directive 93/13 that European Union Member States must ensure that contracts concluded with consumers do not contain unfair terms[40]. The Court of Justice of the European Union (CJEU) pursues a policy aimed at providing consumers with effective protection and is strict in ensuring that this protection is effectively guaranteed[41]. According to settled case law of the CJEU, the protection system of the Unfair Contract Terms Directive starts from the idea that the consumer is in a weak negotiating position vis-à-vis the company[42]. When a consumer enters into a contract with a company, the consumer often has less information at his disposal and therefore agrees to the terms drafted by the company in advance without further consideration[43]. The CJEU holds that Directive 93/13 seeks to eliminate the potential disproportion between

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[38] On this, see Verbeke, A.-L. (2019-2020), p. 803 and the reply of Cambie P. & Ponet, B. (2019-2020), p. 1402.

[39] *OJ* L 095 21.4.1993, p. 29, the coordinated version is at *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01993L0013-20220528*; hereafter referred to as Unfair Contract Terms Directive or Directive 93/13.

[40] Cons. 4 Unfair Contract Terms Directive.

[41] Steennot, R. (2017), p. 81.

[42] CJEU 27 June 2000, C-240/98, ECLI:EU:C:2000:346, Océano Grupo, paragraph 25 (hereinafter: Océano Grupo judgment); CJEU 26 October 2006, C-168/05, ECLI:EU:C:2006:675, Mostaza Claro, paragraph 25 (hereinafter: Mostaza Claro judgment); CJEU 6 October 2009, C-40/08, ECLI:EU:C:2009:615, Asturcom Telecomunicaciones, paragraph 29 (hereinafter: Asturcom Telecomunicaciones judgment); CJEU 9 November 2010, C-137/08, ECLI:EU:C:2010:659, VB Pénzügyi Lízing, paragraph 46 (hereinafter: VB Pénzügyi Lízing judgment); CJEU 14 June 2012, C-618/10, ECLI:EU:C:2012:349, Banco Espanol de Credito, paragraph 39 (hereinafter: Banco Español judgment); CJEU 21 February 2013, C-472/11, ECLI:EU:C:2013:88, Banif Plus Bank, paragraph 19 (hereinafter: Banif Plus Bank judgment); CJEU 26 January 2017, C 421/14, ECLI:EU:C:2017:60, Banco Primus, paragraph 40 (hereinafter: Banco Primus judgment); CJEU 7 December 2017, C-598/15, ECLI:EU:C:2017:945, Banco Santander, pararaph 36 (hereinafter: Banco Santander judgment); CJEU 17 May 2018, C-147/16, ECLI:EU:C:2018:320, Karel de Grote - Hogeschool, paragraph 26 (hereinafter: Karel de Grote-Hogeschool judgment); CJEU 11 March 2020, C-511/17, ECLI:EU:C:2020:188, Györgyné Lintner, paragraph 23 (hereinafter Lintner judgment); CJEU 17 May 2022, C-693/19 and C-831/19, ECLI:EU:C:2022:395, SPV Project 150, paragraph 51; CJEU 17 May 2022, C-725/19, ECLI:EU:C:2022:396, Impuls Leasing România, paragraph 39; CJEU 17 May 2022, C-600/19, ECLI:EU:C:2022:394, Ibercaja Banco judgment, paragraph 35.

[43] Océano Grupo judgment, paragraph 25; Mostaza Claro judgment, paragraph 25; Asturcom Telecomunicaciones judgment, paragraph 29; VB Pénzügyi Lízing judgment, paragraph 46; Banco Español judgment, paragraph 39; Banif Plus Bank judgment, paragraph 19; Banco Santander judgment, paragraph 36; Karel de Grote-Hogeschool judgment, paragraph 26.

the rights and obligations of the parties to the contract by creating a fundamental balance that ensures party equality[44]. Achieving this requires the intervention of a third party outside the contract[45]. According to the CJEU, national courts must assess *ex officio* whether a contractual term in the contract, which falls within the scope of the Unfair Contract Terms Directive, is unlawful and, where necessary, eliminate the imbalance created between the contracting parties. This the so-called *'ex officio* doctrine'[46]. This obligation, which, according to the CJEU, falls upon the national courts, is essential to provide effective consumer protection (principle of effectiveness)[47].

Is this *ex officio* judicial control indispensable? On the basis of the CJEU case law, it has been argued that the objectives stemming from the Unfair Contract Terms Directive can also be achieved if consumers can actually avail themselves of effective and efficient remedies to challenge the unfair nature of contractual terms[48]. Decisive is that there are no unjustified obstacles in national procedures that would prevent consumers from effectively availing themselves of the protection afforded to them under Directive 93/13[49]. The CJEU also emphasises that, in order to effectively benefit from the consumer protection resulting from the Unfair Contract Terms Directive, consumers are expected not to remain entirely passive and, consequently, should make effective use of the remedies available to them[50]. National courts cannot be obliged to remedy this total passivity when the consumer has had the possibility of using adequate remedies under reasonable and fair conditions[51]. The CJEU does not consider consumer protection as an absolute right[52]. It exam-

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[44] Mostaza Claro Judgment, paragraph 36; Asturcom Telecomunicaciones judgment, paragraph 30; VB Pénzügyi Lízing judgment, paragraph 47; Banco Español judgment, paragraph 40; Banif Plus Bank judgment, paragraph 20; Banco Primus judgment, paragraph 41; Karel de Grote-Hogeschool judgment, paragraph 27.

[45] Océano Grupo judgment, paragraph 27; Mostaza Claro judgment, paragraph 26; Asturcom Telecomunicaciones judgment, paragraph 31; VB Pénzügyi Lízing judgment, paragraph 48; Banco Español judgment, paragraph 41; Banif Plus Bank judgment, paragraph 21; Karel de Grote-Hogeschool judgment, paragraph 28.

[46] Mostaza Claro judgment, paragraph 38; Banif Plus Bank judgment, paragraph 22; Karel de Grote-Hogeschool judgment, paragraph 29; Lintner judgment, paragraph 26; Werbrouck, J. (2023), p. 315 *ff*.; Nowak, J.T. (2021). *Ambtshalve toepassing van EU-recht door de Belgische burgerlijke rechter*. KU Leuven, 412 p.; Van Doninck, J. (2020-2021), p. 767.

[47] CJEU 21 November 2002, C-473/00, ECLI:EU:C:2002:705, Cofidis SA, paragraph 33 (hereinafter: Cofidis judgment); Karel de Grote-Hogeschool judgment, paragraph 31; CJEU 20 September 2018, C-51/17, ECLI:EU:C:2018:750, OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt., paragraph 88 (hereinafter: OTP Bank and OTP Faktoring judgment).

[48] Commission notice. (27 September 2019). *Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts*, 2019/C 323/04, p. 46.

[49] Commission notice. (27 September 2019). *Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts*, 2019/C 323/04, p. 45.

[50] Commission notice. (27 September 2019). *Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts*, 2019/C 323/04, p. 49.

[51] Asturcom Telecomunicaciones judgment, paragraph 47; CJEU 10 September 2014, C-34/13, ECLI:EU:C:2014:2189, Monika Kušionová, paragraph 56; CJEU 1 October 2015, C-32/14, ECLI:EU:C:2015:637, ERSTE Bank Hungary Zrt., paragraph 62 (hereinafter: ERSTE Bank Hungary judgment); SPV Project 1503 judgment, paragraph 60; Ibercaja Banco judgment, paragraph 44.

[52] SPV Project 1503 judgment, paragraph 58; judgment Ibercaja Banco, paragraph 42.

ines whether there is a 'non-negligible risk' that the consumer will be unable to avail himself of the remedies provided for and thus will not enjoy effective protection. This risk will exist where specific procedural requirements make the use of the available remedies impossible or extremely difficult, or because of the fact that the consumer has incomplete information and therefore too limited knowledge to object effectively[53].

Would IOS meet the concerns of effective consumer protection? The purpose of IOS is to allow the creditor to obtain an enforceable title to the uncontested claim simply, quickly and without unnecessary formalities and this without a debate on the merits of the uncontested debt[54]. As long as the debtor does not dispute the debt, there will be no substantive control by the court and therefore no *ex officio* review of unfair contract terms. IOS is however equipped with several procedural safeguards that contribute to effective consumer protection as required by the Unfair Contract Terms Directive. This materialises in the limitation of contractual interest and damages clauses to 10% of the principal amount,[55], the service of the notice for payment (personal contact), the reasonable waiting period of one month and eight days, the possibility of a free of charge contestation where *"any reason will do"* and the marginal control of the magistrate[56]. Finally, there is the possibility for the debtor to initiate legal proceedings within the one-month period after service of the enforceable title. This allows the debtor to suspend recovery without excessive formalism, significantly short deadlines or excessive costs. This ultimate safeguard ensures that there is no significant risk that would prevent the debtor from acting.

In the Banco Di Desio judgement, the CJEU stated that Union law opposes *'national legislation which provides that, where an order for payment issued by a court on application by a creditor has not been the subject of an objection lodged by the debtor, the court hearing the enforcement proceedings may not, on the ground that the force of res judicata of that order applies by implication to the validity of those terms, thus excluding any examination of their validity, subsequently review the potential unfairness of the contractual terms on which that order is based.'*[57]

In its considerations, the CJEU stated that that European Union law requires each member state to provide effective and appropriate means to terminate unfair terms in contracts between consumers and sellers[58]. In order

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[53] Commission notice. (27 September 2019). *Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contract*, 2019/C 323/04, p. 51; Banco Español judgment, paragraph 54; Finanmadrid judgment, paragraph 52; CJEU 13 September 2018, no. C-176/17, ECLI:EU:C:2018:711, Profi Credit Polska S.A. w Bielsku Białej variusz Wawrzosek, paragraphs 61-72 (hereinafter: Profi Credit Polska judgment).

[54] De Mol, L., & Rodriguez y Canteli, J. (2020), p. 74.

[55] Michielsens, A. & Chabot, L. (2018), p. 53.

[56] Snoeck, F. & Lombardi, P. (2019-2020), p. 1679.

[57] CJEU 17 May 2022, C-693/19 and C-831/19, ECLI:EU:C:2022:395, Banco Di Desio (hereinafter: Banco Di Desio judgment).

[58] Banco Di Desio judgment, paragraph 54.

to verify whether a national procedure makes the application of Union law impossible or very difficult (principle of effectiveness), the course and the special features of each national recovery procedure must be examined *in concreto*, taking into account the safeguarding of the rights of defence, the principle of legal certainty and the proper course of the recovery procedure. The principle of effectiveness does not go so far as to remedy the complete passivity of the consumer[59].

An important and unique feature of IOS is that after the non-contestation report (enforceable title) has been served upon him, the debtor can effectively defend himself by instituting legal proceedings to the competent Enterprise Court. This converts the administrative procedure into a legal procedure, in which the judge will hear the parties on the merits and can investigate whether the underlying contract contains an unlawful term. Moreover, due to the limitation of contractual interest and damage clauses to 10% of the principal sum in IOS, excessive damage clauses are automatically excluded at the start of the proceedings.

Consequently, a IOS recovery scheme for consumer debts based on the existing one would appear to meet European consumer protection concerns. Let us turn now to the draft legislative proposals circulated in 2018 and 2022.

4. IOS FOR CONSUMERS

The Explanatory Memorandum of the 2018 preliminary draft considers IOS recovery in the B2B context as a well-performing, fast and cost-efficient alternative to judicial recovery[60]. About 200,000 default judgments are rendered annually by the Belgian justices of the peace for consumer claims, which amounts to about 80% of their caseload[61]. The added value of the digitalisation of recovery under IOS was amply demonstrated during the corona crisis[62]. The many advantages of IOS and the large number of default judgments would then appear to provide a justification for an extension of the existing rules on IOS to consumer debt recovery. To best meet the anticipated European consumer protection, it is however conducive to provide additional procedural safeguards in the B2C IOS procedure. The 2018 preliminary draft provides additional guarantees that would accommodate the special position of consumers in the economy[63]. The main changes and additional guarantees compared to the current IOS are:

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[59] Banco Di Desio judgment, paragraph 60.

[60] *MvT bij Voorontwerp van wet 2018*, p. 2.

[61] Verbeke, A.-L. (2022), p. 72.

[62] Interview kanaal Z : *https://trends.knack.be/kanaal-z/events-webinars/debatten-panelgesprekken/z-extra-round-table-sam-tes-ondernemingen-11-03-24/*.

[63] *MvT bij Voorontwerp van wet 2018*, p. 4.

— Restricting the scope of application to uncontested claims of which the justice of the peace has jurisdiction in last instance proceedings[64]. This means that only small claims up to a maximum of EUR 2,000.00 can be recovered through IOS[65]. What is striking here is that when an undisputed claim effectively falls within this scope of IOS, the legislator imposes an obligation to use IOS, thereby excluding the possibility of initiating court proceedings for claims not exceeding that amount, as opposed to the current IOS recovery in B2B relations[66].

— Next, before recovery is actually initiated, the bailiff must carry out a number of preliminary checks regarding the claim; he needs to verify that the debtor's data are correct and that the mandatory legal provisions on amicable recovery of consumer debts[67] have been carefully observed[68]. In addition, the preliminary draft provides for the extension of the CBB so that the bailiff can obtain a more comprehensive overview of the debtor's solvency[69].

— Subsequently, the preliminary draft provides for an additional and free of charge notice sent by the bailiff after which a one-month period begins to run during which the debtor is given the opportunity to respond via a standard form[70].

— Finally, the debtor-consumer will be able to contest the debt for the first time upon receiving said notice. This can be done simply ticking the "contestation" box on the model form and returning it to the bailiff. Consequently, the debtor does not have to state any reason for contesting[71].

In the summer of 2022, a further draft prepared by Professor Alain-Laurent Verbeke was then incorporated by former Justice Minister Vincent Van Quickenborne into a 'Preliminary draft law containing measures in the fight against over-indebtedness'[72]. This preliminary draft law distinguishes two major phases in the procedure; the mandatory prior verification phase and the optional subsequent recovery phase. The main modifications and additional guarantees are briefly listed below:

— The draft provides a preliminary compulsory double check, where the bailiff verifies whether the legal requirements regarding the invoice have been respected, whether the information regarding the debtor is correct and whether the mandatory provisions on amicable recovery of consumer debts have been complied with. Next, the bailiff should examine the consumer's solvency, i.e. the feasibility of recovery. Early detection of insolvent debtors

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[64] *Voorontwerp van wet 2018*, p. 4, 17 and 24.
[65] *MvT bij Voorontwerp van wet 2018*, p. 4-5.
[66] *Voorontwerp van wet 2018*, p. 12 and 17.
[67] The law of 20 December 2002 on the amicable recovery of consumer debts was repealed by the insertion of Book XIX of the Economic Law Code 'Consumer Debts'.
[68] *Voorontwerp van wet 2018*, 2, 5, 17-18 and 25.
[69] *Voorontwerp van wet 2018*, p. 14, 18 and 25.
[70] *Voorontwerp van wet 2018*, p. 7-8 and 26.
[71] *MvT bij Voorontwerp van wet 2018*, p. 8.
[72] Verbeke, A.-L. (2022), p. 67.

in order to avoid useless costs is a very important element for consumer claims[73].

— This is followed by an advance notice (by letter, mail or text message) via the bailiff asking the consumer to proceed with payment within a period of 15 days. This notice includes the various response options and the consequences should the consumer fail to respond[74].

— In the absence of a response, the bailiff will proceed with the service of the notice for payment (as in the current IOS), which obliges him to carry out another solvency investigation. In the event of (imminent) insolvency, the bailiff is obliged to end the IOS. If the solvency check is positive, the formal notice will be served and the recovery phase will begin[75].

— After service of the formal notice, the bailiff will be obliged to accept an instalment plan proposed by the debtor if it allows the debt to be settled within six months. If it extends over a longer period, this will require the consent of the creditor. A refusal of the proposal amounts to a dispute which implies the termination of the IOS. The instalment plan will be recorded in an official report of non-contestation which will be automatically notified via the CROS-Register to the justice of the peace who will be responsible for judicial oversight of the payment arrangements[76].

— The major change as compared to the 2018 preliminary draft is the role of the justice of the peace in declaring the report of non-contestation enforceable. Through the CROS-Register, the justice of the peace has access to the entire file and has the power to verify whether everything has been done correctly. In doing so, the justice of the peace can decide to halt the proceedings and additionally refer the consumer to protective social services[77]. After the delivery of the enforceable title, the debtor will receive a final warning via the bailiff (letter, SMS, mail, etc.) allowing the consumer another eight days to pay the debt, dispute it formally or request a repayment plan. In the event of a dispute, enforcement cannot be commenced and the recovery will be discontinued[78].

Both preliminary drafts contain adequate safeguards that contribute to effective and efficient consumer protection. On the one hand, the partial digitalisation of IOS has a great added value which has both a time and cost-saving effect. On the other hand, personal contact with the debtor will also contribute to effective consumer protection. Together, both elements form the core of an efficient consumer debt recovery scheme that would safeguard the interests of the debtor and the creditor. In that regard, the following elements would require careful consideration:

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[73] Verbeke, A.-L. (2022), p. 69 and 76; Articles 5 and 6 *Preliminary draft law 2022*.
[74] Verbeke, A.-L. (2022), p. 78; Article 6, § 3 *Preliminary draft law 2022*.
[75] Verbeke, A.-L. (2022), p. 80 and 82; Article 7 *Preliminary draft law 2022*.
[76] Verbeke, A.-L. (2022), p. 84; Article 8 *Preliminary draft law 2022*.
[77] Verbeke, A.-L. (2022), p. 73, 85 and 86; Articles 10 and 11 *Preliminary draft law 2022*.
[78] Verbeke, A.-L. (2022), p. 86.

— The double formal control that is very evident in both preliminary drafts. The bailiff must check beforehand whether the data relating to the debtor are correct and whether the legal formal requirements and the mandatory provisions on amicable recovery of consumer debts have been complied with. Given the importance of a thorough solvency investigation, the CBB should provide the bailiff with all information required to detect a (looming) financial insolvency at an early stage. This will allow him to better assess the advisability and usefulness of recovery under IOS[79]. Early detection of insolvent debtors avoids useless costs, which will benefit both the debtor and the creditor.

— An advance notice to which standard forms are attached that allow the consumer-debtor to respond in a low-threshold manner with either the full payment of the debt, a request for payment facilities or a dispute of the debt (just as in the current IOS). The mandatory acceptance of the instalment plan with a six-month deadline is an essential element here. The bailiff goes *in situ* to serve this advance notice and can thereby actually verify the debtor's solvency and provide explanations to the debtor where necessary.

— The marginal check on the enforceability of the report of non-contestation. The advance notice already gives the consumer an additional opportunity to dispute the debt or request an instalment plan, which also extends the deadline. If there is no response from the debtor or the instalment plan is not followed punctually, a marginal control by the justice of the peace, comparable to the B2B IOS, should suffice. If the consumer-debtor proposes an instalment plan exceeding a six month-period, the bailiff should reassess the debtor's solvency and relate this information to the creditor, making full use of his facilitating role[80].

-— Finally, upon receipt of the enforceable title, the bailiff will send a final warning (letter, SMS, e-mail, etc.), giving the consumer another eight days to pay the debt or request a repayment plan. A dispute at this stage should no longer lead to the automatic termination of the procedure. The consumer who does not agree at this stage should file court proceedings within one month.

— Legal doctrine has criticised the compulsory use of a lawyer in the current B2B IOS because of its cost and limited added value[81]. In most cases, the role of the lawyer is minimal or even non-existent[82]. The bailiff would appear equally or even better suited to carry out any prior check.

Due to a lack of political consensus at the government level, among other things on the adequate level of consumer protection and the role of the lawyer, these proposals have not been formally submitted to the parliamentary process yet.

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[79] Snoeck, F. (2021), p. 11.
[80] Art. 519, § 3 and 4 JC.
[81] Berthe, A. (2020), p. 43; Gillaerts, P. (2017-2018), p. 623; De Jaeger, T. (2017), p. 876.
[82] Berthe, A. (2020), p. 43.

5. CONCLUSION

In recent years, a change in mentality in the recovery of outstanding debts has occurred. Much attention is now being paid to the fact that relatively small debts should not escalate into excessive amounts due to the additional recovery costs[83]. At the same time, the self-employed and SMEs as creditors show a greater financial vulnerability with regard to defaults and often have no or only limited resources to initiate legal recovery proceedings[84]. An efficient and effective recovery procedure for small and undisputed consumer debts could offer a balanced outcome benefiting both creditors and consumers. An extension of IOS to consumer debts has been cited repeatedly in policy documents[85] to help meet changed attitudes towards debt recovery and to curb over-indebtedness among consumers. Having already tried its hand at IOS in B2B relations, Belgium is now reflecting on its extension to B2C. Concerns of European consumer protection do not seem insurmountable. The Belgian experiment may yet yield results both at home and abroad[86].

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[83] Snoeck, F. (2021), p. 9.

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[86] This contribution is based upon the Dutch language master of laws' thesis that the first author wrote in the academic year 2021-22 at the Vrije Universiteit Brussel, under the supervision of the second author, acting as her promotor. The first author drafted a up to date synthesis of her master thesis in Dutch, which was then translated, revised and redrafted by the second author.

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