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DIFFERENT PATHS FOR DEBTORS AND CREDITORS

Robert Anderson, Hans Dubois, Anne Koark, Götz Lechner,
Iain Ramsay, Thomas Roethe and Hans-W. Micklitz (Ed.)

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

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Consumer Bankruptcy in Europe
Different Paths for Debtors and Creditors

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Table of Contents

Abstract

The economic crisis has fuelled the debate on regulated state insolvencies. And while debt relief is being considered for nations, in some European countries consumers live their whole lives in debt as there is no consumer bankruptcy process which provides for an exemption from residual debt.

There are thus no uniform regulations on how private individuals can make a clean financial start in Europe and debtors and creditors have different roads to take. The standard moral debate on consumer bankruptcy proceedings ranges between two extremes, i.e. from attaching individual blame for debt to expropriation of creditors.

Keywords

Debt Adjustment, Consumer Insolvency, Managing Household Debts in the EU

Introduction

This Working Paper results from a conference organised by Hans-W. Micklitz in October 2010 and supported by SCHUFA[1], Germany. The major aim of the conference was to discuss consumer bankruptcy in Europe, in the perspective of debtors and creditors.

The economic crisis has fuelled the debate on regulated state insolvencies. And while debt relief is being considered for some states, citizens in some cases live their whole lives in debt as in this country there is no consumer bankruptcy process which provides for an exemption from residual debt, like in Bulgaria, Italy, Croatia, Lithuania and Poland. In Spain, private debtors are entitled to debt relief on a maximum of only 50% of their debt and in other countries, long periods of differing lengths are needed until complete exemption from remaining debt is granted. The length of time that information on consumer bankruptcies can be published in public or private registers also varies.

There are thus no uniform regulations on how private individuals can make a clean financial start in Europe and debtors and creditors have different opportunities. The standard moral debate on consumer bankruptcy proceedings ranges between two extremes, i.e. from attaching individual blame for debt to expropriation of creditors.

But who is to blame for the debt? Those who gave credit or those who can't pay it back? Have over-indebted people mainly become addicted to the temptations of the credit-financed consumer society or are they just the "victims of the risks of modern life"? The only longitudinal study of its kind, conducted in Germany*, shows that about half of all people in consumer bankruptcy got into a difficult financial situation as a result of everyday risks like unemployment, failed self-employment or the breakdown of a relationship or marriage. They are best able to successfully start again and to take part responsibly in business life – as long as the right conditions exist to do so.

The conference papers, here presented, shall contribute to the overall debate on the future of consumer bankruptcy in Europe. I would like to thank the participants for their input into the debate, Schufa for generously sponsoring the event and Tanja Panhans from Schufa for her enormous commitment to the project. Without her the conference would not have taken place.

Hans-W. Micklitz

May 2011

[1] SCHUFA Holding AG is the leading German and one of the oldest European credit bureaus founded in 1927. SCHUFA has the largest nationwide data pool in Germany with 466 million data sets for the evaluation of the current payment behaviour of 66 million adult individuals. About 6.000 companies declare (positive and negative) data to SCHUFA and query for data. Consumer have online-access to their data by www.meineSCHUFA.de

CONFERENCE PROGRAMME

Thursday, October 28, 2010

19.30 - 22.00 Welcome Dinner & Get to Know Each Other
Venue: EUI, Villa La Fonte

Friday, October 29, 2010

9.00 Welcome & Introduction
Prof. Hans-W. Micklitz; Prof. of Economic Law, European University Institute , Prof. Dieter Steinbauer; Member of the Executive Board, SCHUFA Holding AG
Venue: Villa La Fonte

9.15 – 10.15

Contemporary issues and challenges in European consumer bankruptcy regulation

Outline of the development of existing procedures, the different approaches in Europe, experience with them (e.g. the role of repayment plans etc) and the possibilities for the future.

Presenter: Professor Iain D.C. Ramsay; Kent Law School; University of Kent
Chair: Prof. Nick Huls; Professor of sociology and law at Erasmus University, Rotterdam

10.15 – 11.15

Consumer Insolvency: A social or commercial matter?

Consumer over-insolvency can be approached from two policy perspectives, either as a social problem or as a matter for the regulation of the market. In European recommendations we can find social policy emphasis. Both understandings of the consumer insolvency are needed to find a feasible regulation.

Presenter: Professor Johanna Niemi; Prof. of Law, University of Helsinki
Chair: Prof. Nick Huls; Professor of sociology and law at Erasmus University, Rotterdam

11.15 – 11.30 *Coffee Break*

11.30 – 12.30

Consumer Bankruptcy: Point of view of the collecting business

The damage caused by bankruptcies to the European Economy; The evolution of bankruptcies in Europe; Reasons of the high level of bankruptcies

Presenters: Kornel Tinguely and Marco Recchi; President and Vice President of the Federation of European National Collecting Associations
Chair: Tanja Panhans, Leading Expert Public Relations at SCHUFA Holding AG

12.30 – 13.45 *Lunch*

13.45 – 14.45

Insolvent and nevertheless successful: a debtor's point of view

How my bankruptcy occurred; What bankruptcy felt like; The hurdles of the second chance
Why the second chance is important; Perspectives

Presenter: Anne Koark; Anne Koark had to register insolvency for her company and as a consequence simultaneous personal bankruptcy
Chair: Tanja Panhans, Leading Expert Public Relations at SCHUFA Holding AG

14.45 - 15.45

Social and economical inclusion as a result of the German insolvency statue (InsO)

Results of the first European panel study creating longitudinal data about filers for bankruptcy allows us by using similar instruments for measuring attitudes, well-being, labour-market integration, family-structures.

Presenter: Goetz Lechner; Sociologist (PhD); Germany.
Chair: Prof. Hans-W. Micklitz; Prof. of Economic Law, European University Institute

15.45 – 16.00 *Coffee Break*

16.00 - 17.00

Managing household debts in the EU: an integrated approach to service provision

The process preceding consumer bankruptcy; Overview of over-indebtedness in the EU and the impact of the financial crisis; What services are provided in the EU, by which entities and to whom? (special attention to an integrated approach of legal, social, economic, etc service provision) Which challenges remain, in particular in the context of public expenditure cuts?

Presenter: Hans Dubois**;** Research Officer; Eurofound Living Conditions and Quality of Life unit Dublin/Ireland
Chair: Prof. Hans-W. Micklitz; Prof. of Economic Law, European University Institute

17.00 Learnings & Conclusion (Prof. Hans-W. Micklitz)

19.30 *Dinner, Venue: EUI, Villa Schifanoia*

Saturday, October 30, 2010

9.30 – 12.00 Cultural Program: Discovering Oltrarno (English-speaking guide)
A stroll through the narrow streets of Oltrarno, the authentic quarter of Florence situated on the other side of the Arno-River and famous for its numerous little and traditional craft producers.

Between Neo-Liberalism and the Social Market: Approaches to Debt Adjustment and Consumer Insolvency in the EU

Iain Ramsay*

1. Introduction

With hindsight we are beginning to comprehend the economic period from the late 1970s in Europe, characterized by the growth of neoliberalism (Harvey D. 2005), deregulation of financial services, increased precariousness of employment in many countries and changes in the family unit. The growth of over-indebtedness in many European countries, particularly since the economic crisis of the late 1980s, is one consequence of these phenomena. For example, in France, individuals making application to the over-indebtedness commissions increased from 68,000 in 1991 to 216,000 in 2009.[1] Many EU countries introduced debt-adjustment systems as one aspect of the response to the growth of over-indebtedness[2] (Niemi-Kiesilainen 1997; Niemi J., Ramsay I.D.C. et al. 2003; Reifner, Niemi et al. 2003; Kilborn J. 2004; Kilborn J. 2004-05; Niemi and Henrikson 2005; Kilborn J. 2006; Kilborn 2007; Irish Law Reform Commission 2009; Kilborn J. 2009; Niemi J. 2009). These systems, originally introduced in many countries as crisis measures in the late 1980s and early 1990s, have now become normalized, metamorphosing through a continuing learning process into a combination of debt - adjustment and insolvency relief through a discharge of debt sometimes after only one year[3], but often after a debt repayment plan over a period of 3-7 years. Since the early 2000s new member states of the EU have also introduced insolvency systems, often based on models from the old states.[4]

The credit crisis poses challenges for European legal systems. There may be more individuals who are over-indebted, but there are also cost pressures on financing the justice system and public programmes throughout Europe. The treatment of over-indebtedness which addresses both consumption and production risks, poses problems in public administration and governance, raising the role of the relative balance of public and private actors in its administration and the appropriate legal, economic and social expertise. This paper examines experience in European consumer insolvency systems, based on the modest empirical studies of existing systems, primarily England, France and Germany. Part 2 discusses the reasons for the use of consumer insolvency, and the limited data on the characteristics of users; Part 3 examines the development of distinct national approaches, relating them to explanations based on legal origins (Anglo-Saxon/Civilian), interest groups and the influence of ideologies of neo-liberalism and the social market. Part 4 outlines common themes, such as the increased concern with bureaucratic rationality in systems of debt adjustment, and discusses the ambiguous objectives of consumer insolvency and its relationship to the credit system. Part 5

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* Professor of Law, University of Kent, Canterbury, UK. This is a modified version of a paper presented at the Workshop on Credit and Debt, EUI, Fiesole, October 29, 2010.

1 See statistics at Banque of France http://www.banque-france.fr/fr/instit/telechar/protection_consommateur/statistiques-surendettement.pdf

2 Denmark, 1984, France 1989, Finland 1993, Sweden, 1994, Austria, 1993, Germany (enacted 1994 but not in force until 1999, Belgium, 1998, Netherlands, 1997, Luxembourg, 2000, Portugal, 2004. England and Wales , (2002) is a special case, see discussion below.

3 This is possible in the UK, France, and Belgium.

4 These include Latvia (2008) (based partly on English model of individual voluntary arrangement); Czech Republic (2008) ; Slovakia (2006); Slovenia (2008); Poland 2009 , Greece 2010 (based partly on German model). Spain and Italy have not yet enacted a consumer insolvency statute, Ireland is reforming its bankruptcy law, which currently has a discharge period of 12 years, and is almost never used by consumers.

concludes by underlining the absence of systematic social-science knowledge on existing systems and the likelihood of greater European convergence.

The treatment of over-indebtedness is one part of consumer credit regulation policy which straddles economic and social policy (Ramsay 2010a). The EU promotes consumer credit as "the lubricant of economic life"[5] within the context of a "competitive social market economy". The development of debt-adjustment systems and insolvency, is part of the constitution of this market (Ramsay I. 2003; Ramsay 2010a). The EU has thus far focused more on creating a competitive credit market than addressing its social costs, perhaps reflecting the influence of neo-liberal ideas and financial interests in credit policymaking within the EU(ALTER-EU 2009).

2. An Overview

Table 1 provides statistics on per capita filings for insolvency in different countries. Table 2 outlines the relationship of household debt to disposable income in countries in the EU and North America between 2000-2006. One must approach the data in Table 1 with caution. For example, the German data does not include agreed rescheduling of debts which are a mandatory requirement in the German system; French data do not include situations where an agreement for rescheduling has been agreed by the parties and English data do not include the large number of private debt management plans. Both the German and English data include individual small business bankruptcy, while the French data are restricted to consumer debtors[6]. It is dangerous therefore to draw broad conclusions from these data. However, the Anglo-Saxon countries (US, Canada, Australia, England and Wales) have a higher level of insolvency filings than France or Germany. Table 3 shows the persistence of a relatively high rate of consumer bankruptcy in North America probably reflecting the higher levels of debt to disposable income within these economies (Table 4) and, in the case of the US, the role of private medical debts in insolvency. Germany would not register on this table in the 1990s, notwithstanding the existence of over-indebtedness in that country, since consumer bankruptcy did not exist. This suggests the more general hypothesis that the structure of legal remedies and institutional framework for accessing the remedies are significant (Mann R. 2009) in affecting their use. Ronald Mann argues that the ease of accessibility to the Canadian system of bankruptcy accounts for its comparatively higher rate of bankruptcy (taking into account levels of debt) than the US.

2.1. Who Uses the Personal Insolvency and Debt Adjustment Systems?

Studies in England, France and Germany suggest that there is not one typology of debtor and there are different reasons for using insolvency procedures (Banque de France 2008; Insolvency Service 2008; Backert W., Brock D. et al. 2009; Cour des Comptes 2010). The complexities of class analysis in contemporary societies, and the limited empirical data on consumer insolvency in Europe make it difficult to draw broad comparative conclusions about whether the use of debt –adjustment mechanisms is a "middle class" phenomenon as argued by Sullivan, Warren and Westbrook in the US(Sullivan, Warren et al. 2000). Although the over-indebted in Europe can be drawn from all layers of society, existing empirical evidence on use of systems of over-indebtedness suggests that insolvents

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5 In its initial draft of the 2008 Consumer Credit Directive. See Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of the laws, regulation and administrative provisions of the Member States concerning credit for consumers. Brussels 11.9.2002 COM (2002) 443 final 2002/0222 (COD).

6 With the caveat that although the French system is restricted to "non-professional debts" it may be possible for an individual whose non-professional debts are high, to access the French over-indebtedness procedures. See Vigneau V. and Bourin G-X. (2007). Droit du surendettement des particuliers. Paris, Lexis-Nexis.

are primarily drawn from lower middle income, working class and low income groups [7]. Family breakdown, represented by an overrepresentation of divorced individuals is also a common feature. There is a subset of debtors associated with high levels of unemployment, who may be dependent on state welfare and using credit to supplement inadequate income. In France these characteristics represent those using the *rétablissement personnel* [8] procedure and in England the Debt Relief Order[9], both of which provide a discharge of debts within one year. Single parents are often within this group (Insolvency Service, 2010). In England and Wales women are over-represented within this group. These debt relief processes are therefore part of, or possibly a substitute for other social policy measures: their overall effectiveness in this role remains to be studied

TABLE 1 : Insolvency filings per 10,000 capita 2002, 2008

	2002	**2008**
England and Wales	**6**	**20**
Germany	**2**	**12**
France	**4**	**11**
US	**53**	**38**
Canada	**38**	**44**
Australia	**19**	**21**

Sources: (Gerhardt M. 2009): Office of Superintendent of Bankruptcy Canada

[7] See below discussion of England. In Germany Backert et al conclude that "…bankruptcy occurs over the full range of positions in Germany. Filing for bankruptcy is not an experience limited to the lower end of society. Nonetheless, there are some more people in lower prestige positions, like unskilled workers, and fewer people at the upper end of the distribution".Backert W., Brock D., et al. (2009). Bankruptcy in Germany: Filing Rates and the People Behind the Numbers. Consumer Credit Debt and Bankruptcy. Niemi J., Ramsay I. and Whitford W. Oxford, Hart.

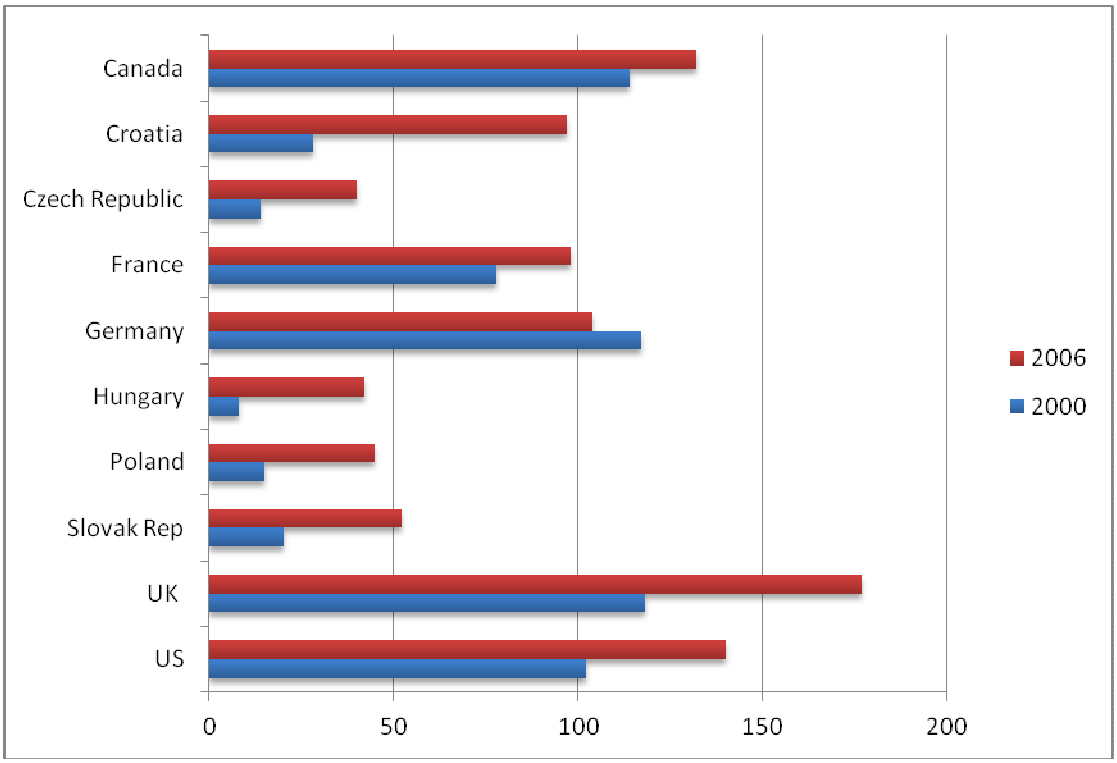
, Ramsay I. (2011). A Tale of Two Debtors: Responding to the Shock of Over-Indebtedness in France, A story from the Trente Piteuses.

Some recent Dutch data suggests that more individuals with higher incomes are now applying for relief Jungmann N. and N. Huls (2010). Individual and collective efficiency in debt enforcement and debt advice. Paper presented at Law and Society Association Chicago.

[8] This is the procedure introduced in 2003 by the loi-Borloo, which permits discharge of debts for individuals who are "irredeemably compromised". See data on the users of this procedure in Banque de France Enquête typologique 2007 sur le surendettement at 12-13.

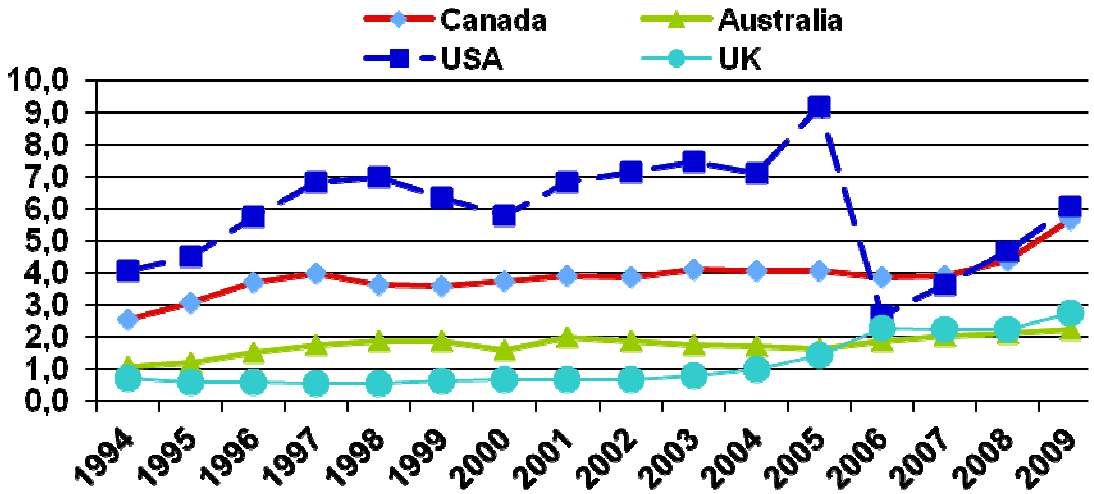
[9] This is a low cost (£99) procedure for individuals with debts under £15,000 and no assets or surplus income who may obtain a discharge of debts after one year. Eighty percent of debtors on Debt Relief Orders are not in employment (retired, home carer) and 54% are unemployed. Sixty three percent are women and forty five percent are single. Insolvency Service (2010). Debt Relief Orders: Preliminary Evaluation. DBIS. London, TSO.

TABLE 2: Household Indebtedness as percentage of disposable income 2000 and 2006



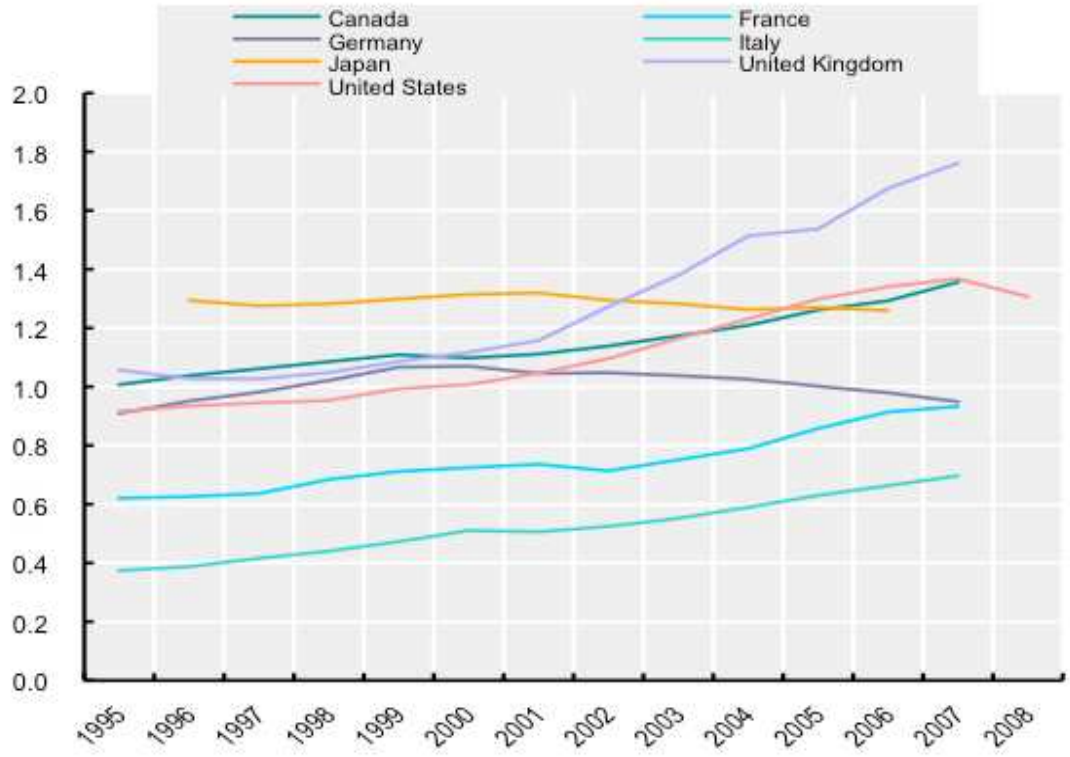
Source: (Laeven L. and Laryea T. 2009)

TABLE 3: Individual Insolvency Filings, per 1000 population 18+ "Anglo Origins": 1994-2009



Source: Office of Superintendent of Bankruptcy Canada.

TABLE 4: Household Indebtedness to Gross Disposable Income 1995-2009 (OECD Fact book 2010)



2.2. Reasons for Over-Indebtedness: "Active" and "Passive" Over-Indebtedness and the Social Construction of Debtors

Laws are premised on images of debtors and creditors and historically the law has been driven by different images of debtors (Rock 1973; Quilter M. 2004) reflecting an ambivalence as to whether the debtor or creditor is responsible for over-indebtedness. The reasons for bankruptcy and over-indebtedness in Tables 5-8, drawn from the UK, France and Germany, suggest that changes in employment status and other changes of circumstance are important factors in causing financial difficulties and recourse to insolvency procedures in the UK, France and Germany. There may also be issues of financial mis-management.

TABLE 5: REASONS FOR OVER-INDEBTEDNESS/OVER-INDEBTEDNESS COMMISSIONS: FRANCE

	2001	2004	2007	2007 (PRP)
Too much credit	**19.4%**	**14.6%**	**13.6%**	**5.4%**
Poor Management	**7.7%**	**6.4%**	**6%**	**2.4%**
Housing costs	**3.1%**	**1.2%**	**1.2%**	**0.9%**
Excess charges	**2.2%**	**1.4%**	**1.3%**	**1%**
Unemployment/Job loss	**26.5%**	**30.8%**	**31.8%**	**32%**
Separation/Divorce	**15.5%**	**14.7%**	**14.7%**	**14.5%**
Accident/Illness	**9.1%**	**10.8%**	**11.3%**	**18.8%**
Lowered resources	**6.9%**	**6.2%**	**6.2%**	**7.3%**
Death	**2.5%**	**2.4%**	**2.5%**	**3.6%**
Other	**7.1%**	**11.5%**	**11.4%**	**14.1%**
Total	**100%**	**100%**	**100%**	**100%**

Source: Banque de France

TABLE 6: UK Reasons for Financial Difficulties 1989, 2002

	1989	2002
Loss of income	**26**	**45**
-redundancy	**---**	**19**
-relationship breakdown	**---**	**5**
--sickness or disability	**---**	**7**
--other loss of income	**---**	**14**
Other changes in circumstances	**7**	**--**
Insufficient (1989) Low (2002) Income	**25**	**14**
Over-commitment	**24**	**10**
Increased/unexpected expenses	**10**	**12**
Overlooked or withheld payment	**12**	**8**
Third party error	**--**	**5**
Debts left by former partner	**--**	**4**
Other reasons	**12**	**3**

Source: Berthoud and Kempson, "Credit and Debt ---The PSI Report" 1992; Kempson, 2002

TABLE 7: Insolvency Service, England and Wales (2008) Study of Reasons for Individual Bankruptcy 2006-7 as recorded by Official Receiver

Living Beyond Means	**30%**
Unplanned Change of circumstance[10]	**43%**
Business Failure	**16%**

[10] This includes "'life events', such as illness, an accident or a relationship breakdown, and the loss or reduction of income (either of the bankrupt or his/her household)".

Table 8: Reasons for Over-Indebtedness: Germany (Multiple Responses)

Unemployment	42%
Lack of financial overview	37%
Divorce/Separation	36%
Business failure	22%
Too Much consumption	21%
Lack of experience with banks	20%
Family problems	20%
Decrease of income	19%
Lack of experience with money	18%
Low Income	18%
Psychological problems	15%
Co-liability	12%
Surety	12%
Own sickness	10%
Others	21%

Source: Backert, Brock, Lechner, Maischatz (2009) in Niemi, Ramsay and Whitford (2009) at 283.

In France, the Bank of France makes the distinction between active and passive over-indebtedness (see Table 5). This distinction played an important role in political debates and justifications for the extension of debt relief. A conventional argument in France is that passive over-indebtedness grew during the 1990s, associated with increasing unemployment and precarious employment combined with changes in family structures(Hyest J-J. and Loridant P. 1997; Le Duigou 2000). Passive over-indebtedness justified the increased availability of discharge of debts as a social exception to the norm that promises are binding and as an instrument of social policy. Passive over-indebtedness as an explanation reduces the responsibility of both creditors and debtors for the problems of over-indebtedness. This distinction also underpins Nordic systems of debt relief, which permit relief for social *force majeure* but are reluctant to allow the imprudent debtor access to debt relief. The new Polish law on individual insolvency follows this model, only permitting relief for those whose debts are caused by life events such as illness or unemployment.[11] However, the distinction between active and passive over-indebtedness is difficult to sustain. Many individuals suffer from changes of circumstances but do not file for bankruptcy. An individual who faces reduced employment may use credit cards to attempt to maintain a lifestyle hoping that they will be able to obtain better employment. Over-indebtedness may result from a combination of factors(Gloukoviezoff G. 2010).

Teresa Sullivan, Elizabeth Warren and Jay Westbrook argue that the large increase in US consumer bankruptcy during the 1980s and 90s was a combination of the increased precariousness of employment, combined with high debts and changed family patterns with more single parent

[11] See discussion of the new law on the website of the Polish Office of Consumer Protection http://www.uokik.gov.pl/news.php?news_id=1076

households.[12] The rise of the two-income family as a means of maintaining middle-income status, replacing the male breadwinner model of the post-war period, creates substantial risk of over-indebtedness if one partner faces reduced employment. (Warren 2003) The increased downward pressure on wages since the 1970s with credit being used as a method of compensating for relatively flat wages and maintaining one's consumption status, is particularly noticeable in Anglo-American capitalism (Barba and Pivetti 2009). Increased financialisation and privatization of risks also require individuals to carry more debt(Gloukoviezoff G. 2010).

Identifying reasons for over-indebtedness are important for policy making but one must treat studies with caution because it is not always easy to attribute one reason for over-indebtedness and the normative judgment of those measuring the reasons for over-indebtedness may be relevant. Individuals may also blame themselves in situations where they are subject to external pressures. The concepts of financial responsibility and financial literacy have become prominent in policy circles and among some debt advisers in recent years. It is hardly surprising therefore that there is increased emphasis on lack of financial literacy or capability as a reason for over-indebtedness. Finally, the reasons for over-indebtedness do not indicate the specific triggers for filing an insolvency claim, which might include wage garnishment or excessive debt collection practices.

A significant reason for individual insolvency in both Germany and England and Wales is business failure (see Tables 7 and 8), reflecting the overlap between household and business credit. A common method of financing small businesses in the UK is through overdrafts and credit cards. Encouraging risk taking and entrepreneurship underpin reforms to business bankruptcy with the objective of lightening the costs and reducing the stigma of entrepreneurial failure and is a policy objective within the EU(Armour J. and Cumming D. 2008)[13] This was the primary objective of the liberalization of English insolvency law in 2002(Ramsay I. 2003; Walters A. 2005). But consumers may have been the primary beneficiaries of this liberalization. The relatively long discharge period in Germany for the 22% of business failures (6 years) raises questions about effects on risk taking by small-unincorporated individuals. Michelle White argues that differences in bankruptcy law between Germany and the US might account for the difference in individual start ups between the two countries (Berkowitz J. and White M. J. 2006). Civil law systems such as France draw a sharper distinction between commercial and individual bankruptcy with separate procedures. The distinction between trader and consumer bankruptcy was rooted in the idea that only traders were subject to the vicissitudes of trade and external economic events—passive over-indebtedness. The idea that only traders, rather than individual consumers should have liberal access to bankruptcy relief is not moribund in common law systems; credit grantors opposed the application of the 2002 English liberalization of bankruptcy to consumers.[14]

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[12] Sullivan, Warren and Westbrook identify five sources for increased over-indebtedness "increased volatility of jobs and income; the explosion of consumer debt with sky-high interest rates; divorce and changing parenting patterns that are increasing the number of single-adult households; the astonishing ability to treat medical problems—at astonishing prices; and the fierce determination that Americans have to buy and retain a family home at all costs" T. Sullivan, E. Warren and J. Westbrook, The Fragile Middle Class: Americans in Debt (New Haven: Yale, 2000) at 2.

[13] See EU Commission, Best Project on Restructuring, Bankruptcy and a Fresh Start (DG Enterprise, 2003).

[14] See HC Parl. Deb. Standing Committee B Enterprise Bill Col 628 M Waterson moving amendment No. 455.Historically the distinction in England was based on ideas of active and passive over-indebtedness. Blackstone argued that its was only traders who were "liable to accidental loss, and to an inability of paying their debts, without any fault of their own", William Blackstone, Commentaries on the Laws of England 5th edn (Oxford, 1773) ii. 473. and nineteenth century supporters of the distinction argued that the non-trader "almost necessarily incurred his debts in consequence of his own thoughtlessness and extravagance". Hansard 3rd series (1860) clvii 682 quoted in V. Markham Lester, Victorian Insolvency at 136.

3. Explanations for European Systems of Debt Adjustment and Insolvency

The explanation for the development of these systems appears simple. They are responses to changes in the economic and social environment. They are functional responses to increased problems of over-indebtedness providing a safety net. However, there are significant variations in institutional approach and ideology towards the treatment of debt adjustment (Niemi J. 2003; Ramsay 2006a). Particular approaches may reflect the role of interest groups, ideology or simply a form of path dependency.

Legal origins have, according to recent literature, consequences for the style of regulation and forms of social control of economic life (La Porta, Lopez-de-Silanes et al. 2008). The French civilian tradition is more likely than common law countries to intervene in market failures and crises with centralized regulation, which then develop their own path dependency. This literature has been primarily applied to business regulation but may have less application to an area that is statutory in origin such as bankruptcy and consumer law.

Research suggests that these areas of law are best explained by reference to political interests, including state interests such as Ministries of Justice, and ideology (Niemi J. 1999; J. Sgard 2006; Ramsay 2006a). In Scandinavia the adoption of legislation responded to middle class pressures from homeowners losing their homes in the late 1980s recessions. In Germany, introduction of consumer bankruptcy was able to piggyback on the passage of business bankruptcy reforms. Reforms were introduced by both Conservative and socialist governments and relief from debt could appeal to different constituencies: reducing the need for welfare support (Conservative), providing a "fresh start" (Liberal) and preventing social exclusion (both left and right) (Huls 1992). Development of consumer bankruptcy in Europe politicized the rather low-visibility areas of civil procedure and bankruptcy. Reformers built consumer debt-adjustment systems primarily through modification of existing insolvency and court procedures with some inspiration from the US model of the "fresh start". The novelty of the French procedure (discussed below) seems attributable more to the particular politics of consumer protection and state interests rather than being hard wired to legal origins(Salomon 1997). The significant public role in England for the Official receiver in processing consumer bankrupts is a historical legacy of its role in the official supervision and administration of small commercial bankruptcies (which historically comprised the largest percentage of bankruptcies.

Vivienne Curran argues that continental European legal systems are more attached to the principle of *pacta sunt servanda* than the common law (Curran V. 1998) and fear the effects on payment morality in relaxations of rules on consumer repayment. This accounts for the reluctance in civilian systems to introduce discharge of debts for consumers. Certainly the introduction of debt adjustment systems for consumers in many European countries is often accompanied by rhetoric indicating that the ability to write down debts was not intended to be an easy option or to challenge the norm of *pacta sunt servanda*. The Netherlands Minister of Justice introduced Dutch reform of consumer insolvency with the statement that "It is a starting point in our legal system that a debtor should honour its obligations. The present proposal does not offer an easy escape for people who lead a loose life and irresponsibly pile one debt upon another" (Apeldoorn J. 2008).The introduction of a discharge through *rétablissement personnel* in France in 2003 is intended as a subsidiary form of relief in the event that no repayment plan can be devised. Germany requires a "period of good behaviour" before discharge. Governments feared that permitting more individuals, for whatever reason, to walk away from their debts would have a ripple effect in society with a decline in the norm of promise keeping or the stigma of debt default.[15]

[15] The issue of a decline in stigma has been studied in the US. See e.g. D Gross and N Souleles "An Empirical Analysis of Personal Bankruptcy and Delinquency 15 Review of Financial Studies 19-47. The findings and methodology of this study were critiqued in T Sullivan, E Warren and J Westbrook (2006) "Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings" (2006) Stanford L. Rev 59.

It is difficult to assess whether this rhetoric reflects partly political calculation. There is unlikely to be broad political support for easy access to the "right not to pay one's debts" (Ripert 1936). Most consumers do not expect to be over-indebted and may have only modest sympathy for the over-indebted who do not form a distinct political constituency. The extent of debt relief must partly depend on the effectiveness of spokespersons such as consumer or social welfare groups, who may be able to harness the media through the use of dramatic stories to create a political demand for action. Creditors may be willing to support some form of collective debt relief since this may be more effective than individual actions. Increased debt problems do not automatically get transmitted into reforms. Both Ireland and Spain with significant consumer debt problems do not have an effective consumer insolvency procedure(Irish Law Reform Commission 2009).

Concerns about the impact of debt relief on the sanctity of promises also exists in common law countries. When Debt Relief Orders were introduced in England in 2009 for those debtors with no income or assets and no repayment capacity, it was emphasized that this posed no threat to the credit system and was restricted to individuals with no possibility of repayment. The US repayment alternative to straight bankruptcy—Chapter 13—has substantial political support as the "more responsible way" for consumers to address over-indebtedness (Sullivan T. A., Warren E.W. et al. 2003) . We might hypothesise that English, US and continental European systems all exhibit a tension between the conflicting principles of *pacta sunt servanda* and *rebus sic stantibus*.

3.1. The Anglo-Saxon Systems: Distinct Trajectories

Johanna Niemi has argued that there is a fundamental cleavage between Anglo-Saxon systems of individual bankruptcy which permitted a discharge of debts for individuals and continental Europe where the procedure of discharge of debts for individuals was not then easily available (Niemi J. 2003). An individual in the Anglo-Saxon system has a right (subject to having money) to declare bankruptcy, give up non-exempt assets and be given a fresh start.

This insight suggests that legal origins do matter but there are substantial differences within Anglo-Saxon systems. Countries such as the US, Canada and Australia, certainly do provide relatively open bankruptcy systems with a liberal discharge. Personal insolvency has always existed as a legal possibility for individual consumers in England and Wales, but was generally not regarded as a desirable alternative for consumers. Influential opinion has consistently viewed a repayment alternative with the possibility of an ultimate write-off as the primary remedy for consumers.[16] Consumer bankruptcies did increase during the early 1990s but it was not until 1999 that they constituted the majority of insolvencies in England, something which occurred much earlier in other "Anglo-Saxon" countries such as the US, Canada and Australia.[17]. The New Labour government fast-tracked liberal business bankruptcy reform, through the reduction in the discharge period, in their flagship Enterprise Act 2002, as part of an agenda to promote risk taking and reducing the fear of failure by businesses[18]. It was not primarily aimed at protecting consumers.

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[16] See e.g. the Cork Committee para 272. (1982) See Insolvency: A Fresh Start (London, The Insolvency Service, 2000) at para 1.48.

[17] The Insolvency Service report, Bankruptcy A Fresh Start notes that in 1998, 65% of insolvencies were business related and that they "represent a far higher proportion of the total than in other countries. For example, of the 1.4 million bankruptcy filings in the USA in 1998 some 1.35 million were by consumers. In the same year in Canada, of a total of 86,000 bankruptcies 75,000 related to consumers whilst figures for 1998/99 for Australia show there to have been some 27,000 individual insolvency proceedings, 89% of which related to consumers." [para 2.3]

[18] For further background on these changes seeRamsay I. (2003). Bankruptcy in Transition: The Case of England and Wales--The Neo-Liberal Cuckoo in the European Bankruptcy Nest. Consumer Bankruptcy in Global Perspective. Niemi J., Ramsay I. and W. W. Oxford, Hart: 205-225.

The English response to over-indebtedness since the 1980s has been fragmented and often driven from below by private actors. There exists now a mixed system of private and public debt advice and management with a significant private over-indebtedness industry.[19] There are now a large number of overlapping alternatives for debtors, which raises the problem of ensuring impartial advice by intermediaries on the most appropriate alternatives. Table 9 indicates the distribution of different remedies.

Table 9: English Insolvency Alternatives 2009

Individual Bankruptcy	72,480
Individual Voluntary Arrangement	47,641
Debt Relief Order	11,831
Administration Order	1,948
Debt Management Plan	100,000-150,000 (estimate)

Sources: Insolvency Service; Ministry of Justice, Judicial and Court Statistics 2009

There are different markets and segments of the over-indebted population served by these remedies. Debt Relief Orders are restricted to individuals with no income or assets and liabilities under £15000. Individual bankruptcy is characterized by individuals with high levels of unemployment and low homeownership (less than 10%) (Insolvency Service 2008). A minority of bankrupts with surplus income may be required to make payments over three years. Debtors on Individual Voluntary Arrangements (IVAs) are generally earning less than the average income, in employment and repaying between £200-£400 a month over five years, Perhaps one third are homeowners and choose an IVA because of the possibility of saving the home(Boyden P. 2005; Green 2009). Those on private debt management plans may have lower debts than those on IVAs (under £25000 or less). Plans are often projected to run for up to ten years but rarely last longer than 36 months. Debt management plans are viewed by credit granters as a form of debt collection(Collard S. 2009). England therefore provides through this public and private mixture many alternatives that are available only under the French state system (see below).

From the late 1980s England focused primarily on promoting debt advice, to be funded initially by either charity or public subsidy. From the mid 1990s creditor financed and for profit debt management companies grew. The growth of this industry can be measured by the fact that a major study of debt advice in 1995 hardly discusses private debt management services, although recognizing a large unmet need for debt advice, perhaps reaching 1,000,000 (Kempson 1995). By 2009 there were approximately 150 fee charging debt management companies [20]. Entrepreneurial insolvency professionals also transformed the Individual Voluntary Arrangement—a method of writing down debts designed for business professionals introduced in 1986---into a routinised method of processing profitably large numbers of individuals with consumer debts[21].

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[19] For an example of the variety of services offered see the website of a major provider http://www.moneydebtandcredit.com/

[20] Ministry of Justice, Department of Business Innovation and Skills, et al. (2009). Debt Management Schemes--Delivering effective and balanced solutions for debtors and creditors. Ministry of Justice, Deparment of Business Innovation and Skills and T. I. Service. London, TSO.

[21] See Ramsay, above note 17 and Green, M. (2009). New Labour-More Debt---The Political Response. Consumer Credit, Debt and Bankruptcy. J. Niemi, I. D. C. Ramsay and W. Whitford. Oxford, Hart. Walters, A. (2009). "Individual Voluntary Arrangements: a 'fresh start' for salaried consumer debtors in England and Wales." International insolvency Review 18: 5-36.

Paradoxically , in a country associated with neo-liberalism, there is a substantial public service role in processing consumer bankruptcies through the Official Receiver, part of the government public service. This phenomenon grew from the practice of processing small commercial bankruptcies (which have historically been the dominant type of bankruptcy) through a process of cross-subsidisation.[22] However, The UK government does not view bankruptcy as a public good to be financed by the state and individuals are required to pay fees (currently at a minimum £450), based on a user pay model. Even in the case of The Debt Relief Order, introduced in 2009, individuals must pay a modest fee and be channeled through an approved intermediary.

The rise of the over-indebtedness industry in England creates a number of important actors with a vested interest in any reform discussions of the system.[23] There is little overall coordination of the rather complex English system and a lack of clarity concerning the goals of consumer insolvency. The control and regulation of the private over-indebtedness industry has been a continuing issue(Office of Fair Trading 2010). It is difficult for individuals to exercise informed consumer choice in determining their options. Some individuals may find that no options are available because they do not have sufficient means to pay for a procedure. There is also an absence of evidence on the success of repayment programmes. Current reforms may attempt to introduce, as in France, greater bureaucratic rationality into the system through a single gateway to remedies and more uniform treatment.

3.2. The US Model: The Influence of Interests and Ideologies

Explanations of US consumer bankruptcy law and its institutional structure emphasize the importance of ideology and interests rather than legal origins in shaping its contours. David Skeel describes the historical interest group conflicts over debt and bankruptcy which often represented geographical and class conflicts, and the central role that lawyers played in expanding the role of bankruptcy and acting as spokespersons for debtor interests (Skeel 2001). US rejection of a substantial role for governmental processing of bankrupts, initially based on the grounds of costs and a fear that any government agency would favour creditors, now reflects the political influence of lawyers and bankruptcy judges[24].

The Bankruptcy Reform Act of 1978 was adopted against the background of the post second World War "consumers 'republic" in the US(Cohen 2003). This represented a class compromise where a private consumer marketplace supported by government policies such as low cost mortgages and tax-subsidized consumer credit intended to spur increased private consumption that would ensure high employment and productivity, democracy and equal status, substituting for a fully developed welfare state. It was an American version of T.H. Marshall's concept of "social citizenship," with credit as the key. (Cohen 2003).

The US Bankruptcy Commission (1973) conceived of individual bankruptcy, as providing a fresh start for male wage-earning consumers. Consumer bankruptcy performed a safety net –an insurance function—in a country with a minimal welfare state[25]. Chapter 7 of the Bankruptcy Code permitted an

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[22] See historical discussion in V. Markham Lester Victorian Insolvency: Bankruptcy Imprisonment for Debt, And Company Winding Up in Nineteenth Century England (Oxford: OUP, 1995) at 292 estimating that small commercial cases requiring official involvement represented 81-86 percent of total annual bankruptcies.

[23] For example Clear Debt, a large one-stop shop indicates that it is a member of the "Debt Resolution Forum" and "aims to be at the forefront of any proposals to introduce a regulated debt management plan".

[24] For an overview of the attempts to introduce administrative bankruptcy in the US see A Littwin, "The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness may account for its surprising Success (2011) 52 Wm & Mary L. Rev. 00.

[25] Sullivan Warren and Westbrook (2000) found three primary reasons for bankruptcy in the US are unemployment, medical costs and divorce Sullivan, T. A., E. Warren, et al. (2000). The Fragile Middle Class.

individual to give up non-exempt assets in return for the fresh start where income received after bankruptcy could not be reached by creditors . The level of exempt property is established by states with significant variations between states. Under this system, the costs of bankruptcy are spread by creditors through adjustments in the price and availability of credit, although it is difficult to assess the actual impact. Creditors also have an incentive to monitor the provision of credit.

It would be misleading however to view Chapter 7 as "the" US model since it competes with the model of Chapter 13, originally introduced in the 1930s , where individuals make repayments of a portion of their debts over a period usually of three years. A modernized Chapter 13 was viewed by many groups as the major innovation of the Bankruptcy Reform Act of 1978, which would function as the primary method of rehabilitation for consumer debtors. This would permit consumers to address issues of secured debt (such as a car loan, or family home) within a repayment plan that could be imposed on creditors. Consumers could make an informed choice as to which chapter to use. The US model of Chapter 13 influenced European reformers and academics in the 1980s who promoted the idea of a modified fresh start for European debtors that would graft European ideas of an "earned start"—with a repayment programme as a condition for a discharge—to the general concept of the fresh start (Huls 1992; Huls 1994).

The repayment model of Chapter 13 was not however a success with the majority of consumers choosing Chapter 7 and many Chapter 13 plans failing (Sullivan Warren and Westbrook) . Financial interests felt that they had given up too much in the 1978 compromise and from the early 1980s attempted to change the law to make it more difficult for individuals to use Chapter 7 bankruptcy, claiming that the system was being abused, although there was little evidence to support this contention.

Elizabeth Cohen argues that in the contemporary US there is a consumerization of the republic where, in her view, individuals are focused on self-interest with little interest in the common good, in an economy of increased inequality and segmentation of markets. This phenomenon undercuts support for the risk and loss spreading programs, such as consumer bankruptcy, which seem to be giving others "something for nothing" (Whitford 1997). This provided background support for the continuing lobbying by financial institutions to reduce open access to this modest form of redistribution, culminating in the Bankruptcy Abuse and Consumer Protection Act 2005 which introduced "means testing"--- a legal presumption that individuals with above median income should be filing in Chapter 13. Individuals must also receive counseling before they can declare bankruptcy. Contemporary research in the US questions the effectiveness of the US Bankruptcy system in providing the "fresh start" for a significant number of debtors and its inadequacy as a form of social policy (Porter and Thorne 2006). The US credit system has become therefore one of relatively free access to credit but increasing regulation of the ability to write down debts. The introduction of the Consumer Financial Protection Bureau under the Dodd-Frank Act of 2010 may modestly alter that balance with greater regulation of credit granting.

(Contd.)

(Sullivan, Warren and Westbrook) and bankruptcy is used by a wide cross section of society. Sullivan Warren and Westbrook argue that it is a middle class phenomenon based on analysis of occupation and education.

3.3. France: From Consumer Protection to Un Droit Social

In 1989 France adopted a unique institutional approach to the treatment of over-indebtedness.[26] Publicly financed over-indebtedness commissions were created in each département comprised originally of representatives of the local public administration, a representative of the Bank of France as secretary, and one representative from consumer groups and financial associations (since 2003 they include a lawyer and social worker). Individuals unable to pay their non-professional debts could apply to the Commission, which would conciliate a plan with their creditors to repay their debts. Application to court could be triggered by a failure of conciliation. The Bank of France played a central role in the establishment and management of the commissions—a unique role for a central bank. This regime was modified in 1995, 1998, 2003, 2007 and 2010[27]. As a consequence of these reforms the Commissions rather than the courts now dominate the French system, providing a free "one-stop shop" for debtors seeking debt relief which ranges from moratoria, through repayment plans typically lasting five years, to the possibility of a discharge of debts within one year, introduced in 2003. Table 10 indicates the recent distribution of files.

TABLE 10: Treatment of Cases before Over-Indebtedness Commissions 2005-2009

	2005	2006	2007	2008	2009
Dossier Applications	182330	184866	182855	188485	216396
Dossiers Accepted	155946	157950	154938	159967	182695
Agreed Plans	97391	95853	84343	87673	95426
Closure of procedure (after acceptance of dossier)	5949	5945	5927	3970	3727
Recommendation by Commission approved by judge	29514	29991	29836	37668	35515
Retablissement personnel	19259	24190	27959	33378	41045

Source: Banque de France

[26] Loi n°89-1010 du 31 décembre 1989 relative à la prévention et au règlement des difficultés liées au surendettement des particuliers et des familles as amended. The current provisions are now found in Book III, Title III of the Code de la Consommation. For official background see Lamier, L. (1989-90). Projet de la loi relatif à la prévention et au règlement des difficultés liées à l'endettement des particuliers Avis no 43.

, Simonin, J. (1989-90). Rapport no 40. d. l. O. Commission des Affaires Économiques. Paris.

, Kilborn J. (2004-05). "La Responsibilisation de L'Économie: What the United States Can Learn From the New French Law on Consumer Overindebtedness" " Michigan Journal of Int'l law 619 **26**.

[27] The relevant provisions are in the Code de Consommation Book III Title III L330-1- L334-10 and R331-1- R 334-2.

The French system initially envisaged both the Commission and the courts as central actors but the courts were overwhelmed by large number of applications in the early years and in 1995 the Commission was made the pivot of the system. In 1998 the Commission was permitted to recommend the extinction of debts after a moratorium of two years and in 2003 the procedure of rétablissement personnel was introduced which permitted a discharge after one year for those debtors "irredeemably compromised".[28] This procedure reintroduced the courts in a central role, requiring the Commission to refer a dossier to a judge who would open the insolvency procedure, appoint a trustee who would assess the assets and debts of an individual and if there was nothing to realize declare the case closed. This procedure resulted in a 20% increase in the work of the courts, substantial delays, and significant costs borne by the state.[29] Reforms in 2007 permitted a judge to close the insolvency procedures immediately if it is clear that the individual has no assets. In 2010, as part of the implementation of the EU Consumer Credit Directive, the law now permits the Commission to recommend a rétablissement personnel" where the debtor has no surplus assets and this will be given executory force by a judge. In addition, repayment plans will be limited to eight years, an individual will be registered for only five years on the public credit reporting system and banks cannot close accounts because an individual has made an application to the over-indebtedness commission.

The development of the French system represented the realization that a temporary problem of consumer over-indebtedness had become entrenched with the increased unemployment and economic problems of the 1990s(Hyest J-J. and Loridant P. 1997; Boltanski L. and Chiapello È. 2011). Originally conceptualized by some as a measure to address the "active over-indebtedness" of consumers and the financial problems of new home purchasers, the dominant rationale now is the prevention of social exclusion, representing *un droit social* an exception to the norm of pacta sunt servanda. This social aspect that draws support from both the Catholic right and social left should not be equated with socialism but rather with ideas of reintegration and rehabilitation.

The justifications for the increasing dominance of the Commissions are those of a concern to reduce the delays associated with courts, the need for swift intervention, and possibly expertise. However their role is not without controversy. The decentralized nature of the commissions that are not part of an administrative hierarchy, and the open texture of the legislation resulted in substantial variations in between commissions in their treatment of debtors on important issues such as the good faith of debtors (the requirement for entry to the system), the amount of income to be left to a debtors (the *reste a vivre*)[30]. The Cour des Comptes (National Audit Office) in 2010 criticized the initial sorting system undertaken by the Commissions, the absence of monitoring of individual debtors after a repayment agreement is agreed, and the limited institutional links between Over-Indebtedness commissions and social work agencies.(Cour des Comptes 2010)[31] The recent loi Lagarde (2010) envisages greater transparency and harmonization of approach between commissions.

The institutional development of the French system involved substantial delegation of policy development to courts and administrators and contradicts in practice the ideology of centralization, hierarchy and expertise in French administration, suggesting a more pluralistic and fragmented framework.[32] The role of the Bank of France is key to the development of the law providing the

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[28] Generally the inability to develop a repayment plan (including the possibility of some write down of debt) within 8 years.

[29] See the Canivet review (2005) Canivet, G. (2005). Rapport du comité de suivi de l'application des dispositions relatives au surendettement de la loi no 2003-710 du 1er août 2003. Paris, Cour de Cassation.

[30] For example, the Marseilles commission apparently takes a different view of what constitutes good faith to Saint Denis Cour des Comptes (2010). La Lutte contre le surendettement des particuliers: une politique publique incomplète et insuffissament pilotée. Paris.

[31] Id at 480-481.

[32] See discussion in Ramsay I. (2011). A Tale of Two Debtors: Responding to the Shock of Over-Indebtedness in France, A story from the Trente Piteuses.

secretariat and the locations for the Commission under a service contract with the State. The Bank's involvement in 1989 was initially to be in a better position to monitor lending practices and to provide continued employment to employees who might be downsized.(Salomon 1997) The latter reason has become a significant rationale since the introduction of the Euro has reduced the role of the Bank. Approximately 12% (1570) of the Bank's employees are now involved in work on over-indebtedness. The Cour des Comptes critiqued the Bank's role as not being appropriate for a central bank. There is a contemporary tension between the idea that the state should provide this service based on social solidarity and the relatively high costs of doing this through the Bank of France. There is some interest in increasing the involvement of social workers and reducing the role of the Bank of France.

Writers classify the French law of over-indebtedness as *un droit social*(Cassation 2009) but discharge of debts through insolvency remains restrictive, counseling is not an integral part of the law, there is only modest monitoring of debtors' conduct under a plan and social workers only became voting members of the Commission in 2010. Critics might question its effectiveness as a substitute social policy. These developments must be set within the context of the tension between neo-liberalism and social solidarity in contemporary France. Before the credit crisis the Sarkozy regime wished to increase the role of consumer and housing credit in the economy, suggesting that the French were underindebted compared to other countries(Bourdin 2006). The Lagarde reforms are motivated partly by an interest in assuring re-entry of consumers to the credit market.

3.4. Germany: "An Earned Fresh Start Instead of Debt for Life"

From the mid to late 1980s, there was recognition of the limits of existing insolvency law for ordinary individuals who could not obtain a discharge of debts particularly in the light of the growth of consumer debt (Trendelenburg H. 2000; Kilborn J. 2004) . The German law, which came into force in 1999, was consciously crafted against the background of US law which was regarded as too "debtor friendly". It was necessary for an individual to have an "earned fresh start" with the consequence that an individual had to go through a number of stages before receiving a discharge.

The central characteristics of the German model are: the mandatory requirement of an attempt to reach an amicable settlement before a formal filing for bankruptcy. A lawyer or debt counselor must certify failure to reach an agreement with creditors before the second judicial stage where there is again the requirement of an attempt to achieve a consensual plan. If this fails then any non-exempt assets are sold and the debtor must follow a period of "good conduct" for six years, turning over non-exempt portions of income with the incentive of increased exemptions in years 4-6 if payments are maintained. The balance is written off after six years. The deferral of court costs since 2001 has permitted greater access to the system.

Studies of the German system have noted problems of substantial delay at the initial stage because of the limited number of debt counseling agencies: many individuals cannot afford lawyers. A study of German debtors in 2005-06 (Backert W., Brock D. et al. 2009) found that 80% of debtors have no repayment capacity. Of those who did pay, 50% pay less than €100 per month. There is now a proposal to reduce the period to three years.

Götz Lechner (Lechner G. 2010) critiques the lack of flexibility in the German model which does not take into account the different typologies of debtor for example those subject to accidents of life who simply need an immediate "fresh start" and those needing help with financial management or with problems requiring social work assistance. The German system is not a rational sorting process. All must go through the same six-year process unless they have been able to reach a settlement with their creditors. There may be distributional issues here since wealthier debtors may be able to reach agreements through lawyers. It is not clear to what extent the six-year period contributes to social reintegration. Wolfgang Backert et al conclude that "living with overindebtedness means a reduction in social contacts, social inclusion and it often means living life near the poverty line"(Backert W., Brock D. et al. 2009)).

3.5. Scandinavia: "Social Welfare and Moral Conservatism" (Niemi, 2003)?

Many Scandinavian debt adjustment systems grew out of the severe recession of the late 1980s and the banking crisis [1993, Finland and Norway, 1994, Sweden]. The recession threatened the middle classes and also revealed the limits of the welfare state. Niemi argues that the response was to view debt adjustment as a substitute for the limits of the welfare state in protecting against social risks such as unemployment. It was not a direct response to the growth of consumer credit and problems of overspending. There was little interest in facilitating early reentry to the credit market, rather a concern for not affecting the morality of debt repayment. This balance of "social welfare and moral conservatism" resulted in high access barriers to the debt adjustment system. At the same time for those gaining access there was support through social debt counseling of individuals to ensure full social reintegration. Access was limited to those who deserved relief because of "permanent insolvency" and Anna Persson in her study of Sweden notes that between 1994-2004, 35,803 individuals applied but only 14,561 were granted relief (Kilborn 2007). Recent data suggest that unlike many countries where the largest tranche of over-indebted individuals are drawn from the 25-50 age group, older consumers (55+) are the primary users of the Swedish system because of the requirement of demonstrating "permanent insolvency"(Ahlstrom and Savemark, 2010). While recent reforms will make the system more accessible there remain significant entry barriers.

3.6. Belgium and Netherlands

Belgium and Netherlands are two systems for which there are some empirical data. *Belgium* introduced a law on collective debt settlement in 1998(Kilborn J. 2006; Noel D. 2010) adopting a modified French model without the role of the Bank of France as mediator. Mediation of debts is provided often by a community welfare centre or non-profit association. The mediator is initially chosen by the debtor who will draw up a repayment plan, which must be agreed by all creditors. If this fails then a judicial mediation procedure envisages the possibility of an imposed plan administered by a debt mediator drawn from institutions authorized by the State (which must employ a social worker and lawyer). The plan may be up to five years with the possibility of a full discharge at the end. If an individual is unable to formulate any plan—is completely insolvent—then a judge may discharge her without any requirement of a repayment. The judge may impose an obligation to seek budgetary assistance, or refer an individual to a social or medical agency.

Jason Kilborn indicates in 2006 (Kilborn J. 2006) that consensual plans in Belgium averaged over six years, with individuals often able only to make small repayments. The Belgian system is financed partly by subsidies for the state licensed community mediation services. The state levies a tax on credit institutions which is related to creditors' level of arrears and which helps to fund debt mediation in those cases where individuals cannot make any contribution. Since 2006 applications have increased from 11,853 to 15, 904 applications in 2009 representing a rate of approximately 14 per 10,000 capita.

The *Netherlands* introduced a debt adjustment system which was intended to promote amicable settlements(Jungmann N. and Huls N. 2009). Only if these failed would a judicial plan be imposed. Municipal debt counselors play a key role in assisting individuals to achieve a fresh start. The legislation was based on the assumption that debt is often symptomatic of wider problems and municipalities were in the best position to address these problems. These plans (usually lasting three years) may include conditions such as an obligation to actively look for work. However after the introduction of the statutory debt settlement procedure, amicable settlements declined. Nadja Jungmann and Nick Huls attributed this partly to creditors trusting courts more than local debt counselors and the possibility of greater returns to court imposed plans. Kilborn notes that many plans offer little or no returns to creditors and there is the possibility of a discharge after one year in extreme cases of inability to repay(Kilborn J. 2006). Jungmann and Huls note a recent trend (2009) of higher income debtors using the system with 25% of applicants exceeding €50000 in income (average income €32,500).

4. Commonalities and Differences

Most systems search for greater bureaucratic rationality and routinisation in the sorting and processing of debtors so that individuals in similar situations face uniform treatment. This recognizes that "consumer bankruptcy is generally a small stakes game"(Niemi J. 2003; Niemi J., Ramsay I.D.C. et al. 2003). It is not possible to have expensive legal advice or complex proceedings for consumer bankrupts. This is also true of many small commercial bankruptcies. Several institutional alternatives have emerged. First, there is administrative processing by the state. This occurs in England, France, and Sweden, although the relevant institutions and procedures in each country are quite distinct. In these countries the courts play a residual role. Other European systems are in theory court based with debtors required to make an application to court for their bankruptcy. Indeed the European Convention on Human Rights may require the possibility of access to a court.[33] Evidence suggests that the court process may be a formality and that the role of the court is primarily as a backstop or site of referral rather than a central actor. Court based systems tend to have substantial delays and the pressure on public funding of the judicial system, the limited ability of lower courts to address economic and social issues of debt, and variable decision making by judges based on their ideological preferences, create pressure for either increased administrative processing or alternatives to court through private or supervised negotiation through state subsided mediation.

Individuals often bargain in the shadow of the formal law and many European systems require negotiations before accessing court procedures. There are benefits to encouraging privately agreed settlements between debtors and creditors provided both parties are reasonably well informed and know their rights. However "in practice it is not easy to reach voluntary settlement between the debtors and all their creditors"[Niemi and Henrikson, 2006]. German studies indicate a 10 percent rate of voluntary settlements and the Netherlands has a relatively low rate. Sweden has abolished this requirement in order to permit debt counselors to conserve resources for cases where their assistance is necessary(Kilborn 2007)

There is a contrast in the sorting process between France and England. The former relies primarily on public officials within an increasingly corporatist Commission while the latter includes private actors which advise and influence debtor choices. The English system is premised on consumer choice but the relatively complex nature of the regime confer significant power on these intermediaries, and studies in the US and Canada have demonstrated how intermediaries influence debtor's choices

[33] See discussion of the effect of debt adjustment systems on property rights under Article 1 by the ECHR in Bäck v. Finland, no. 37598/97, § ..., ECHR 2004-VIII.

(Ramsay I. 2000; Braucher J. 2009). Intermediaries, whether public or private, often may be influenced by ideology as well as interest and this may affect the success of a system. In the Netherlands, creditors distrusted credit counseling organizations, preferring the courts(Jungmann N. and Huls N. 2009). Creditors probably regard the Bank of France as a trusted intermediary. Intermediaries may also affect the levels of application and the willingness to use bankruptcy: there are high levels of advertising by the private over-indebtedness industry in the UK.

Bureaucratic rationality contrasts with a more individualized "professional treatment" model(Mashaw 1983) which Johanna Niemi suggests was associated with the social welfare model in Nordic countries(Niemi J. 2003; Niemi J., Ramsay I.D.C. et al. 2003). However, given the costs of individualized treatment of debtors, and the relatively low status of social workers, one suspects that these systems are often characterized by bureaucratic rationality[34]. Debt counselors effectively become processors of cases, rather than providing extensive advice. Even in the US where consumer bankruptcy is mediated through the lawyer client relationship, bankruptcy is a relatively routinised procedure. The use of information technology is likely to increase this standardization, and might also be used to enhance consumer knowledge and understanding of the debt repayment system.

The analogy to a welfare system indicates that insolvency systems are a modest forms of redistribution. Like all welfare systems there are issues of accountability for both providers and those benefiting from the system. There is the impact of the system on debtor incentives to work and live a dignified life. There is also a concern at the cost of the process and the role of state subsidization of the infrastructure of debt relief. The UK solution of user pay and privatization of debt advice, with some state subsidy of debt relief, contrasts with a French approach where the taxpayer pays for all aspects of debt treatment.

4.1. What Are the Objectives of the Systems?

"Rehabilitation" is outlined as a European objective for debt adjustment systems by the Council of Europe Report (Niemi and Henrikson 2005). Rehabilitation is however an ambiguous concept. It may simply mean the opportunity to get rid of debt and reenter the credit economy or it may involve the idea of economic and social re-integration, avoiding social exclusion. This distinction corresponds loosely to neo-liberal and social market conceptions of bankruptcy, the latter approach viewing bankruptcy as part of social policy. Niemi argues that the latter is the understanding in some Nordic countries, where counseling may include a wide range of issues such as seeking employment etc. In England and Wales rehabilitation may be achieved either through a prompt discharge or through making repayments. The prevention of social exclusion is recognized as a goal but counselling is not an integral part of debt adjustment. Counselling is also not a formal aspect of the process in France although the Over-Indebtedness Commissions now include an individual with knowledge of social work. In Germany the assumption is that the good behaviour period, irrespective of the amount repaid, will perform a rehabilitative function. A similar approach is taken in the Netherlands where the "earned fresh start" is often mentioned with the argument that even a symbolic repayment plan is necessary. Paradoxically, counseling now exists in both the US and Canada although it is primarily concerned with issues of money management and financial education, attempting to create an empowered consumer rather than reintegrate a citizen.

There is ambiguity as to whether debt adjustment and insolvency is primarily an institution of social policy attempting to fully integrate an individual into society and avoiding social exclusion or whether the primary goal is to get the individual back into the credit market. Adopting Anthony Giddens' idea

[34] Jungmann & Huls describe this process in the Netherlands and also the attempts by the relevant professionals (debt counselors) to subvert the more rule-bound system. Jungmann N. and Huls N. (2009). Debt Counselling in the Shadow of the Court. Consumer Credit Debt and Bankruptcy: Comparative and International Perspectives. Niemi J., Ramsay I. and Whitford W. Oxford, Hart.

of welfare as a 'politics of second chances' (Giddens A. 1994) bankruptcy may clearly attempt to serve both objectives. But there are almost no empirical studies in Europe of how effectively each debt adjustment system achieves these goals. Consumer insolvency is also linked to family policy. A major rationale for the introduction of systems of debt adjustment was the problems of homeowners in the recession of the early 90s and several systems (Norway, France) attempted to permit over-indebted individuals to maintain their homes.

4.2. Consumer Insolvency and the Credit System

Consumer insolvency is part of the credit system. It is a mandatory term of credit contracts and is one-- albeit crude- regulator of the perimeters of credit. Economic theory conceptualises consumer bankruptcy as an ex ante insurance policy for individuals to reduce the individual and social costs of debt. The economic question concerns the optimal insurance contract in terms of how much future income and assets individuals wish to protect through bankruptcy insurance (Adler B., Polak B. et al. 2000 June; Livshits, MacGee et al. 2007). Increased insurance protection through insolvency might result in a switch from unsecured to secured credit (generally unaffected by insolvency), and higher interest rates. An insurance protection that protects income rather than extensive protection of assets might be more distributionally progressive. It also might increase incentives for individuals to remain productive. Generous insurance against action by unsecured creditors might permit consumers to stay in their homes, paying the mortgage from income freed from payment of unsecured debts. The state might wish to encourage increased private insurance through bankruptcy in order to reduce one externality of over-indebtedness –reliance on state support. Incentives for private ordering through renegotiation of debt agreements would also reduce state costs.

Generous income protection through a fresh start permits re-entry to the credit market--- albeit potentially a sub-prime market. In a depression a large percentage of over indebted individuals on long repayment plans and without the possibility of accessing new credit is not desirable. This raises the question of whether there is an optimal balance of repayment versus discharge in insolvency systems.

A debtor-oriented system of debt recovery may increase credit costs and defaults. But a creditor-oriented system may create incentives for over lending in consumer markets and increase the externalities (third party costs) associated with over-indebtedness. Given these costs the social benefits of a discharge may exceed the costs. The level of consumer lending in a society is determined by many institutional factors (e.g. ex ante requirements of responsible lending) and there is no "natural" level of credit in a society. The US provides a historical social experiment with the most liberal credit laws and the most liberal bankruptcy laws.

To the extent that economies in the EU view consumer credit as an important engine of growth then over-indebtedness will be a continuing phenomenon. *Ex ante* controls through responsible lending and other information requirements will have a modest effect in preventing over-commitment.

5. The Future and a Research Agenda

European experience with the development of debt adjustment and insolvency procedures has been a continuing learning process. Writing in 2009 Johanna Niemi argues that there is both "consistency and variation" over European jurisdictions(Niemi J. 2009): Jason Kilborn (Kilborn J. 2009) notes that there has been a move towards administrative processing of debtors in many countries and a reduction in court involvement. One must be careful with claims of convergence, particularly in the area of personal insolvency. Similar concepts may be applied differently, have different purposes and understandings. Administrative processing by the Official Receiver, the Bank of France or the Swedish KVM may represent quite distinct processes. Johanna Niemi has underlined also the importance of the "internal point of view" on the nature of the system, reflecting different images of social life (Niemi J. 2003; Ramsay 2006a). This is also an area where there is often a difference between the law in books and the law in action.

There is only modest systematic empirical research on many aspects of personal insolvency in Europe. We know little about the trajectory of individuals into bankruptcy, the impact of debt on individuals, or the success of treatment systems(Braucher J. 2009).It would be useful (although hard) to assess the value of counseling, particularly given the pressures on state funding. Longitudinal studies of debtors hardly exist. The objectives of the systems and their relationship to the credit and social support systems are sometimes not clear

Because over-indebtedness implicates many different state interests—economy, justice, employment, family policy and social work, it is hard to develop an overall strategy. Regulation of consumer credit by the EU reflects the tensions between neo-liberalism and the social market. The EU wishes to created an integrated credit and capital market. It has done this primarily through competition, liberalization and hard law such as the 2008 Credit Directive, whose full harmonization provisions are intended to increase competition through better information. The EU has adopted a softer approach to over-indebtedness, analyzing best practices in debt management as part of the open method of co-ordination. This has produced some studies[35] but Europe has few studies matching the scope of the US Sullivan, Warren and Westbrook study or the US Consumer Bankruptcy Project. The Council of Europe and academic studies have outlined general principles for the treatment of debts(Reifner, Niemi et al. 2003; Niemi and Henrikson 2005) but there remain substantial institutional differences between states. Establishing the ground rules for debt adjustment or bankruptcy is also part of establishing common ground rules for an integrated market (Feibelman A. 2009). Perhaps the rather modest phenomenon of individual "bankruptcy tourism" will stimulate further analysis of this area.

[35] See e.g. D. Korczak, "Amnesty of Debts: Amicable Agreements and Statutory Solution, Discussion Paper Peer Review (2006).European Commission (2008b). Towards A Common Operational European Definition of Over-Indebtedness, Directorate General for Employment, Social Affairs, and Equal Opportunities.

References

Adler B., Polak B., et al. (2000 June). "Regulating Consumer Bankruptcy: A Theoretical Inquiry." Journal of Legal Studies **29**(2): 585-614.

ALTER-EU (2009). A captive Commission: the role of the financial industry in shaping EU Regulation.

Apeldoorn J. (2008). "The "Fresh Start" for Individual Debtors: Social Moral and Practical Issues." International insolvency Review **17**: 57-72.

Armour J. and Cumming D. (2008). "Bankruptcy and Entrepreneurship." Am. Law & Economics Rev. **10**: 303-350.

Backert W., Brock D., et al. (2009). Bankruptcy in Germany: Filing Rates and the People Behind the Numbers. Consumer Credit Debt and Bankruptcy. Niemi J., Ramsay I. and Whitford W. Oxford, Hart.

Banque de France (2008). Enquête Typologique sur le surendettement Paris.

Barba, A. and M. Pivetti (2009). "Rising household debt: Its causes and macroeconomic implications-025EFa long-period analysis." Cambridge Journal of Economics **33**(1): 113-137.

Berkowitz J. and White M. J. (2006). "Bankruptcy and Small Firms Access to Credit." RAND Journal of Economics **35**(1): 69-84.

Boltanski L. and Chiapello È. (2011). Le nouvel esprit du capitalisme. Paris, Gallimard.

Bourdin, J. (2006). Accès des ménages au credit en France. Délégation du Sénat sur la Planification. Paris.

Boyden P. (2005). Living on Tick: The 21st century debtor. London PWC.

Braucher J. (2009). A Law-in-Action Approach to Comparative Study of Repayment Forms of Consumer Bankruptcy. Consumer Credit, Debt & Bankruptcy. Niemi J., Ramsay I. and Whitford W. Oxford Hart.

Canivet, G. (2005). Rapport du comité de suivi de l'application des dispositions relatives au surendettement de la loi no 2003-710 du 1er août 2003. Paris, Cour de Cassation.

Cassation, C. d. (2009). Rapport Annuel: Les personnes vulnérables dans la jurisprudence de la Cour de cassation. Paris.

Cohen, L. (2003). A Consumers' Republic. New York, Knopf.

Collard S. (2009). An Independent Review of the Fee-Charging Debt Management Industry. Bristol, Personal Finance Research Centre.

Cour des Comptes (2010). La Lutte contre le surendettement des particuliers: une politique publique incomplète et insuffissament pilotée. Paris.

Curran V. (1998). "Cultural Immersion, Differences and Categories in US Comparative Law." Am. J.Comp.Law **46**.

European Commission (2008b). Towards A Common Operational European Definition of Over-Indebtedness, Directorate General for Employment, Social Affairs, and Equal Opportunities.

Feibelman A. (2009). "Consumer Bankruptcy as Development Policy." Seton Hall L.Rev.

Gerhardt M. (2009). Consumer Bankruptcy Regimes and Credit Default in the US and Europe. CEPS. Brussels.

Giddens A. (1994). Beyond Left and Right: The Future of Radical Politics. Palo Alto Cal., Stanford University Press.

Gloukoviezoff G. (2010). L'Exclusion Bancaire: Le Lien Social à l'épreuve de la rentabilité. Paris, Presses Universitaires De France.

Green, M. (2009). New Labour-More Debt---The Political Response. Consumer Credit, Debt and Bankruptcy. J. Niemi, I. D. C. Ramsay and W. Whitford. Oxford, Hart.

Harvey D. (2005). NeoLiberalism: A Brief History. Oxford, Oxford University Press.

Huls, N. (1992). "American Influences on European Consumer Bankruptcy Law." Journal of Consumer Policy **15**(2): 125-142.

Huls, N. (1994). Over-Indebtedness of Consumers in the EC Member States: Facts and Search for Solutions, EC.

Hyest J-J. and Loridant P. (1997). Rapport d'information no 60 Surendettement Prévenir et Guérir. S. Francais. Paris.

Insolvency Service (2008). Profiles of Bankrupts and Companies in Liquidation 2004/5-2006/7. DBIS. London, TSO.

Insolvency Service (2010). Debt Relief Orders: Preliminary Evaluation. DBIS. London, TSO.

Irish Law Reform Commission (2009). Personal Debt Management and Debt Enforcement. Dublin, Law Reform Commission.

J. Sgard (2006). "Do legal origins matter? The case of bankruptcy laws in Europe 1808–1914." European Review of Economic History **10**: 389-419.

Jungmann N. and N. Huls (2010). Individual and collective efficiency in debt enforcement and debt advice. Paper presented at Law and Society Association Chicago.

Jungmann N. and Huls N. (2009). Debt Counselling in the Shadow of the Court. Consumer Credit Debt and Bankruptcy: Comparative and International Perspectives. Niemi J., Ramsay I. and Whitford W. Oxford, Hart.

Kempson, E. (1995). Money Advice and Debt Counselling. London, Policy Studies Institute.

Kilborn J. (2004). "The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law and Surprising Lessons for the United States." Northwestern University Journal of International Law and Business **24**.

Kilborn J. (2004-05). "La Responsibilisation de L'Économie: What the United States Can Learn From the New French Law on Consumer Overindebtedness" " Michigan Journal of Int'l law 619 **26**.

Kilborn J. (2006). "Continuity, Change and Innovation in Emerging Bankrputcy Systems: Belgium and Luxembourg " Am. Bankr. Inst. L.J. **14**.

Kilborn J. (2006). "The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New US Law from Unexpected Parallels in the Netherlands." Vanderbilt Journal of Transnational Law **39**.

Kilborn J. (2009). Two Decades, Three Key Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion and Sacrifice Consumer Credit, Debt and Bankruptcy. Nieimi J., Ramsay I. and W. Whitford. Oxford, Hart.

Kilborn, J. J. (2007). "Out with the new, in with the old: As Sweden aggressively streamlines its consumer bankruptcy system, have US reformers fallen off the learning curve?" American Bankruptcy Law Journal **80**(4): 437-477.

La Porta, R., F. Lopez-de-Silanes, et al. (2008). "The Economic Consequences of Legal Origins." Journal of Economic Literature **46**(2): 285-332.

Laeven L. and Laryea T. (2009). Principles of Household Debt Restructuring IMF.

Lamier, L. (1989-90). Projet de la loi relatif à la prévention et au règlement des difficultés liées à l'endettement des particuliers Avis no 43.

Le Duigou, J. P. (2000). Endettement et surendettement des ménages. Paris, Conseil Economique et Social.

Lechner G. (2010). The German Consumer Bankruptcy Process-(not) a rational solution for all filers for bankruptcy. Law and Society Association. Chicago.

Livshits, I., J. MacGee, et al. (2007). "Consumer bankruptcy: A fresh start." American Economic Review **97**(1): 402-418.

Mann R. (2009). Making Sense of Nation-Level Bankruptcy Filing Rates. Consumer Credit Debt and Bankruptcy: Comparative and International Perspectives. R. I. Niemi J., Whitford W. Oxford, Hart**:** 225-247.

Mashaw, J. L. (1983). Bureaucratic Justice. New Haven, Yale.

Ministry of Justice, Department of Business Innovation and Skills, et al. (2009). Debt Management Schemes--Delivering effective and balanced solutions for debtors and creditors. Ministry of Justice, Deparment of Business Innovation and Skills and T. I. Service. London, TSO.

Niemi, J. and A. Henrikson (2005). Report on Legal Solutions to Debt Problems in Credit Societies, Council of Europe.

Niemi J. (1999). "Consumer Bankruptcy: Market Failure of Social Problem?" Osgoode Hall Law Journal **37**: 473-503.

Niemi J. (2003). Collective or Individual? Constructions of Debtors and Creditors in Consumer Bankruptcy. Consumer Bankruptcy in Global Perspective. Niemi J., Ramsay I. and Whitford W. Oxford Hart.

Niemi J. (2009). Overindebted Households and Law: Prevention and Rehabilitation inEurope. Consumer Credit, Debt and Bankruptcy. Niemi J., Ramsay I. and W. W. Oxford Hart.

Niemi J., Ramsay I.D.C., et al. (2003). Consumer Bankruptcy in Global Perspective. Oxford, Hart.

Niemi-Kiesilainen, J. (1997). "Changing Directions in Consumer Bankruptcy Law and Practice in Europe and USA." Journal of Consumer Policy **20**.

Noel D. (2010). Social Inclusion and Debt Advice: Belgian Report. European Seminar Prevention and Treatment of Over-Indebtedness Namur, Belgium.

Office of Fair Trading (2010). Debt Management Guidance Compliance Review. O. o. F. Trading. London.

Porter, K. and D. Thorne (2006). "The failure of bankruptcy's fresh start." Cornell Law Review **92**(1): 67-128.

Quilter M. (2004). "Daniel Defoe: Bankrupt and Bankruptcy Reforme." Journal of legal History **25**(1): 53-73.

Ramsay I. (2000). "Market Imperatives, Professional Discretion and the Role of Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy." American Bankruptcy Law Journal **74**.

Ramsay I. (2003). Bankruptcy in Transition: The Case of England and Wales--The Neo-Liberal Cuckoo in the European Bankruptcy Nest. Consumer Bankruptcy in Global Perspective. Niemi J., Ramsay I. and W. W. Oxford, Hart**:** 205-225.

Ramsay I. (2003). Consumer Credit Society and Consumer Bankruptcy: Reflections on Credit Cards and Bankruptcy in the Informational Economy. Consumer Bankruptcy in Global Perspective. Niemi J., Ramsay I. and W. Whitford. Oxford, Hart.

Ramsay I. (2011). A Tale of Two Debtors: Responding to the Shock of Over-Indebtedness in France, A story from the Trente Piteuses.

Ramsay, I. D. C. (2006a). "Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: An Unfinished Story from England and Wales " Theoretical Inquiries in Law **7**: 625-666.

Ramsay, I. D. C. (2010a). Regulation of Consumer Credit. Handbook of Research on International Consumer Law. G. Howells, Ramsay I.D.C., Wilhelmsson, T. Cheltenham, Edward Elgar.

Reifner, U., J. Niemi, et al. (2003). Consumer Over-Indebtedness and Consumer Law in the European Union, IFF.

Ripert, G. (1936). "Le droit de ne pay payer ses dettes." Dalloz, Receuil Hebdomadaire, Chronique(28): 59-60.

Rock, P. (1973). Making People Pay. London, Routledge.

Salomon, D. (1997). Quand une politique publique en cache une autre...La loi Neiertz comme réponse politique et acte opportuniste des organes de tutelle. Le Surendettement des particuliers. M. Gardaz. Paris, Anthropos**:** 1-37.

Simonin, J. (1989-90). Rapport no 40. d. l. O. Commission des Affaires Économiques. Paris.

Skeel, D. (2001). Debt's Dominion. Princeton, NJ, Princeton University Press.

Sullivan T. A., Warren E.W., et al. (2003). Who Uses Chapter 13? Consumer Bankruptcy in Global Perspective. R. I. NIeimi J., Whitford W.,. Oxford, Hart**:** 269-282.

Sullivan, T. A., E. Warren, et al. (2000). The Fragile Middle Class.

Trendelenburg H. (2000). "Discharge in Germany from an International Point of View." International insolvency Review **9**: 111-120.

Vigneau V. and Bourin G-X. (2007). Droit du surendettement des particuliers. Paris, Lexis-Nexis.

Walters, A. (2009). "Individual Voluntary Arrangements: a 'fresh start' for salaried consumer debtors in England and Wales." International insolvency Review **18**: 5-36.

Walters A. (2005). "Personal Insolvency After the Enterprise Act: An Appraisal." Journal of Corporate Law Studies **5**(1): 65-104.

Warren, E., and Amelia Warren Tyagi (2003). The Two-Income Trap: Why Middle Class Mothers and Fathers Are Broke.

Whitford, W. (1997). "Changing Definitions of Fresh Start in US Bankruptcy Law." Journal of Consumer Policy **20**: 179-198.

Back to Start: Insolvent and Nevertheless Successful

Anne Koark

My name is Anne Koark. I am British and have been living in Germany since 1985. Until 2003 I had my own company, which was very successful. Now when I am asked what I do, I say I am a V.I.P. Very Intensively Penniless and an Ex-Pleitier!!!

In June 1999 I founded my own company "Trust in Business "in a farmhouse in Freising near Munich airport. I founded the company next to my full-time job, to see whether my idea really met market needs. My company Trust in Business offered all services required for starting a subsidiary in Germany. Within 48 hours of starting up, we had the first two Silicon Valley customers. We had one recommendation after another. Articles came out about us everywhere. One article had Jimmy Carter on the front page and a double-sided feature about my company in the middle. I was delighted. With 1200% revenue growth and the costs minimal, I was convinced that this was a success.

As we expanded, the space in the farmhouse became too small and I decided to rent office space. I decided to rent office space close to the airport. Shortly before moving in, a customer asked whether we would be prepared to open an office service, so that he could move into our office space too. So we opened an office service in which companies could rent space. In March 2001 we won a prize for entrepreneurs for the German speaking countries. When the Canadian Prime Minister came to Germany we looked after accompanying delegations and helped them with economic contacts. The press discovered us. The Sueddeutsche Zeitung made me "Germany's Erin Brockovich of Small and Middle-Sized companies". Please don't look at me too closely, as I cannot afford plastic surgery to look like Julia Roberts!

And then September 11 came and with September 11 the foreign investment in Germany sank in 2002 to 1/8 of the year before. This meant for us nobody wanted to rent new space in our office space. I had made a cardinal mistake by signing a long-term inflexible contract. My liquidity plan did not look good at all. I decided to do without my own salary. I had a professional in to reduce costs, look at turnaround strategies and change management and undertook many measures which took time to do.

And then the first customer went bankrupt. I was furious!!! I thought – How could he? We have worked for our money! And why does he not have the respect to contact us?

The second customer went broke and the third and I thought if I work just a little harder things would be great. At the end it was 19 hours a day. The words insolvency, debtor and creditor crept through my mind. I hoped that if solvent meant you dissolve, insolvent would mean that you don't. Finally when the Iraq war started and a potential investor decided against investing it was clear that registering insolvency was the only possibility. And as I had a private company this meant simultaneous private bankruptcy too.

I looked for advice on what to do. The journey to the attorney, felt like it was a journey to bury one of my children – my company. The entrepreneur par excellence who had negotiated with the entourage of the Canadian Prime Minister was frightened. I looked for someone to go with me. On the way I hoped that I would not cry when I heard the word "insolvency attorney". When I got there, the door opened and I thought I would scream for laughter. I did not dare as I thought the attorney might think that I was not only insolvent but not OK in my head. In England we say if you have no money "I have not got a bean". There he stood, my attorney – the spitting image of "Mr. Bean". He told me that I would lose everything: company, apartment, car, mobile phone, life insurance, pension insurance, all of my savings etc. And I waited for the hangman to come who was to execute the punishment for being a failure as an entrepreneur, the court-appointed administrator. I secretly hoped that he would at least bear resemblance to George Clooney, if he were to accompany me for six years.

The court-appointed administrator closed all of my bank accounts and asked me to work for two months to help him extract the remaining money out of the company for the creditors and close down the company. While employees were paid by the unemployment office, there was not enough money in the insolvency assets to give me any money at all. As a single mother of two children I needed a solution. I went to the unemployment office, asked where insolvent people should go and was told at the information desk "I don't want to have anything to do with someone like you!" The unemployment office was not responsible for me and told me to go to social security. The social security office told me that as I was the owner of an apartment, they were not responsible for me – even though this could only be sold by the insolvency administrator. I was four months without health insurance and in fact without any money at all. As I have very strange children – they eat and drink – I was lucky that good friends helped me through this period. All attempts to find a job after my company was closed failed. The reasons were: You are freelance – are you sure that you can fit into a company? You are over 40 – that is a little old. You are a single mother; you will be missing all the time. You're wages will be taken away – except for an existence minimum. Where will your motivation to do a good job come from? And if we ask you to do overtime, you will only have the same money. Will that work? To work freelance I was told I would need to earn as much as an employee from day one of starting up, which obviously is not possible. Immediately with the registration of bankruptcy the credit agencies noted my insolvency and it was impossible to get a bank card or credit card. Try booking a hotel for a business trip without one. It seemed completely counteractive to me that the stigmatization of bankruptcy should keep me from working in the interest of the creditors, if they were to see money in my six years of insolvency and in the interest of the state itself, that would receive taxes if I worked, but have to pay for me and my family if I did not.

I asked permission from my insolvency administrator if I could contact my creditors myself and he agreed. I was relieved as all that I had left was my honour, respect and my reliability. And if I were to use these contacts professionally later, then this was imperative.

I decided that I needed to inform the press that I had gone broke. This was the only way of determining when the press would tear me to pieces. I wrote an article and Wallstreet Online published it. The article had 8.000 readers. I received 1200 thank you letters that I "outed" myself. Many of the people were suicidal due to the stigmatization of failure. All of the people had the same problem that I had. They did not want to go to social security institutions – they wanted to work. The only problem being that a financing of a new business when you have lost everything is near to impossible. Although I was only 4 weeks in insolvency at the time, these people looked to me to try and break the taboo of failure on their behalf, which was the reason that I later went on to write my first booking German called "Insolvent and nevertheless successful" to show that bankrupt people are not all people who lived beyond their means. The book was 7 months on the economic bestseller list in Germany and yet people do not openly buy it for fear that other people could assume they are insolvent. A second book called "Back to Start" ("Zurück auf Start") followed in March of this year.

At the end of a period of six years (the present bankruptcy period in Germany), where I lived from less than the amount provided for by law, as I assumed that the large part of what I submitted would go to the creditors, I had to wait an additional 2 ½ months for the discharge of residual debts to be decided as the report from my administrator had not been submitted to the court. The court then decided that I had done my dues in correspondence with the law for six years and decided discharge of residual debts. And when this decision was published, the decision was entered into the records of the commercial credit agencies causing my credit rating to sink from over 97% to 30%, so that it was again not possible for me to open a business account, receive any loans for business, nor to close out new and less-expensive contracts for telephone etc. for three years until the entry into the records of the credit agencies is deleted. Thus the effects of insolvency last at the moment for 9 years and not 6 years in Germany. And I was astonished to discover that although according to the last report I saw the assets of my insolvency amounted to approximately €184.000 my creditors had seen only a minute part of that –as far as I know approximately € 20.000 in total.

If debtors like me are put into a position where they cannot get back on their feet then that is the most expensive of all solutions for everyone, as every year we produce thousands of additional people, who the system has to support, as we take away every opportunity for them to get back on their feet and support themselves. We have to come to terms with the fact that most people do learn from mistakes and most people, who make mistakes, are not criminals. Laurence J. Peter the Canadian author once said: "Nobody can be perfect unless he admits his faults, but if he has faults, how can he be perfect?" I would like to say that learning from bankruptcy is a painful experience, but not being allowed to move forward and prove you have learnt, is even more painful. We are reaching a peak where many with innovative ideas are afraid to enter into entrepreneurship as they fear the effects of private bankruptcy. Of course people have to pay for their mistakes, but if the penalties are too high, we pay for our prejudice by the creditors losing out, as no debtor can work, by the state losing out on new taxes and instead paying for the social cases, we have thus created, as a debtor who is prevented from working, earns nothing for years and this benefits no one. Also skills are short-lived nowadays, if you do not keep in practice. So if a debtor is prevented from working by a stigma for years on end, then we may not be able to integrate him later.

We must move towards a system that allows those who have failed a second chance. This is a system, which allows us to learn from mistakes and which allows countries to profit from continual learning; a system that considers those who learn from mistakes and try again to be successful. My name is Anne Koark, "Once insolvent and nevertheless successful"!

The Heteronomy of Private Insolvency Proceedings and the Social Structure of Entrepreneurial Activity

A Commentary on Anne Koark's Speech

Thomas Roethe

The text to be analysed here was drawn up for a conference about insolvency law, in particular private insolvency and its social effects, and was recited as a speech. The author of the speech - one has to assume - was invited since, in the eyes of organizer, she disposes of profound experience and knowledge in this context.

The analysis of the speech text should reconstruct the case of the private insolvency of the speaker in its structural properties in the "language of the case" [1]. Using the methodology of "objective hermeneutics", I will begin with the first sentence of the speech and analyse sequentially until no new interpretations result from the structure. For a better understanding of the argumentative sequences I will render descriptive passages of the speech in the shortened form.

The speech bears the title:

Back to start: Insolvent and nevertheless successful

If we consider the wording *"Back to start:"* then we readily recognize the command from the board game "Monopoly", which is to be followed after drawing the respective game card. Until the next turn to throw the dice, the player is excluded from any further happenings and must watch the actions of the other players in the round without doing anything him-/herself. Irrespective of the playing card drawn, the command to return to "start" can be connected with a bonus in play money and other times the return to start is without any gain. These are the rules of the game that has to follow the logics of basic rules – without which the game would not be existent. They decide over the weal and woe of the player.

Considering we are dealing with a speech about real private insolvency, the entitling metaphorics of the game is surprising as "the ability to play" has per se the prerequisite for the species as a whole and in particular for the "homo oeconomicus" of work-free time.

Firstly, therefore, the question must remain open as to whether the speaker wishes to see her thoughts on the topic of private insolvency framed in ironic juxtaposition, as is often to be found in Anglo-Saxon language mannerisms, or whether the philosophical conviction actually exists that life and in particular economic life is to be seen as a game.

After the colon, which promises explanation, the title is further developed with the words *"Insolvent and nevertheless successful"* into the presentation of an economic paradox: inability to pay, over-indebtedness and simultaneously being successful, it is assumed, generally exclude one another.

We therefore may await expositions which present an extraordinary case and which in addition follow the game rules of "Monopoly" as far as for this participant, who is still insolvent and also successful (again?) – without telling us the type of success - "Back to start" means getting back into the game again.

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[1] Fundamentally for this see Oevermann, et al, in: Soeffner, H. G. (Hg): Interpretative Procedure. Stuttgart 1979 (German title: Interpretative Verfahren. Stuttgart, 1979.)

In the first section of her speech the author of the speech introduces herself in 3 lines as a British citizen, who has been living and working in Germany for 25 years and who, until 2003, had a successful company. Today – after 7 years – she refers to herself with a pun on words as a V.I.P, as "*Very Intensively Penniless and an Ex-Pleitier"* – a description of state, which does not keep a serious lack of money secret, but at the same time has left the pejorative title of a "Pleitier" in the past. In other words: the phase of insolvency is over. The question of the maintained "success" however remains open – it must be a "success", which cannot be explained in short and strikingly and which at least is not based on recovered economic stability.

In the second section the business idea is portrayed, namely a company which offers companies forming a subsidiary in Germany, especially in the area of Munich, all services necessary for such. It is thereby notable that the speaker founded this company while she was in full-time permanent employment. It can, therefore, be regarded as certain that she is not afraid of work.

The demand for these services was considerable and the perception and reporting in the economic press extensive and full of prestige –

"Articles came out about us everywhere. One article had Jimmy Carter on the front page and a double-sided feature about my company in the middle. I was delighted".

The indication of positive press reviews, i.e. what specialist journalists had to report about the founding of this business – was subjectively understood here as a legitimation of the own and correct entrepreneurial action and thus misunderstood. The opinions published in the press in 1999 were, of course, only journalistic considerations: considerations of people, therefore, who did not have to personally experience the entrepreneurial risk and exactly because of that could deliver enthusiasm and moral support. With this comment the author of the speech moves within the form circle of moods and convictions, which represent a reality sui generis, but which often enough do not have anything in common with the imponderabilities of the actual happenings and the future chances. Ex post she describes herself as "delighted", and thus takes on an ironical distance to her state at that time.

With respect to the means invested, the revenue exploded (1200 %), which certainly was a reason for joy and strengthened the belief that a marketable product was in her possession.

The third section is concerned with the expansion of business fields, the renting of business space, the winning of a prize for entrepreneurs, the recognition in the daily press, the contact to the international political class, in total the high regard, which strengthened the optimism and which is difficult to convert economically into actual balance statement success.

In the fourth section the economic effect of the 11th September 2001 is portrayed, with its dramatical effects on the international clientele's willingness to invest, which immediately struck the young company and the entrepreneur. The costs are reduced and professional advice is sought. A long-term rental contract, concluded under the impression of the positive mood and the good course of business, now proves to be a mill-stone. The entrepreneur decides to forgo her own entrepreneurial salary.

The fifth section is very short:

"And then the first customer went bankrupt. I was furious!!! I thought – How could he? We have worked for our money! And why does he not have the respect to contact us"?

A bankruptcy occurs; the customer can no longer fulfil his payment obligations. The speaker is furious, she understands this event at first at the interpersonal level in the sense of how could the customer have done this to her and only after that at the business level, which brings the services performed into view, which now will remain without payment and a further thought considers the communication forms which have broken down, which are both at the intersubjective as well as at the business level similar to an information boycott.

A definitive loss of receivables is a serious threat, especially for a young company which has not had an opportunity to form corresponding reserves and which in any case has to hold its own in turbulent times. But it is also an intellectual threat, with which it becomes clear that all paths leading to a payment of any kind are blocked. A business arrangement, held to be sound, proves to be resistant to any good will to come to a mutually agreed solution. It seems to be a non-reversible stroke of fate, which has to be lived with from now on.

This is in clear contradiction to the publically expressed appreciation of the company, which now has to recognize that "good will" and economic reality are under certain circumstances two fundamentally different spheres. The determinations of "give and take", which underlie all trade and commerce, all business relationships, which best-case culminate in the much-discussed "win-win situation", can be invalidated for reasons of contingency. This contingency of business life has its source in the complexity of human nature (catastrophic natural events are to be left unconsidered here), which up until now escape all prognosis. This gap is generally called "consideration of risks" and "risk control", which is to mean that worst-case scenarios belong to entrepreneurial activities. And even worst-case scenarios can lose their prognostic content with respect to developments that cannot be anticipated by common sense – that is valid as a general conviction. The 11th September 2001 is such a date. On such a date a company can fail, another will possibly win.

The entrepreneur is subject to such risks even with the greatest of care.

The entrepreneur as a professional structure type of market observation, of product definition, of work organisation, of quality control, of profit maximization and finally of re-investment carries nolens volens the responsibility for more than his/her own person. The failure of an entrepreneur means the social death of the individual– not to speak of the consequences for his creditors, contractual partners, workers, employees and his/her family.

This fundamental experience of the 19th century – see for example Thomas Mann's "Buddenbrooks", takes more and more of a back seat since the second half of the 20th century, as the expertisation and scientification of entrepreneurial action in the form of a manager employed non-tariff , who is at the most responsible for the operating profit gain importance. Even a manager can fail professionally – an entrepreneur with heart and soul fails in his own life history, if he/she is not able to remedy the errors that he/she has made.

The entrepreneurial speaker has to experience the failure of one of her business partners and she is wounded to the core by this failure. From now on the survival of the young company and of the young entrepreneur is focussed upon. The non-expected case is eventuated.

In the sixth section the entrepreneur notes the insolvencies of the second and third contractual partners, the loss of receivables for which there is no compensation in any way. Extensive personal commitment and conscientiousness even up to the point of physical exhaustion (better known as self-exploitation of the self-employed) cannot change anything about this. As an entrepreneur, she has now failed and instead of the promising future continuation of 1200% operating profit, totally different terms conquer the awareness of the entrepreneur:

"The words insolvency, debtor and creditor crept through my mind. I hoped that if solvent meant you dissolve, insolvent would mean that you don't."

This wording ex post is, of course, not to be understood literally, but takes the apocalyptic shrewdness into consideration of how quickly the tide can turn. Debtors and creditors were ostensibly not subject of the day-to-day considerations of the business, now sarcastic considerations of the term "insolvency" come into force.

This sarcasm has a double face:

In view of failure it reproduces hope that you yourself could not be meant, fate could overlook you (here the awful entrepreneurial fate), the dissolution of the person would not take place. On the other hand the fear is given space that it could really be the dissolution of the own person.

Now we have to determine that such shrewd and sentimental considerations would not be of importance, if we would have to decide between the person and the company. In the case presented, we are factually concerned with a company that could not succeed on the market under difficult conditions (thus the awful fate of a company) and only secondarily with an entrepreneur. Only here both fates threaten to fall into one. And actually:

"Finally when the Iraq war started and a potential investor decided against investing it was clear that registering insolvency was the only possibility. And as I had a private company this meant simultaneous private bankruptcy too."

A further political development that was not to be expected interferes in the formation history of the young company. The company cannot be economically saved. The private insolvency resulting from this is borne by the entrepreneur formally as an individual, the economical fate of the company as a social entity – also in the treatment by the insolvency administrator, will take a back seat behind this juridical circumstance, as naturally company insolvency follows different rules to a private insolvency. From the course of events we now must divide our attention to the level of the settlement modes to be observed and in addition it is to be expected that the private insolvency, as a fate personally experienced, will successively superimpose all entrepreneurial interpretations.

In the seventh section the author of the speech describes her advice-seeking path to an attorney with the feeling that the excellent entrepreneur, who had worked together with the great and renowned of this world, was now concerned with the termination of the company, *"bury one of my children"*.

This is a generally accepted and sentimental formulation, whenever people have to divide themselves from circumstances that they have grown fond of, but in this context the deep commitment with which the company was operated, is voiced and rightly so: the company as a supporting pillar also of the private existence will dissolve into thin air and thus an essential individual area of life, carried by the author of the speech with all analysis, expectations, decisions and far into the dispositions of private life, will disappear.

The advising attorney makes her acquainted with the direct consequences of the private insolvency: she will not only lose the company, but also her apartment, her car, her mobile telephone, her pension and life insurance and all savings. That is beyond the company and also the end of economic self-determination, consequently a massive limitation of personal autonomy.

"And I waited for the hangman to come who was to execute the punishment for being a failure as an entrepreneur, the court-appointed administrator."

The word "punishment" stands out in this depressing resume that implies an autosuggestion, which would criminalize the failure as an entrepreneur. That is, of course, not the case. The entrepreneur becomes the object of civil law and not of criminal law; the appearance of the hangman is not to be feared. In a metaphorical understanding, however, such terrible events can indeed be understood as religiously initiated punishment from God.

Only the dull insolvency day-to-day life is not concerned about the subjective feelings of an insolvent person; fantasies about the hangman and lethal punishment measures do not reach it – it is concerned with the over-indebtedness and the creditors receivables, also of those creditors who themselves feel hit by God's judgment due to the outstanding payments.

Accounts receivable are juxtaposed by the inability to pay. It is this simple fact that the society of justice has to regulate, in order to waive any archaic form of enforcement of claims and punishment. Insolvency, as a disaster, has two affected sides, as the author of the speech rightly ascertained in the

fifth section. "Punishment" is however the inner-psychological representation, which the author of the speech is left with. Since, however, it is not a criminal sentence – a fact of which she is aware – this can only apply to the disparity between entrepreneurial mistakes and personally felt consequences. In addition to the grave economic consequences, which affect the standard of living, it is particularly those consequences that condemn the entrepreneur – a prototype of a "vita activa" – to inactivity.

In the eighth section the measures, which were introduced by the insolvency administrator appointed by the court, are described in order to gain a necessary overview over the extent of the damage and the means, which are possibly to be distributed to the creditors and then to close the company and the accounts. Over 2 months the speaker gives active assistance to this. Assistance which the insolvency administrator will have valued, since as we know from previous examinations[2], insolvency administrators often have their hands full with systemizing the unsorted mountains of paper of their "clientele". Just as the speaker had built-up the company with sure hands, she was now involved in its regulated termination. The employees could and had to take on the journey to the employment office and for the entrepreneur herself there were no means left over, from which she could live. No illegal income accounts, no shares in profits transferred to friends or family – tabula rasa. Thus, literally speaking, the first act of the company drama has come to an end.

After this biographical caesura a second act begins which finds our protagonist in completely changed social contexts:

1. The six-year "period of good conduct" begins, which prohibits the protagonist from executing credited business transactions or from making unregistered income.
2. Contingent income exceeding the deductible self-maintenance limit must be deployed for servicing the debts.
3. The question of a means of subsistence at all needs to be clarified.
4. How can income be achieved at all, if the employment market has no need for a mother of two children who is over forty years old and in addition to this is an ex-entrepreneur, who is accustomed to working independently?
5. A new commercial self-employment - created from nothing- is without chance even as a thought-experiment.

At first friendships and then finally the social network provided by the welfare state, the bureaucratic hurdles of which, however, have to be overcome, intervene in this predicament in order to assist. There is veritable adversity!

"As a single mother of two children I needed a solution. I went to the unemployment office, asked where insolvent people should go and was told at the information desk "I don't want to have anything to do with someone like you!" The unemployment office was not responsible for me and told me to go to social security. The social security office told me that as I was the owner of an apartment, they were not responsible for me – even though this could only be sold by the insolvency administrator. I was four months without health insurance and in fact without any money at all."

This text passage unveils in its outrage and in its subjectively-felt degradation due to rejection two different aspects:

An extremely independent and energetic and active working woman, showered with recognitions for her work up until now, lives in absolute bankruptcy and searches for a solution to maintain herself and

[2] Roethe, T.: Private Insolvency. Pilot study for Schufa 2006. MS (German title: Private Verschuldung. Pilotstudie für die Schufa. 2006. MS)

her children. She looks for the necessary assistance – from the state and its authorities. She, thus, joins the fraternity of the indigent and the unemployed. Even if we take the quote "I don't want to have anything to do with someone like you!" cum grano salis, she has to experience that she is not the desired case of an unemployed person. The labour exchange, which after the title reform is called the Job Center, disdains the interaction with failed entrepreneurs, as it is primarily responsible for people who, for whatever reasons, have dropped out of the employment market. And even the social welfare office, which according to the social security code is responsible for any kind of indigence, finds reasons to initially reject the request for assistance.

An entrepreneur, who - in her career - was used to having contact with authorities in the sense of implementation of business aims, where possible conflict-free, to be able to work, is now forced to prove her indigence. However, it is evident that the "responsibility" of authorities for her fate is assumed by the failed entrepreneur as a natural constant, even if the authorities firstly make a rejection as a matter of routine and formally in all procedurality. The bitter complaint that she was without health insurance and liquidity for 4 months is demonstratively directed to the audience of her speech and thus demands moral indignation and support. What could this appeal be directed to? Of course it is directed to the fact that an entrepreneur, in the case of his/her failure, today has the certified right on the part of the state, to timely receive an existence minimum from the tax budget. That is the pledge of the social welfare state, which at the same time levels out all status-related privileges. Everyone, even a failed entrepreneur, has to integrate themselves in dependency and let themselves be bureaucratically managed before the means of subsistence can flow. But this complaint also includes another additional aspect, namely the deep-felt duty to augment the benefits of the creditors, which is simply not provided for and therefore does not make a significant difference in return for payment or fiscally.

This complaint however also thus unveils a totally difference nuance, which goes much further than bureaucratic misunderstandings:

> If we come to speak of the classical character of the entrepreneur, who opens up new markets, creates jobs, who is responsible for his/her employees, who knows how to economically and socially form local, regional, national and international business relationships and whose failure is a social and economic catastrophe for all involved, for suppliers, traders, employees, creditors, then we come back to the sociological structural type of an intrepid developer of profit- and performance-oriented social relationships, which promise a "win-win situation" for both sides of business relationships and increase the resources for wealth in society.
>
> It is the entrepreneur, who - with his/her aptitude and his/her sense for the necessary task and problem solutions - provides the basis for all tax incomes in a society. This achievement is juxtaposed by the risks of contingent failure, which are to be minimized by business strategies fed by experience and intuitive judgement, as well as economic market observation. Because of the socio-political consequences, which failure has, the state also has an eminent interest in fencing in the risks and conditions the action of entrepreneurial action in multifarious and in continually new ways, which are to correspond to society's need for security. We are, therefore, dealing with a dynamic-dialectic action-practical balance between risks and chances, which has to be continually rebalanced. The willingness to take risks must not be stifled, if markets are to function efficiently and prosperously and at the same time catastrophes are to be urgently avoided.

In the present case we recognize that all calculations failed. The failed entrepreneur finds herself in the role of a recipient of social security benefits – a role, which she has to accept. That means a fateful reversal of the driving forces; the entrepreneur who used her intelligence and inventiveness to have personal success and to give society resources becomes a cost factor. The conspicuous amalgamation of self-felt indigence, when faced with the embarrassing administrative procedures of the authorities, and the real indigence - in spite of all the spirit of initiative and *propulsive action potential – of b*eing condemned to the possibilities of a wait-and-see attitude (attentism), gives us a glimpse of an absolutely rational rebellious pattern of interpretation:

"It seemed completely counteractive to me that the stigmatization of bankruptcy should keep me from working in the interest of the creditors, if they were to see money in my six years of insolvency and in the interest of the state itself, that would receive taxes if I worked, but have to pay for me and my family if I did not."

The newly appointed recipient of social security benefits, who - after her debacle - can now survive with her children at the cost of the taxpayer, feels stigmatized by her bankruptcy. One could question, how that could be the case. Were rules infringed? Was she deprived of her rights? No, definitely not.

Her reproach has a much deeper aim. The stigmatization lies in the application of the proceedings of private insolvency on her case.

> From our examinations for private insolvency[3] we know the relief and the outrage of consumers, who have manoeuvred themselves into over-indebtedness due to the abundant consumption of mobile telephoning (particularly adolescents) and excessive payments by instalments. Relief because the knowledge grew with the torturing collection measures that the mountain of debts would never be able to be paid. Outrage resulting from the feeling that consumerism – felt to be a human right – was totally incomprehensibly blocked for them. However, the legislator thinks it to be right to prescribe this clientele with a contemplation phase, which lasts for years and gives the supplying companies the task of being more cautious in giving credit to consumers if the receivables cannot be retrieved. Behind the law there is, therefore, in addition to the final regulation of the damage, also a finance-educational aspiration which is directed at both sides – to the consumer as well as to the supplier. The temptation of non-payable consumption should be stopped, and the consumer must learn that he/she cannot afford everything.

These normative-formative characteristics of the law miss the point for the addressee in the case of our failed entrepreneur. She did not fail due to exuberant consumption behaviour, but predominantly due to geopolitical distortions, which were also joined (only seen retrospectively) by entrepreneurial mistakes, which did not take such contemporary eventualities into account. In the "eyes" of private insolvency law these may be finalizing errors, however, in view of the chances of remaining open for the future, with which our species is plagued, these are simply distressing experiences.

The law, which is applied here to a failed entrepreneur, inhibits exactly what the person - now declared to be a recipient of social security - wants to achieve as a top priority; namely to service her debts with respect to the creditors,

"…should keep me from working in the interest of the creditors, if they were to see money in my six years of insolvency...".

[3] Roethe, T.: Consumer over-indebtedness of young people – Social causes, in particular the importance of a social change of values. For the German Federal Agency for Agriculture and Food. 2006, MW (German title: Verbraucherverschuldung junger Menschen – Gesellschaftliche Ursachen, insbesondere die Bedeutung eines gesellschaftlichen Wertewandels. Für die Bundesanstalt für Landwirtschaft und Ernährung. 2006. MS)

If I anticipated further towards the beginning that it is "to be expected that the private insolvency, as a fate personally experienced, will successively superimpose all entrepreneurial interpretations", then we are now being taught differently: the damnatory impact of the proceedings was only able to convulse the protagonist for a short period of time. Even if she cannot escape this prescribed fate and licks her wounds – she returns to the entrepreneurial roots of her action and that beyond all private dreariness. Therefore, it is not the outlook that she will be able to legitimately remain in debt to her creditors for the unpaid amounts, which spurs her on, but - on the contrary - she feels, in the sense of rational economic activity described by Max Weber, that it is binding to settle her obligation and is for this reason unhappy with the law and the inactivity enforced upon her.

Nota bene: these are rational and not moral considerations. The moral normative considerations are made by the law, which wants to educate and which wants to achieve a long-term consensus with the corresponding write-offs. The recipient of social security - as an entrepreneur, who is not be stifled, refers here to the dangers of economic activity, to all unexpected eventualities and active counter-strategies to limit the damages and to make amends for them.

We can safely assume that entrepreneurs know of the risks of transactions with their business partners. Indeed they professionally discuss them in practice on a day-to-day basis, let the results of such reasoning find form and wording in their contracts, and *reciprocally* protect themselves with all other legal arrangements to meet this purpose. Sometimes this works well and sometimes it does not work out well. As we can remember from the case described above of the entrepreneur's losses from the first debtor, she had also trusted him and was disappointed, just as she had to disappoint her creditors. But if we speak of the massive risk of entrepreneurial activity, then we are also speaking of the contractual risk of the partners amongst one another. If we take the ideal-typical entrepreneur, then he/she knows that some things can go awry[4], and he/she will take precautionary measures against that. Is the thought not evident that all entrepreneurs forearm themselves in day-to-day business for short-term defaults of payment and form reserves in a collegiate understanding? Should it not, for this reason, be possible for our protagonist, to feel a belonging to the entrepreneurship as a highly specialized professional social group with failure and success and do everything in her power to restore her situative financial solvency?

In other words, the rational certainty of not having to remain in debt to her business partners/creditors belongs to her calculus. It is this structural professional "solidarity", which bursts the framework of the insolvency proceedings. It is simply this fact, which stigmatizes her, as it suspends the self-regulating risk community of the entrepreneurs to a large extent and in an authoritarian manner. She is forced to say goodbye to her obligations, which is intolerable for her.

This way of thinking is implicitly underlied by a "community of fate" of the entrepreneurs, who are purged by suffering, and already know that it is not always bad intention, if the business partner does not settle his/her payment obligations on time or cannot service them at all and it is exactly for this reason that reserves are formed in companies. The idea of being able to forearm oneself against unexpected defaults of payment is a long experience, which is reflected for example in the business fields of insurances and reinsurances. Out of court settlement proceedings ensure the reconciliation of interests in continuing business relationships – and for the failed entrepreneur all such precautions are not to have a chance of becoming valid? Private insolvency prescribes it as such.

Behind the indignation about this circumstance another scenario can be found ex negative, which suggests the thought that the whole entrepreneurship solves such insolvency and payment conflicts corporately, without involving the state and the jurisdiction and gives active entrepreneurs the possibility of further selling their products after situative failure in a modified, cleverer but nevertheless energetic way. In view of the codified methods of proceeding that might well sound

[4] I am excluding all form of deceit or criminality in this model consideration.

irritating, but at the same time such a thought is very plausible, resulting from the bitter experience of repudiation from the group of active people, especially as it is not primarily concerned with own welfare, but takes the structural type of entrepreneurial activity into account. The elementary difference between entrepreneurial action and welfare state provision is made clear by the next half of a sentence:

"and in the interest of the state itself, that would receive taxes if I worked, but have to pay for me and my family if I did not."

The state, therefore, that feels appointed to regulate the further fate of the fallible entrepreneur according to its stipulations, acts as the "umpire" in a field of action, in which by definition it understands nothing and does not have to understand anything. It does without the exuberant productive energy of a citizen, it feeds from previously tax payments that have been made – no in fact more than that, the providing state gladly pays for talents, which it leaves fallow.

In a nutshell, we find here the paradox of the welfare state, which leads its citizens, who have economically failed, to the temptation of a tentative attitude of wait and see or only wants to lead them there.

In the protagonist, the state meets an advocate for personal autonomy, who resigns herself to the legal constraints, but does not however immobilize the reflection about her fate and its integration in irrational modes of operation, but on the contrary contradicts the temptation to paralysis.

That is the one side.

The other side of this rationality also recognizes the failure of entrepreneurship as a whole, which itself has not succeeded in developing processes and systems that could pick up entrepreneur colleagues in difficult times.[5]

These implicatures of the "rational rebellious" interpretation pattern are of immense intellectual and declamatory vehemence and want to claim theoretical validity in all of their personal-structural plausibility. They are, however, up until now in the speech, which forms the basis for our considerations, game tokens or jettons, which thought-experimentally decide about "Back to start".

In the ninth section, which is only composed of three lines, it is put that:

"I asked permission from my insolvency administrator if I could contact my creditors myself and he agreed. I was relieved as all that I had left was my honour, respect and my reliability. And if I were to use these contacts professionally later, then this was imperative."

With these sentences the author of the speech leaves the tragic and sometimes sarcastic humoristic description of her ordeal. Contrary to the customer/debtor known to us already from the fifth section, who was a shirker and quitter and drove our author of the speech to utter dismay, she takes on her own failure as an entrepreneur as a personal responsibility, such as if the private insolvency proceedings, which would relieve her of a burden over the years, were a farce in view of the entrepreneurial reality.

The proceedings are on the one hand and the person of the entrepreneur is on the other. If we are speaking of honour, respect[6] and reliability, then in all "old-fashionedness" the practical will is revealed, to stand up and to be accountable for decisions and also for wrong decisions.

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5 Here I am only depicting one consequence of the case-typical inappropriate application of the rules of private insolvency. The entrepreneur as a type has not enjoyed large popularity in Germany for decades, as the polls show again and again. Let us call that an ideological macro weather situation. A corporately organized arrangement, which could pick up failed entrepreneurs, which is implicitly insinuated by the thought background of the speaker, would hardly be politically enforceable, but it is not therefore incorrect.

The claim to being "successful", described above as problematic without economic background, is fulfilled in the declaration and in the understanding of the text as the shrewd recognition that the crisis, the failure is to be understood as the action-practical resultant of business activity.

And with this claim to communicative explanation with respect to her creditors and the following discussions the pragmatism is revealed, which German private insolvency law does not know and does not want to allow. The state and its jurisprudence forgo the examination of the single case. They surrender to the fault of not understanding just to what extent they intervene in the life of those, who only wanted to remain owing someone something.

The protagonist addresses her creditors out of her own impulse and accepts all prescribed limitations, strongly resists all "reliefs", which could possibly exist in feeling released from debt in the middle-term and seeks the contact to her creditors. She reveals that she does not intend to consider her insolvency as the dissolution of her entrepreneurial identity.

In the inner relationship of her entrepreneurship her creditors remain her direct partners, the relationship to whom is not terminated with notice due to the eventuated private insolvency, even if the insolvency allows for such a breakdown of relations. This again shows how little she can reconcile herself with the proceedings and to what extent she feels that the proceedings run contrary to her own efforts and endeavours. She does not deny to any extent the entrepreneurial mistakes, which she has made in a difficult world situation, but beyond the proceedings she looks for possibilities of a collegiate regulation of debts with her creditors, as she believes that she recognizes even in the process of the insolvency proceedings that her vital business relationships are not being bureaucratically rendered lifeless.

The case and the regulation (as a fundamental difference of juridical perception) completely deviate from one another, as described already above:

The case described to us – the economical collapse of an entrepreneur, in a complex economic field, is subsumed in a regulated method of procedure, which as a social welfare instrument is intended for a clientele, who would not know how to help themselves on their own and seeks a discharge at the cost of the creditors and the tax-payer.

The entrepreneur however looks for contact to the creditors and takes responsibility for open receivables, obviously in order to find agreements, as entrepreneurs always have to do in situations of crisis.

This does not bring her personal economic fate with all its shocks and psychological severity to a halt, but it allows the self-perception as an agile and problem-solving oriented entrepreneur type intact.

Thus, she highlights an impressive discrepancy – it is not hedonistic irrationality with extravagancies which have ruined her, but "strokes of fate" to amorphously summarize the contingent events of contemporary history) have not caused her entrepreneurial „protestant ethics" to fail in foreseeable precautionary prognostics. The entrepreneurial ethics remain realistically unaffected as such and the will of our protagonist to maintain them in the even deeper waters of private insolvency, shows the stability of this entrepreneurial interpretation pattern, which does not allow itself to be placated by the rules of private insolvency which oblige to good conduct and a wait-and-see attitude (attentism).

The speaker demands and exercises the taking over of responsibility and productivity in the crisis, exactly in the situative failure, and with this lived category of citoyen aspiring Europe encounters a German law, which no longer knows, nor wants to know anything of these ethics.

(Contd.)

[6] See Berger, P.L., Berger, B., Kellner, H.: The Homeless Mind. Modernization and consciousness. Random House, 1973. Excursus about the term of honour and its downfall.

The entrepreneurial risk management also has to orientate itself to what can be expected. The "Weltangst", to use this wonderful German word here, does not lead to anything else other than an anxious action rigour. The speaker, who is not coincidentally British, confronts her audience with the pragmatic wisdom that life must go on and professionally or even professionalized vocations also quite simply have their explanation in the welfare of societies. We may assume it to be the painful result of the considerations of Anne Koark that a clever legislator should take that into account.

It would then be correct if the legislator knew how to value the type of the upstanding honest entrepreneur. If the legislator did so, then the speaker would have even more solid arguments from her own experience on her side, namely the right to a case-by-case consideration – and that is the stigma of the private insolvency regulation itself, which does without this basic necessity.

In the following sections (10 to 13) the speaker reports of her efforts to free herself from the inactivity prescribed to her, to make her own case exemplary, to make it public, to look for publicity, to inform, to publish, to become politically active – out of the limitation – not to let the matter rest and to also form a lobby for failed entrepreneurs, who share their fate in the processing in the private insolvency.

That conjures up an old motif from the past, which was spoken in London in 1848:

" … unify yourselves, … you have nothing to lose but your chains".[7]

And just as Marx, as the analyst, had to highlight the productive forces of the proletariat from the logics of the social context then, in order to criticize the dominance of the ignorant bourgeoisie and to shake it, the speaker takes up the fight against the ignorance of legal stipulations which oppose the organisation of productivity.

In section 12 it is put that*:*

"Of course people have to pay for their mistakes, but if the penalties are too high, we pay for our prejudice by the creditors losing out, as no debtor can work, by the state losing out on new taxes and instead paying for the social cases, we have thus created, as a debtor who is prevented from working, earns nothing for years and this benefits no one."

That is indeed true – before the eyes of Hegel's "Weltgeist" the mistakes of the individual always have unpleasant and unwelcome consequences. They inherently "revenge" themselves.

Can we speak of "penalties" for this reason?

No, indeed not. The private insolvency law also does not want to penalize. On the contrary it wants to achieve legal order between creditors and debtors, also at the price that the private entrepreneur as a social structure type, the proverbial „honest Hamburg merchant" – by decree blundered into the cohort of the privately insolvent - can no longer fulfil his self-imposed obligations.

In this indifference and in the unleashed dedication to the due legal process meant as a rigid formal „justice", a society shows itself, which technocratically, with one stroke of the pen, strikes out the dispositions born in the logic of entrepreneurial activity – and nota bene – increases its own immense debts .

I break off the analysis pragmatically at this point, as the conflicting argumentations in the text of the speech no longer allow themselves to be suspended.

To be understood as an appendix:

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7 Freely cited according to Marx, K. The Communist Manifesto, London, 1848.

In the eleventh section the author speaks of many difficulties, which are beyond the law but nevertheless accompany her, in installing a basis for a life after the period of good conduct has ended, like for example opening a bank account.

Quasi by the way she experiences that a sum of approximately184,000 Euros has come together as assets in her insolvency case and that to her knowledge approximately 20,000 Euros of her debts have been paid from that – she is not informed of more.

At the end of my analysis I took the liberty of asking Ms. Koark about this peculiar fact and she informed me that the insolvency administration alone devoured approximately 60,000 Euros including value added tax. I assumed at the beginning of my considerations that one entrepreneur would lose due to contingent events like September 11th, 2001 and another might possibly win.

Ergo: these proceedings are not only very expensive for the creditors.

Insolvent und Trotzdem Erfolgreich

Der hier zu analysierende Text ist für eine Tagung zum Insolvenzrecht, spezieller zur Privatinsolvenz und dessen sozialen Folgen verfaßt und als Rede vorgetragen worden. Die Verfasserin der Rede, so muß man vermuten dürfen, wurde deswegen eingeladen, weil sie in den Augen der Veranstalter über profunde Erfahrungen und Kenntnisse in diesen Zusammenhängen verfügt.

Bei der Analyse des Redetextes, soll der Fall der privaten Insolvenz der Vortragenden in seinen Struktureigenschaften in der „Sprache des Falls“[1] rekonstruiert werden. Der Methode der „objektiven Hermeneutik“ folgend, beginne ich mit dem ersten Satz der Rede und analysiere sequentiell, bis sich keine neuen Lesarten aus der Textur ergeben. Deskriptive Passagen der Rede, werde ich zum besseren Verständnis der argumentativen Sequenzen in geraffter Form widergeben.

Der Vortrag ist betitelt mit:

Back to start: Insolvent and nevertheless successful

Betrachten wir die Formulierung *„Back to start:“* erkennen wir ohne weiteres den Befehl aus dem Gesellschaftsspiel “Monopoly“, der nach dem Ziehen der entsprechenden Spielkarte zu befolgen ist. Der Spieler ist vom weiteren Geschehen bis zur nächsten Würfelrunde ausgeschlossen und hat das Treiben seiner Mitspieler tatenlos zu betrachten. Abhängig von der gezogenen Spielkarte, kann der Befehl, auf „Start“ zurückzugehen mit einem Bonus in Spielgeld verbunden sein, ein andermal erfolgt die Zurücksetzung auch ohne Gewinn. So sind die Regeln des Spiels, das der Logik der konstitutiven Regeln zu folgen hat – ohne sie wäre das Spiel nicht existent, sie entscheiden über Wohl und Wehe der Spieler.

Angesichts eines Vortrags zur realen Privatinsolvenz ist die titelgebende Metaphorik des Spiels überraschend, denn ‚Spielfähigkeit’ setzt per se für das Gattungswesen insgesamt und speziell für den „homo oeconomicus“ arbeitsfreie Zeit voraus.

Zunächst muß also die Frage offen bleiben, ob die Vortragende ihre Gedanken zum Thema privater Insolvenz in ironischer Brechung gerahmt sehen will, wie das im angelsächsischen Sprachgestus häufig zu finden ist, oder aber ob tatsächlich die philosophische Überzeugung besteht, das Leben, insbesondere das ökonomische Leben, sei als Spiel zu betrachten.

Der Vortragstitel wird nach dem Erläuterung versprechenden Doppelpunkt mit den Worten *“Insolvent and nevertheless successful”* zu einer vorgestellten ökonomischen Paradoxie ausgebaut: Zahlungsunfähig, überschuldet und gleichzeitig erfolgreich zu sein, muß, so wird supponiert, generell als ausgeschlossen gelten.

Wir dürfen also Ausführungen erwarten, die einen außergewöhnlichen Fall darstellen und der darüber hinaus den Spielregeln des ‚Monopoly’ insoweit folgt, als *„Back to start“* die Wiederaufnahme des Spielgeschehens für diesen Akteur bedeutet, der zwar immer noch insolvent, aber doch auch (wieder?) erfolgreich ist, ohne daß wir die Art des Erfolges benannt bekommen.

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[1] Dafür grundsätzlich Oevermann, et al, in: Soeffner, H. G. (Hg): Interpretative Verfahren. Stuttgart, 1979.

Im ersten Abschnitt ihres Vortrags stellt sich die Autorin auf 3 Zeilen als britische Staatsbürgerin vor, die seit 25 Jahren in Deutschland lebt und arbeitet, die bis 2003 ein erfolgreiches Unternehmen betrieb. Heute nach 7 Jahren bezeichnet sie sich in einem Wortspiel als V.I.P, als „*Very Intensively Penniless and an Ex-Pleitier*" – eine Zustandsbeschreibung, die eine heftige Geldnot nicht verschweigt, aber gleichwohl den pejorativen Titel eines ‚Pleitiers' hinter sich gelassen hat, mit anderen Worten, die Phase der Insolvenz ist abgeschlossen. Die Frage des behaupteten ‚Erfolgs' bleibt gleichwohl offen – es muß sich um einen ‚Erfolg' handeln, der sich kurz und plakativ nicht schildern läßt, der zumindest aber nicht auf wiedererlangter ökonomischer Stabilität beruht.

Im zweiten Abschnitt wird die Geschäftsidee geschildert, nämlich Unternehmen, die eine Niederlassung in Deutschland, speziell in der Gegend um München herum, alle dazu erforderlichen Dienstleistungen anzubieten. Bemerkenswert ist dabei, daß die Vortragende dieses Unternehmen gründete, als sie selbst noch als Vollzeitangestellte beschäftigt war. Es darf als sicher gelten, daß sie sich vor Arbeit nicht fürchtet.

Die Nachfrage nach diesen Dienstleistungen war erheblich und die Wahrnehmung und Berichterstattung in der Wirtschaftspresse umfangreich und voller Prestige –

„*Articles came out about us everywhere. One article had Jimmy Carter on the front page and a double-sided feature about my company in the middle. I was delighted"*.

Der Hinweis auf die positiven Pressestimmen, also das, was fachkundige Journalisten zu dieser Geschäftsgründung zu berichten hatten – wurde hier subjektiv wie eine legitimatorische Bestätigung des eigenen und richtigen Unternehmerhandelns verstanden und damit mißverstanden. Die in der Presse veröffentlichten Meinungen im Jahre 1999 waren selbstredend nur journalistische Betrachtungen, Betrachtungen von Leuten also, die dieses unternehmerische Risiko nicht am eigenen Leibe spüren mußten und gerade deswegen Begeisterung und moralische Unterstützung liefern konnten. Die Autorin bewegt sich mit dieser Äußerung im Formenkreis von Stimmungen und Überzeugungen, die eine Realität sui generis repräsentieren, aber häufig genug mit den Unwägbarkeiten des wirklichen Geschehens und der Zukunftsoffenheit desselben nichts gemein haben. Ex post schildert sie sich als „delighted", geht also auf ironische Distanz zu ihrer damaligen Verfassung.

In bezug auf die investierten Mittel explodierten die Einnahmen geradezu (1200 %), was ganz sicher ein Grund zur Freude war und den Glauben stärkte, über ein marktgängiges Produkt zu verfügen.

Im dritten Abschnitt geht es um die Ausweitung der Geschäftsfelder, die Anmietung neuer Geschäftsräume, den Gewinn eines Unternehmerpreises, die Würdigung in der Tagespresse, die Kontakte zur internationalen politischen Klasse, insgesamt den Optimismus bestärkende Wertschätzungen, die insgesamt ökonomisch nur schwer auf tatsächlichen Bilanzerfolg umzurechnen sind.

Im vierten Abschnitt wird der ökonomische Effekt des 11. September 2001 geschildert, mit den dramatischen Folgen für die Investitionsbereitschaft der internationalen Klientel, die sofort auf das junge Unternehmen, die Einzelunternehmerin durchschlagen, Kosten werden reduziert, Beratung wird eingeholt, ein langfristiger Mietvertrag, der unter dem Eindruck der überaus positiven Stimmung und des guten Geschäftsverlaufs abgeschlossen wurde, erweist sich nun als Klotz am Bein, die Unternehmerin beschließt, auf ihren Unternehmerlohn zu verzichten.

Der fünfte Abschnitt ist sehr kurz:

"And then the first customer went bankrupt. I was furious!!! I thought – How could he? We have worked for our money! And why does he not have the respect to contact us"?

Ein Bankrott tritt ein, der Kunde kann seine Zahlungsverpflichtungen nicht mehr erfüllen. Die Vortragende ist empört, sie versteht dieses Ereignis zunächst auf der zwischenmenschlichen Ebene in dem Sinne, wie der Kunde ihr das habe antun können und dann erst folgt die geschäftliche Ebene, die die erbrachten Leistungen ins Feld führt, die nun ohne Bezahlung bleiben und ein weiterer Gedanke streift die verunglückten Kommunikationsformen, die sowohl auf der intersubjektiven wie auch auf der geschäftlichen einem Informationsboykott ähneln.

Ein definitiver Forderungsausfall ist besonders für ein junges Unternehmen, das noch keine Gelegenheit hatte, entsprechende Rückstellungen zu bilden und sich ohnehin in turbulenten Zeiten zu behaupten hat, eine ernste Bedrohung. Aber es ist auch eine intellektuelle Bedrohung mit der klar wird, alle Wege zu einer wie auch immer gestalteten Zahlung sind verschlossen. Ein für triftig gehaltenes geschäftliches Arrangement erweist sich als resistent gegen jeden guten Willen, doch noch zu einer einvernehmlichen Lösung zu kommen. Es wirkt wie ein nicht reversibler Schicksalsschlag mit dem von nun an zu leben ist.

Das steht in deutlichem Kontrast zu der öffentlich geäußerten Wertschätzung des Unternehmens, das nun erkennen muß, daß ‚good will' und ökonomische Realität unter Umständen zwei grundsätzlich geschiedene Sphären sind. Die allem Handel, allen geschäftlichen Beziehungen unterliegende Formbestimmung des ‚give and take', die im günstigen Fall in der viel besprochenen ‚win-win-Situation' kulminiert, kann aus kontingenten Gründen außer Kraft gesetzt werden. Diese Kontingenz des Geschäftslebens hat ihren Ursprung in der Komplexität menschlichen Verhaltens (katastrophale Naturereignisse lassen wir außer hier außer Betracht), das sich bis dato jeder Prognostik entzieht. Diese Leerstelle wird gemeinhin mit ‚Risikoabwägung' und ‚Risikokontrolle' bezeichnet, soll heißen, ‚worst case-Szenarien' gehören zum unternehmerischen Handeln. Und selbst ‚worst case-Szenarien' können ihren prognostischen Gehalt angesichts mit gesundem Menschenverstand nicht antizipierbaren Entwicklungen verlieren, das darf als allgemeine Überzeugung gelten.

Der 11. September 2010 ist ein solches Datum.

An einem solchen Datum kann ein Unternehmen scheitern, ein anderes wird möglicherweise gewinnen.

Der Unternehmer bleibt solchen Risiken selbst bei bester Vorsorge ausgesetzt.

Der Unternehmer als professioneller Strukturtypus der Marktbeobachtung, der Produktdefinition, der Arbeitsorganisation, der Qualitätskontrolle, der Gewinnmaximierung und schließlich der Reinvestition trägt nolens volens Verantwortung über die eigene Person hinaus. Sein Scheitern bedeutet den individuellen sozialen Tod - von den Folgen für seine Gläubiger, Vertragspartner, Arbeiter, Angestellten und seine Familie nicht zu sprechen.

Diese basale Erfahrung des 19. Jahrhunderts, vgl. etwa Thomas Manns „Buddenbrooks", tritt seit der 2. Hälfte des 20. Jahrhunderts immer mehr in den Hintergrund, da Expertisierung und Szientifizierung unternehmerischen Handelns in Gestalt des außertariflich angestellten ‚Managers', der allenfalls für das Betriebsergebnis verantwortlich ist, an Gewicht gewinnen. Auch ein Manager kann beruflich scheitern - ein Unternehmer mit Herz und Seele scheitert lebensgeschichtlich, wenn es ihm nicht gelingen kann, die gemachten Fehler zu heilen.

Die vortragende Unternehmerin muß das Scheitern eines ihrer Geschäftspartner erleben und sie wird von diesem Scheitern ins Mark getroffen. Fortan geht es um das Überleben des jungen Unternehmens und auch um das Überleben der jungen Unternehmerin.

Der nicht erwartbare Fall ist eingetreten.

Im 6. Abschnitt notiert die Unternehmerin die Insolvenzen des zweiten und dritten Vertragspartners, deren Zahlungsausfälle in keiner Weise mehr kompensiert werden können. Extensives persönliches

Engagement bis zur physischen Erschöpfung (besser bekannt als Selbstausbeutung von Selbständigen) kann daran nichts ändern. Als Unternehmerin ist sie nun gescheitert und statt der zukunftsträchtigen Fortschreibung von 1.200 % Unternehmensgewinn, erobern sich ganz andere Begriffe das Bewußtsein der Unternehmerin:

"The words insolvency, debtor and creditor crept through my mind. I hoped that if solvent meant you dissolve, insolvent would mean that you don't.."

Nun ist diese Formulierung ex post selbstredend nicht wörtlich zu verstehen, sondern trägt dem apokalyptischen Witz Rechnung, wie schnell das Blatt sich wenden kann. Waren vorgeblich Schuldner und Kreditgeber niemals Gegenstand alltäglichen Räsonnements des Geschäftsbetriebes, treten nun sarkastische Überlegungen zum Begriff ‚Insolvenz' auf den Plan.

Dieser Sarkasmus hat ein doppeltes Gesicht:

Im Angesicht des Scheiterns reproduziert er die Hoffnung, man selbst könne nicht gemeint sein, das Fatum könne an einem vorübergehen (also das üble unternehmerische Schicksal), die Auflösung der Person werde nicht stattfinden. Andererseits wird auch der Befürchtung Raum gegeben, es könne doch wirklich um die Auflösung der eigenen Person gehen.

Nun haben wir festzuhalten, daß solche gewitzten und gefühlvollen Überlegungen kaum noch von Belang wären, wenn wir zwischen Person und Unternehmen unterscheiden müßten. In dem hier vorgestellten Fall geht es sachhaltig um ein Unternehmen, das unter schwierigen Bedingungen nicht am Markt reüssieren konnte (also das üble Schicksal eines Unternehmens), und erst in zweiter Linie um eine Unternehmerin. Nur, drohen hier beide Schicksale in eins zu fallen. Und tatsächlich:

"Finally when the Iraq war started and a potential investor decided against investing it was clear that registering insolvency was the only possibility. And as I had a private company this meant simultaneous private bankruptcy too."

Eine weitere, unerwartbare politische Entwicklung greift in die Bildungsgeschichte des jungen Unternehmens ein. Das Unternehmen ist ökonomisch nun nicht mehr zu retten. Die darausfolgende Privatinsolvenz trifft die Unternehmerin formal als Individuum, das ökonomische Schicksal des Unternehmens als soziale Entität, auch in der Behandlung durch den Insolvenzverwalter, wird nun hinter diesen juristischen Sachverhalt zurücktreten, denn selbstredend gehorcht eine Unternehmensinsolvenz anderen Regeln als eine Privatinsolvenz. Aus dem Gang der Geschehnisse müssen wir nun mit einer gespaltenen Aufmerksamkeit auf der Ebene der zu betrachtenden Abwicklungsmodi rechnen und darüber hinaus ist erwartbar, daß die private Insolvenz als das am eigenen Leibe erfahrene Schicksal, sukzessive alle unternehmerischen Deutungen überlagen wird.

Im 7. Abschnitt schildert die Autorin ihren ratsuchenden Weg zu einem Anwalt in dem Gefühl, die exzellente Unternehmerin, die mit den Großen dieser Welt zusammenarbeitete, würde mit der Beendigung des Unternehmens, „bury one of my children".

Dies ist eine recht landläufige und sentimentale Formulierung, wann immer Menschen sich von lieb gewonnenen Umständen trennen müssen; in diesem Kontext jedoch meldet sich das tiefe Engagement mit dem das Unternehmen betrieben wurde, völlig zurecht: das Unternehmen als tragende Säule auch der privaten Existenz wird sich absehbar in Luft auflösen und damit ein wesentlich von der Autorin getragener individuierter Lebensbereich mit allen Analysen, Erwartungen, Entscheidungen und weit in das Privatleben hineinreichenden Dispositionen verschwunden sein.

Der beratende Anwalt macht sie mit den unmittelbaren Konsequenzen der Privatinsolvenz bekannt: Sie wird nicht nur das Unternehmen verlieren, sondern auch ihre Wohnung, ihr Auto, ihr Mobiltelephon, ihre Renten- und Lebensversicherung und alle Ersparnisse. Das ist jenseits des Unternehmens auch das Ende der ökonomischen Selbstbestimmung, mithin eine massive Beschränkung der personalen Autonomie.

"And I waited for the hangman to come who was to execute the punishment for being a failure as an entrepreneur, the court-appointed administrator."

An diesem deprimierenden Resümee fällt das Wort "punishment" auf, das eine Autosuggestion nahe legt, die das Scheitern als Unternehmerin kriminalisieren würde. Dem ist nun freilich nicht so. Die Unternehmerin wird Objekt des Zivilrechts und nicht des Strafrechts, das Auftreten eines Henkers steht nicht zu befürchten. In einem metaphorischen Verständnis jedoch können solch schreckliche Ereignisse durchaus als etwa religiös gestiftete Gottesstrafe verstanden werden.

Nur schert sich der graue Insolvenzalltag nicht um die subjektiven Befindlichkeiten eines Insolventen, auch Phantasien über Henker und letale Strafmaßnahmen erreichen ihn nicht – ihm geht es um die Überschuldung und die Forderungen der Gläubiger, auch jener Gläubiger, die sich ihrerseits wegen der ausbleibenden Zahlungen von einem Gottesurteil getroffen fühlen dürfen.

Forderungen steht die Zahlungsunfähigkeit gegenüber. Es ist dieser schlichte Sachverhalt, den die Gesellschaft der Justiz aufgegeben hat zu regeln, um jeder archaischen Form der Forderungsdurchsetzung und auch Bestrafung den Boden zu entziehen. Insolvenz als Desaster hat zwei betroffene Seiten, wie die Autorin schon im 5. Abschnitt richtig feststellte. „Punishment" ist aber gleichwohl die innerpsychische Repräsentanz, die das Verfahren bei der Autorin hinterläßt. Da es sich aber nicht um eine Kriminalstrafe handelt – wie ihr bewußt ist – kann es sich nur um das Mißverhältnis zwischen unternehmerischen Fehlern und persönlich empfundenen Folgen handeln. Neben den gravierenden ökonomischen Folgen, die den Lebensstandard betreffen, sind es besonders die, die den Unternehmer, also den Prototyp einer ‚vita activa', zur Untätigkeit verdammen.

Im 8. Abschnitt wird geschildert, welche Maßnahmen der vom Gericht bestellte Insolvenzverwalter einleitete, um sich den notwendigen Überblick über das Ausmaß des Schadens und die möglicherweise noch an die Gläubiger zu verteilenden Mittel zu verschaffen, und dann die Firma und die Konten zu schließen. Über 2 Monate leistete die Vortragende dabei tätige Mithilfe. Einer Hilfe, die der Insolvenzverwalter zu schätzen gewußt haben wird, denn wie wir aus vorangegangenen Untersuchungen wissen[2], haben die Insolvenzverwalter häufig ihre liebe Not, die ungeordneten Papierberge ihrer ‚Kundschaft' zu systematisieren. So wie die Vortragende den Aufbau des Unternehmens mit glücklicher Hand betrieben hatte, war sie nun an seiner geregelten Beendigung beteiligt. Die Angestellten konnten und mußten den Weg zum Arbeitsamt antreten, für die Unternehmerin selbst blieben keine Mittel übrig, mit denen sie ihr Leben hätte fristen können. Keine Schwarzgeldkonten, keine an Verwandte oder Freunde übertragene Gewinnanteile – tabula rasa.

Damit ist, literarisch gesprochen, der erste Akt eines Unternehmensdramas zum Ende gekommen.

Nach dieser biographischen Zäsur beginnt ein zweiter Akt, der unsere Protagonistin in völlig veränderte soziale Zusammenhänge stellt:

1. Die 6 jährige ‚Wohlverhaltensphase' beginnt, die es der Protagonistin verbietet, kreditierte Geschäfte zu tätigen, oder unangemeldete Einnahmen zu erzielen.
2. Eventuelle Einnahmen, die den Selbstbehalt übersteigen, müssen zum Schuldendienst eingesetzt werden.
3. Die Frage der Subsistenzmittel schlechthin muß geklärt werden.
4. Wie aber überhaupt Einnahmen erzielen, wenn der Arbeitsmarkt keinen Bedarf für eine über 40 jährige Mutter von 2 kleinen Kindern hat, die überdies ein ex-entrepreneur ist, der selbständig zu arbeiten gewohnt ist?

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[2] Roethe, T.: Private Verschuldung. Pilotstudie für die Schufa. 2006. MS

5. Eine erneute gewerbliche Selbständigkeit aus dem Nichts heraus ist schon gedankenexperimentell ohne jede Chance.

In dieser mißlichen Situation greifen zunächst Freundschaften, die helfend zur Seite stehen und schließlich das soziale Netz, das der Wohlfahrtsstaat aufspannt, dessen bürokratische Hürden allerdings genommen werden müssen. Es herrscht veritable Not!

„As a single mother of two children I needed a solution. I went to the unemployment office, asked where insolvent people should go and was told at the information desk "I don't want to have anything to do with someone like you!" The unemployment office was not responsible for me and told me to go to social security. The social security office told me that as I was the owner of an apartment, they were not responsible for me – even though this could only be sold by the insolvency administrator. I was four months without health insurance and in fact without any money at all."

Diese Textpassage enthüllt in ihrem Zorn und in ihrer subjektiv gefühlten Entwürdigung durch Abweisung zweierlei:

Eine überaus selbständige und tatkräftige Frau, mit Anerkennungen ihres bisherigen Wirkens überhäuft, lebt im absoluten Bankrott und sucht nach einer Lösung, um sich selbst und die Kinder am Leben zu erhalten. Sie sucht die notwendige Hilfe - beim Staat und seinen Behörden. Sie reiht sich damit ein in die Riege bedürftiger und arbeitsloser Personen. Auch wenn wir das Zitat "I don't want to have anything to do with someone like you!" cum granu salis nehmen, muß sie erfahren, daß sie nicht der gewünschte Fall einer Arbeitslosen ist. Das Arbeitsamt, nach der Titelreform die Agentur für Arbeit, verschmäht den Umgang mit gescheiterten Unternehmern, weil es in erster Linie zuständig für Personen ist, die aus was für Gründen auch immer, aus dem Arbeitsmarkt herausgefallen sind. Und auch das Sozialamt, das für jedwede Bedürftigkeit nach dem SGB zuständig ist, findet Gründe, das Hilfeersuchen zunächst abzulehnen.

Eine Unternehmerin, die in ihrer Karriere gewohnt war, alle Kontakte mit Behörden im Sinne der Durchsetzung des Unternehmensziels nach Möglichkeit so konfliktfrei wie möglich zu gestalten, um nur arbeiten zu können, ist nun gezwungen, ihre Bedürftigkeit nachzuweisen. Allerdings fällt auf – die ‚Zuständigkeit' (responsibilty) von Behörden für ihr Schicksal wird von der gescheiterten Unternehmerin durchaus wie eine Naturkonstante unterstellt, selbst wenn die Behörden das routinemäßig und formal in aller Prozeduralität erst einmal abweisen. Die bittere Klage, sie sei 4 Monate ohne Krankenversicherung und ohne liquide Mittel gewesen, richtet sich demonstrativ an ihr Vortragspublikum und erheischt somit moralische Entrüstung und Unterstützung.

Worauf könnte sich ein solcher Appell richten? Selbstredend darauf, daß ein jeder, auch ein Unternehmer, im Falle seines Scheiterns, heutzutage das verbriefte Recht hat, staatlicherseits, also aus dem Steuerhaushalt mit dem Existenzminimum auch rechtzeitig versorgt zu werden. Das ist die Zusicherung des Sozialstaats, der im selben Atemzug aber auch alle statusbezogenen Privilegien einebnet. Ein jeder, auch der gescheiterte Unternehmer hat sich in Abhängigkeit einzufügen und bürokratisch verwalten zu lassen, bevor die Subsistenzmittel fließen können. Aber diese Klage umfasst auch noch einen anderen Aspekt, nämlich den, daß die tief empfundene Pflicht, den Nutzen der Gläubiger zu mehren, schlichtweg nicht vorgesehen ist und deshalb auch entgeltlich und steuerlich nicht zu Buche schlägt.

Diese Klage enthüllt damit aber auch eine völlig andere Nuance, die über bürokratische Mißhelligkeiten weit hinausweist:

> Kommen wir noch einmal auf die klassische Figur des Unternehmers zu sprechen, der Märkte erschließt, der für Arbeitsplätze sorgt, der in der Verantwortung für seine Beschäftigten steht, der die lokalen, regionalen, nationalen und internationalen Geschäftsbeziehungen ökonomisch und sozial zu prägen versteht, und dessen Scheitern eine soziale und ökonomische Katastrophe für alle Beteiligten, Lieferanten, Gewerke, Angestellten, Gläubiger bedeutet, dann kommen wir also

> zurück auf den soziologischen Strukturtypus eines unerschrockenen Entwicklers von profit- und leistungsorientierten sozialen Beziehungen, die in einer ‚win-win' Situation beiden Seiten der Geschäftsbeziehungen Erfolg versprechen und die Wohlstandsressourcen der Gesellschaft mehren.
>
> Es ist der Unternehmer, der mit seinem Geschick und seinem Gespür für notwendige Aufgaben- und Problemlösungen die Grundlage für alle Steueraufkommen in einer Gesellschaft bereitstellt. Dieser Leistung stehen gegenüber die Risiken des kontingenten Scheiterns, die sowohl durch Unternehmerstrategien, gespeist aus Erfahrung und intuitiven Urteilen, wie auch aus wirtschaftlichen Marktbeobachtungen, minimiert werden sollen. Wegen der gesellschaftspolitischen Folgen eines Scheiterns hat aber auch der Staat ein eminentes Interesse daran, die Risiken einzuhegen und konditioniert das Unternehmerhandeln in vielfältigen Formen und auf immer neue Weise, die dem Sicherheitsbedürfnis der Gesellschaft entsprechen sollen. Wir haben es also mit einer dynamisch-dialektisch immer wieder neu auszutarierenden handlungspraktischen Balance zwischen Risiko und Chance zu tun. Die Risikobereitschaft darf nicht erstickt werden, wenn Märkte effizient und prosperierend funktionieren sollen und im selben Atemzug müssen Katastrophen dringend vermieden werden.

Im vorliegenden Fall erkennen wir, daß alle Kalküle versagten. Die gescheiterte Unternehmerin findet sich in der Rolle des Sozialhilfeempfängers wieder – eine Rolle, die sie zu akzeptieren hat. Das bedeutet eine schicksalhafte Verkehrung der Antriebe, die Unternehmerin, die ihre Intelligenz und ihren Erfindungsreichtum daran setzte, persönlichen Erfolg zu haben und der Gesellschaft Ressourcen bereitzustellen, wird zu deren Kostgänger. Die auffällige Verquickung von gefühlter Not angesichts der peinlichen administrativen Prozeduren der Ämter und der realen Not bei aller Unternehmenslust und vorwärtstreibenden Aktionspotentialen, in den Gestaltungsmöglichkeiten zum Attentismus verurteilt zu sein, gibt den Blick frei, auf ein geradezu rational rebellisches Deutungsmuster:

"It seemed completely counteractive to me that the stigmatization of bankruptcy should keep me from working in the interest of the creditors, if they were to see money in my six years of insolvency and in the interest of the state itself, that would receive taxes if I worked, but have to pay for me and my family if I did not."

Die frisch gekürte Sozialhilfeempfängerin, die nach ihrem Debakel nun eben auf Kosten des Steuerzahlers mit ihren Kindern überleben kann, fühlt sich durch ihren Bankrott stigmatisiert. Wie das, mag man sich fragen? Wurden Regeln verletzt? Wurden ihr Rechte vorenthalten? Nein, sicherlich nicht.

Ihr Vorwurf zielt viel tiefer, die Stigmatisierung liegt in der Anwendung des Verfahrens der Privatinsolvenz auf ihren Fall.

> Aus unseren Untersuchungen zur Privatinsolvenz[3] kennen wir sowohl die Erleichterung wie auch die Empörung von Konsumenten, die sich durch abundanten Handykonsum (besonders jugendliche Erwachsene) und exzessive Ratengeschäfte in die Überschuldung manövriert haben. Erleichterung deshalb, weil das Wissen mit den qualvollen Inkassomaßnahmen wuchs, solche Schuldenberge niemals tilgen zu können. Empörung aus dem Gefühl heraus, dem als Menschenrecht empfundenen Konsumismus werde gänzlich unverständlich ein Riegel vorgeschoben. Wie auch immer, der Gesetzgeber hält es für richtig, dieser Klientel eine jahrelange Besinnungsphase zu verordnen und gibt den liefernden Unternehmen auf, bei der Vergabe von Krediten an Konsumenten sorgsamer vorzugehen, wenn die Forderungen nicht uneinbringbar sein sollen. Im Hintergrund des Gesetzes steht also neben der schlußendlichen Regulierung des

[3] Roethe, T.: Verbraucherverschuldung junger Menschen – Gesellschaftliche Ursachen, insbesondere die Bedeutung eines gesellschaftlichen Wertewandels. Für die Bundesanstalt für Landwirtschaft und Ernährung. 2006. MS

> Schadens auch ein finanzpädagogisches Ansinnen, das an beide Seiten – Konsument und Lieferant gerichtet ist. Der Verführung zu nicht bezahlbarem Konsum soll Einhalt geboten werden, wie auch Verbraucher zu lernen haben, sich nicht alles leisten zu können.

Diese normativen Gestaltungszüge des Gesetzes verfehlen im Fall unserer gescheiterten Unternehmerin aber den Adressaten. Nicht überbordendes konsumtives Verhalten hat sie scheitern lassen, sondern in erster Linie geopolitische Verwerfungen, zu denen sich (erst aus nachträglicher Betrachtung) auch unternehmerische Fehler gesellten, die eben für solche zeitgeschichtlichen Eventualitäten keine Vorsorge trafen. In den „Augen" des Privatinsolvenzrechtes mögen das finalisierende Fehler sein, angesichts der Zukunftsoffenheit allerdings, mit der das Gattungswesen sich plagen muß, handelt es sich um schlichte leidvolle Erfahrungen.

Das Gesetz, das hier auf eine gescheiterte Unternehmerin angewendet wird, verhindert gerade das, was die nun zur Sozialhilfeempfängerin deklarierte als vordringlichstes Ziel erreichen will: nämlich die Bedienung ihrer Schulden gegenüber ihren Gläubigern,

„…should keep me from working in the interest of the creditors, if they were to see money in my six years of insolvency...".

Antezipierte ich weiter oben, es sei „erwartbar, daß die private Insolvenz als das am eigenen Leibe erfahrene Schicksal, sukzessive alle unternehmerischen Deutungen überlagen wird", werden wir nun eines Besseren belehrt: Die damnatorische Wucht des Verfahrens hat die Protagonistin nur kurzzeitig erschüttern können, wenngleich sie diesem verordneten Schicksal nicht entgehen kann und ihre Wunden leckt - sie kommt zurück auf die unternehmerischen Wurzeln ihres Handelns, jenseits aller privaten Tristesse. Nicht also die Aussicht, ihren Gläubigern die ausstehenden Beträge legitimiert schuldig bleiben zu können zu können, beflügelt sie, sondern im Gegenteil empfindet sie im Sinne des von Max Weber beschriebenen rationalen Wirtschaftshandelns ihre Verpflichtung zum Ausgleich als bindend und hadert deswegen mit dem Gesetz und der ihr auferlegten Untätigkeit.

Nota bene, es handelt sich um rationale, nicht um moralische Erwägungen. Die moralisch normativen Überlegungen stellt das Gesetz an, das erziehen will, das langfristigen Konsens mit entsprechenden Abschreibungen erzielen will. Die Sozialhilfeempfängerin beruft sich als nicht zum Ersticken zu bringende Unternehmerin auf die Fährnisse des Wirtschaftshandelns, also alle unerwartbaren Eventualitäten und die tatkräftigen Gegenstrategien, Schäden zu begrenzen und zu heilen.

> Nun dürfen wir getrost annehmen, Unternehmer wissen von den Risiken im Verkehr mit ihren Geschäftspartnern, alltagspraktisch professionell diskutieren sie das, lassen die Ergebnisse solcher Räsonnements in ihren Verträgen Form und Buchstaben gewinnen, sichern sich wechselseitig ab und was der rechtlichen Vorkehrungen mehr sein könnten. Mal gelingt das gut, mal schlechter. Wenn wir uns an den weiter oben thematisierten Fall des ersten ausfallenden Schuldners der Unternehmerin zurückerinnern, dann hatte sie ihm auch vertraut und wurde enttäuscht, wie sie ihrerseits nun ihre Gläubiger enttäuschen mußte. Aber, wenn wir von dem enormen Risiko unternehmerischen Handelns sprechen, dann sprechen wir auch von dem kontraktuellen Risiko der Partner untereinander. Nehmen wir den Unternehmer idealtypisch, dann weiß er, daß so manches schief gehen kann[4], und er wird Vorsorge treffen. Liegt dann der Gedanke so fern, daß alle Unternehmer sich im laufenden Geschäft untereinander gegen den kurzzeitigen Ausfall von Zahlungen wappnen und Rückstellungen bilden in kollegialem Verständnis?

Sollte es genau nicht deswegen unserer Protagonistin möglich sein, sich der Unternehmerschaft als hochspezialisierter professioneller gesellschaftlicher Gruppe mit Scheitern und Erfolg zugehörig zu fühlen, und alles Mögliche zu tun, ihre situative Zahlungsfähigkeit wieder herzustellen?

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[4] Bei dieser Modellüberlegung schließe ich jede Form von Täuschung oder Kriminalität aus.

Mit anderen Worten, zu ihrem Kalkül gehört die rationale Gewißheit, ihren Geschäftspartnern/Gläubigern nichts schuldig bleiben zu dürfen. Es ist diese strukturelle professionelle Solidarität', die das Insolvenzverfahren aufsprengt, eben dieses Faktum stigmatisiert sie, da es die, in weitem Maße selbstregulative Risikogemeinschaft der Unternehmer autoritär suspendiert. Sie wird gezwungen, sich von ihren Verpflichtungen zu verabschieden, was ihr unerträglich ist.

Implizit unterliegt dieser Vorstellung das Bild einer ‚Schicksalsgemeinschaft' der Unternehmer, die, durch Leid geläutert, längst wissen, daß es nicht immer böser Wille ist, wenn der Geschäftspartner seine Verbindlichkeiten nicht termingerecht oder gar nicht mehr bedienen kann und genau deswegen werden Rückstellungen in Unternehmen gebildet. Die Vorstellung sich rational gegen unerwartete Ausfälle zu wappnen, ist eine lange Erfahrung, die sich beispielsweise im Geschäft der Versicherungen und Rückversicherungen widerspiegelt. Außergerichtliche Schlichtungsverfahren sichern den Interessenausgleich bei fortlaufenden Geschäftsbeziehungen – und für die gescheiterte Unternehmerin sollen alle solche Vorkehrungen keine Chance auf Geltung haben? Die Privatinsolvenz schreibt das so vor.

Hinter der Empörung über diesen Umstand läßt sich ex negativo ein anderes Szenario erschließen, das der gesamten Unternehmerschaft den Gedanken nahelegt, solche Konkurs- und Zahlungskonflikte korporativ zu lösen, ohne den Staat und die Gerichtsbarkeit damit zu behelligen und tatkräftigen Unternehmern die Möglichkeit zu geben, ihre Projekte nach situativem Scheitern modifiziert, klüger und dennoch energisch weiter zu betreiben. Das mag irritierend klingen angesichts der kodifizierten Verfahrensweisen, gleichwohl ist ein solcher Gedanke aus der bitteren Erfahrung der Verstoßung aus den Reihen der Tätigen sehr plausibel, zumal er sich nicht in erster Linie mit dem eigenen Wohl beschäftigt, sondern dem Strukturtypus des Unternehmerhandelns Rechenschaft trägt. Die elementare Differenz zwischen Unternehmerhandeln und sozialstaatlicher Versorgung macht der nächste Halbsatz klar:

"and in the interest of the state itself, that would receive taxes if I worked, but have to pay for me and my family if I did not."

Der Staat also, der sich berufen fühlt, das weitere Schicksal der falliblen Unternehmerin nach seiner Maßgabe zu regeln, spielt sich zu einem ‚Oberschiedsrichter' in einem Handlungsfeld auf, von dem er definitorisch nichts versteht und auch nichts verstehen muß. Er verzichtet auf die geradezu überbordende produktive Energie einer Bürgerin, er nährt sich von den vorab geleisteten Steuerzahlungen, nein, mehr noch, der versorgende Staat zahlt gerne für die Talente, die er brachlegt.

In a nutshell finden wir hier die Paradoxie des Sozialstaates, der seine ökonomisch gescheiterten Bürger zum Attentismus verführt, oder aber auch nur verführen will.

In der Protagonistin begegnet er einer Verfechterin personaler Autonomie, die sich den gesetzlichen Zwängen fügt, deshalb aber nicht die Reflektion über ihr Schicksal und dessen Einbindung in irrationale Verkehrsweisen stillstellt, sondern im Gegenteil der Verführung zur Lähmung widerspricht.

Das ist das eine.

Die andere Seite dieser Rationalität erkennt auch das Versagen der Unternehmerschaft insgesamt, der es nicht gelungen ist, Verfahrensweisen zu entwickeln, die Unternehmerkollegen in schwierigen Zeiten auffangen könnten.[5]

[5] Ich gebe hier nur eine Konsequenz aus der falltypisch unangemessenen Anwendung der Regelungen der Privatinsolvenz wieder. Der Unternehmer als Typus erfreut sich seit Jahrzehnten nicht allzugroßer Beliebtheit in Deutschland, wie die polls immer wieder zeigen. Nennen wir das eine ideologische Großwetterlage. Ein korporatistisches Arrangement, das

Diese Implikate des ‚rational rebellischen' Deutungsmusters sind von immenser intellektueller und deklamatorischer Heftigkeit und wollen in all ihrer personal-strukturellen Plausibilität theoretische Gültigkeit beanspruchen, sie sind dennoch bisher in dem Vortrag, der unseren Überlegungen zugrundeliegt – Spielmarken, die gedankenexperimentell über ‚Back to Start' entscheiden.

Im 9. Abschnitt, der nur drei Zeilen umfasst, heißt es:

"I asked permission from my insolvency administrator if I could contact my creditors myself and he agreed. I was relieved as all that I had left was my honour, respect and my reliability. And if I were to use these contacts professionally later, then this was imperative."

Mit diesen zwei Sätzen verläßt die Autorin die tragische und manchesmal mit sarkastischem Humor begleitete Deskription ihres Leidenswegs.

Sie nimmt, anders als der uns bereits bekannte customer/Schuldner aus dem 5. Abschnitt, der kommunikativ ein Drückeberger war und unsere Autorin ins blanke Entsetzen trieb, ihr eigenes Scheitern als Unternehmerin als personale Verantwortung, so als ob das Privatinsolvenzverfahren, das sie über die Jahre entlasten würde, angesichts der unternehmerischen Wirklichkeit, eine Farce wäre.

Das Verfahren ist das eine, die dahinter verborgene Unternehmerperson ist das andere. Wenn von honour, respect[6] und reliability die Rede ist, dann erweist sich in aller ‚Altmodischkeit' nun der praktische Wille, für Entscheidungen und auch Fehlentscheidungen einzustehen.

Der weiter oben als problematisch skizzierte Anspruch auf „succsessful", ohne ökonomischen Hintergrund, erfüllt sich in der Erklärung und in dem Verständnis des Textes, als die gewitzte Erkenntnis, die Krise, das Scheitern als handlungspraktische Resultante unternehmerischen Wirkens zu begreifen.

Und bei diesem Anspruch auf kommunikative Erklärung gegenüber ihren Gläubigern und den daraus folgende Diskussionen enthüllt sich nun ein Pragmatismus, den das deutsche Privatinsolvenzrecht nicht kennt und nicht zulassen will.

Der Staat und seine Jurisprudenz verzichten auf die Einzelfallbetrachtung, sie ergeben sich der Schuld, nicht zu begreifen, wie sehr sie in das Leben derjenigen eingreifen, die nichts weniger wollen, als jemandem etwas schuldig zu bleiben.

Die Protagonistin wendet sich aus eigenem Impuls an ihre Gläubiger und nimmt all die ihr verordneten Beschränkungen auf sich, weist aber auch alle ‚Erleichterungen', die darin bestehen könnten, sich mittelfristig entschuldet zu fühlen, weit von sich, sie sucht den Kontakt mit ihren Gläubigern und gibt zu erkennen, daß sie ihre Insolvenz nicht als die Auflösung ihrer Unternehmeridentität zu betrachten geneigt ist. Im Binnenverhältnis ihres Unternehmertums bleiben ihre Gläubiger ihre direkten Partner zu denen die Beziehung auch durch die eingetretene Privatinsolvenz nicht gekündigt wird, selbst wenn die Insolvenz einen solchen Beziehungsabbruch vorsieht. Wiederum zeigt sich, wie wenig sie sich mit dem Verfahren anfreunden kann, wie sehr sie es ihren eigenen Bestrebungen zuwiderlaufen sieht. Sie negiert keineswegs die unternehmerischen Fehler, die ihr in einer schwierigen Weltlage unterlaufen sind, aber jenseits des Verfahrens sucht sie nach Möglichkeiten zu einer kollegialen Schuldenregulierung mit ihren Gläubigern zu kommen, weil sie selbst im Prozeß des Verfahrens zu erkennen meint, daß ihre vitalen Geschäftsbeziehungen nun bürokratisch entseelt werden.

(Contd.)

gescheiterte Unternehmer auffangen könnte, so wie es der Gedankenhintergrund der Vortragenden implizit insinuiert, wäre politisch kaum durchsetzbar, aber deswegen nicht falsch.

6 Vgl. Berger, P.L., Berger, B., Kellner, H.: The Homeless Mind. Modernization and consciousness. Random House, 1973. Exkurs über den Begriff der Ehre und seinen Niedergang.

Fall und Regel (als grundsätzliche Differenz juristischer Wahrnehmung) treten hier, wie schon weiter oben dargelegt, vollends auseinander:

Der uns geschilderte Fall - der ökonomische Zusammenbruch einer Unternehmerin, in einem komplexen wirtschaftlichen Feld, wird einer geregelten Verfahrensweise subsumiert, die sozialfürsorgerisch für eine Klientel gedacht ist, die sich alleine nicht zu helfen wüßte und Entlastung auf Kosten der Gläubiger und des Steuerzahlers begehrt.

Die Unternehmerin hingegen sucht den Kontakt mit ihren Gläubigern und stellt sich deren Forderungen, ganz offensichtlich, um zu Übereinkünften zu kommen, wie Unternehmer sie in Krisensituationen immer finden müssen.

Das hält zwar ihr persönliches ökonomisches Schicksal mit allen Schocks und psychischen Härten in der Privatinsolvenz nicht auf, aber es läßt die Selbstwahrnehmung als agiler und problemlösungsorientierter Unternehmertypus intakt.

Damit markiert sie eine imponierende Diskrepanz – nicht hedonistische Irrationalität mit kostspieligen Extravaganzen hat sie in den Ruin geführt, sondern ‚Schicksalsschläge' (um die kontingenten Ereignisse der Zeitgeschichte so als Amorphe zu fassen) haben ihre unternehmerische „protestantische Ethik" an nicht absehbar vorsorgender Prognostik scheitern lassen. Von dieser Katastrophe bleibt die unternehmerische Ethik aber als solche realitätstüchtig unberührt und der Wille unserer Protagonistin, sie in den noch schwierigeren Fahrwassern der privaten Insolvenz durchzuhalten, zeugt von der Stabilität dieses unternehmerischen Deutungsmusters, das sich auch durch die zu Wohlverhalten und Attentismus verpflichtenden Regeln der Privatinsolvenz, nicht beschwichtigen läßt.

Die Vortragende fordert und exerziert Tätigkeit, Verantwortungsübernahme und Produktivität, gerade in der Krise, gerade im situativen Scheitern und trifft mit diesen gelebten Kategorien des alten bürgerlich (für Anne Koark: der citoyen, nicht der bourgeois ist gemeint) aufstrebenden Europas auf ein deutsches Gesetz, das von dieser Ethik nichts mehr weiß und auch nichts wissen will.

Auch das unternehmerische Risikomanagement muß sich am Erwartbaren orientieren. Die „Weltangst", um dieses wunderbare deutsche Wort hier zu benutzen, führt in nichts anderes als die bange Handlungsstarre. Die Vortragende, wohl nicht zufällig eine Britin, konfrontiert ihre Zuhörer mit der pragmatischen Weisheit, das Leben müsse weitergehen und professionelle und gar professionalisierte Berufe hätten ihre Bewandtnis für das Wohlergehen von Gesellschaften schlechthin. Dem sollte ein kluger Gesetzgeber Rechnung tragen, dürfen wir als schmerzensreiches Resultat, der Überlegungen der Anne Koark vermuten.

Das wäre dann richtig, wenn der Gesetzgeber den Typus des aufrechten Unternehmers in seiner Funktionskraft zu schätzen wüßte. Täte er das, dann hätte die Vortragende noch gewichtigere Argumente als ihre eigene Erfahrung auf ihrer Seite, nämlich das Recht auf Einzelfallbetrachtung – und das ist nun das Stigma der Privatinsolvenzregelung selbst, sich dieser basalen Notwendigkeit zu entziehen.

In den folgenden Abschnitten (10 bis 13) berichtet die Vortragende über ihre Bemühungen, sich aus der ihr verordneten Starre zu befreien, ihren eigenen Fall zum Exemplarischen zu machen, ihn öffentlich zu machen, die Öffentlichkeit zu suchen, zu informieren, zu publizieren, politisch initiativ zu werden - aus der Beschränkung heraus - den Fall nicht auf sich beruhen zu lassen und wohl auch eine Lobby zu formieren, für gescheiterte Unternehmer, die ihr Schicksal in der Abwicklung in der Privatinsolvenz teilen.

Da klingt aus der Vergangenheit ein altes Motiv herauf, das in London 1848 gesprochen wurde:

, … vereinigt euch, … ihr habt nicht mehr zu verlieren, als euere Ketten'.[7]

Und so wie Marx als Analytiker die Produktivkraft des Proletariats aus der Logik des damaligen gesellschaftlichen Zusammenhangs zur Geltung bringen mußte, um die Herrschaft einer ignoranten Bourgeoisie kritisieren und ins Wanken zu bringen, so nimmt die Vortragende den Kampf gegen die Ignoranz gesetzlicher Bestimmungen auf, die sich gegen die Organisation von Produktivität stemmen.

Im Abschnitt 12 heißt es:

"Of course people have to pay for their mistakes, but if the penalties are too high, we pay for our prejudice by the creditors losing out, as no debtor can work, by the state losing out on new taxes and instead paying for the social cases, we have thus created, as a debtor who is prevented from working, earns nothing for years and this benefits no one."

Das ist wohl wahr, vor dem Auge des Hegelschen "Weltgeistes" ziehen die Fehler des Einzelnen immer unliebsame Konsequenzen nach sich, sie „rächen" sich gewissermaßen aus sich selbst heraus.

Darf deswegen schon von „penalties" gesprochen werden?

Nein, wohl nicht, auch das Privatinsolvenzrecht will nicht bestrafen, im Gegenteil es will den Rechtsfrieden zwischen Gläubigern und Schuldnern erreichen, auch um den Preis, daß der Einzelunternehmer als gesellschaftlicher Strukturtypus, der sprichwörtliche „ehrliche Hamburger Kaufmann" - per Dekret in der Kohorte der Privatinsolventen hineingeraten - seinen sich selbst auferlegten Verpflichtungen nicht mehr nachkommen kann.

In dieser Gleichgültigkeit und der ungehemmten Hingabe an die als starre formale „Gerechtigkeit" gemeinten Rechtsförmigkeit, äußert sich eine Gesellschaft, die technokratisch mit einem Federstrich, die in der Logik unternehmerischen Handelns geborene Dispositionen streicht – und nota bene – die eigene immense Verschuldung in die Höhe treibt.

Ich breche an dieser Stelle die Analyse pragmatisch ab, da sich widerstreitende Argumentationen im Text des Vortrags nicht mehr sistieren lassen.

Wie ein Nachtrag zu verstehen:

Im 11. Abschnitt spricht die Autorin über vielerlei außerhalb des Rechts stehende, aber gleichwohl begleitende Schwierigkeiten, nach der Wohlverhaltensphase ökonomische Grundlagen für ein Weiterleben einzurichten, wie etwa ein Bankkonto einzurichten.

Quasi nebenbei erfährt sie dabei von Aktivposten, die 184.000 Euro umfaßten. Ungefähr, so sagt sie, seien davon 20.000 Euro für die Schuldentilgung verwandt worden – mehr ist ihr nicht mitgeteilt worden.

Ich nahm mir gegen Ende meiner Ausarbeitung die Freiheit, Frau Koark auf dieses eigentümliche Datum anzusprechen und sie erklärte mir, die Insolvenzverwaltung alleine habe 60.000 Euro verschlungen.

Ich stellte zu Beginn meiner Überlegungen die Vermutung an, der eine Unternehmer werde an kontingenten Ereignissen, wie dem 11. September scheitern, einer anderer werde möglicherweise gewinnen.

Ergo: dieses Verfahren ist nicht nur für die Gläubiger ein sehr teueres Verfahren.

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7 Frei zitiert nach Marx, K. Das kommunistische Manifest, London, 1848.

The German Consumer Bankruptcy Process — (Not) A Rational Solution for All Filers for Bankruptcy

Dr. Götz Lechner

Introduction

Since January 1, 1999, consumers in the Federal Republic of Germany have been able to declare bankruptcy. After a debate lasting almost 30 years, legislators finally took into account that in modern societies, not only businesses but also individual biographies can fail. The social problem of insolvency is gaining attention, and not only because of the statistical fact that several million German households can be considered as being insolvent. These households are no longer in a position to service their debts after covering their basic life expenditures.[1] The provision remains politically controversial[2] and, at first, the statute was also not "functional."

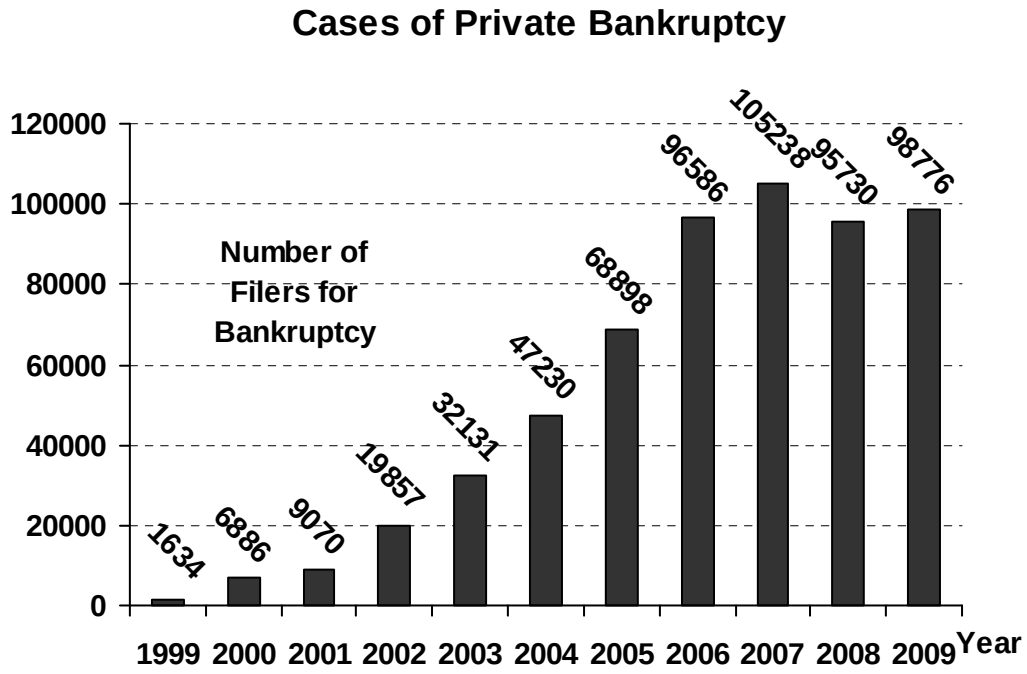

Figure 1

In the first year of its implementation (1999), among an estimated 2.7 million insolvent households, only 1,634 initiated bankruptcy proceedings (thus fewer than 1 per thousand; Springeneer 2006, p. 20)! Through 2001, the year the German Insolvency Statute was first revised, only 17,590 bankruptcy proceedings had been initiated.

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1 A lucid summary of the definition of relative insolvency may be found in Knobloch/Reifner 2009, p. 13

2 Extensively described in Brock/Backert/Lechner 2008

This situation was unsatisfactory given the explicit intention to help promote the social reintegration of insolvent individuals, and only changed after the first revision of the German Insolvency Statute, which came into force on 12/01/2001. The revision introduced a moratorium for procedural costs (§4a) into the process—thereby resolving the problem of granting or rejecting assistance for procedural costs, and many debtors who had not previously filed applications now made use of the options provided by the German Insolvency Statute.

The German Bankruptcy Process Consists of Several Steps

At the outset, there is a strict requirement for a certificate issued by a suitable person or agency (e.g. an attorney or a credit counseling center in accordance with (§305, paragraph 1, line 1)), attesting that an attempt has been made by the debtor to settle out of court.

Once the actual process is initiated, a six-year long "good conduct phase" begins (§287, paragraph 2). During this period, the debtor must fulfill certain obligations (§295). Besides payment of all income above the garnishment limits to the trustee, these obligations specifically include: engaging in adequate gainful employment or making efforts to seek employment if the individual is unemployed, reporting any change of address or residence to the trustee, communicating any changes in income circumstances and turning over any inheritance received during this period on a pro-rata basis. Payments that give preference to any individual creditor are forbidden.

We initially interviewed affected individuals after they had successfully completed the first year of this "good conduct phase." Today, three years later, it is possible to describe the effects of this good conduct phase over time.

Although not explicitly stated, besides a sanctioning function to prevent a "moral hazard," the lawmakers[3] also intended to use the good conduct phase to promote a kind of economic and social "resocialization" process—at least, all the obligations pertaining to the earnings status of the insolvent consumer would suggest this.

Thus, a question arises here whether the social integration of affected individuals has improved significantly in all relevant areas. These areas include integration into the labor market, stabilization of their social environment and general life satisfaction—essentially, the sociological measure of social inclusion. Behavioral changes related to money, also play a role in this process.

The lawmakers provided for no other assistance or counseling for this purpose, which proved to be inadequate in a number of ways. At the end of the questionnaire, the affected individuals had the opportunity to make note of relevant aspects of their subjective experiences. The predominant tone of their responses was: finally, there is someone who takes an interest in us. Later portions of this article will further demonstrate the need for additional assistance and counseling for at least half of the individuals affected.

After six years, upon completion of the "good conduct phase" and if there are no grounds for disallowing it, debtors obtain a discharge from their residual debt (§300), that is, their remaining debts are forgiven. They have a chance to begin a new life without debts, or, as the Federal Minister of Justice puts it in an information brochure in the fall of 2008, "Discharge of residual debt—a new chance for honest debtors."

At this point it would be appropriate to take another look at the concept of the honest debtor: "Honest debtors shall be given the opportunity to achieve discharge of residual debt." This reference in §1 of the German Insolvency Statute actually represents the only occurrence of the term, "honest," in the Statute.

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[3] Niemi-Kiesilainen 1999

The image of the "honest debtor" remains abundantly vague so as to be able to both attribute everything "negative" to debtors and to take into account all the strokes of fate that may result in insolvency.

This becomes the basis for discursive wariness and skepticism in relation to all insolvent individuals, which is implied by a sanction like six years of good conduct.

This study will attempt to nuance this vague image by means of a typology of different kinds of debtors involved in bankruptcy proceedings. In these considerations, the revolving door effect of "Get out of debt—bring on the debts" will play a central role.

People in Private Bankruptcy—Preliminary Methodological Remarks

At the beginning of 2007, 1600 affected individuals who had initiated insolvency proceedings were surveyed within the framework of two research projects, "The consumer bankruptcy process–a functioning assistance system against exclusion from the economic system" and "Consumer bankruptcy processes in the new states of the federal republic," supported by the DFG (German Research Foundation).[4] On the basis of this data, it was possible for the first time to describe the potential success of the process in reincluding affected individuals across social structural dimensions.[5] At that time, the response rate was approximately 10%.

Now, it would be possible to question the validity of data given this level of response, but in view of the sensitivity of the topic, this is actually quite reasonable. The problem with a low response rate, whether it is 50% or, as in this case, about 10%, always lies in the risk that one may be systematically excluding a particular element of the population. The best way to determine whether this has occurred is to compare the survey data with information about the overall population. In the case of the research study reported on here, there is data available for this purpose from the Federal Statistical Office as well as from SCHUFA (the German credit rating system6)–specifically regarding individuals involved in bankruptcy proceedings during the same time period. From a consideration of these external validation variables, it is possible to conclude that the data we collected very accurately represent the circumstances of the overall population of individuals who initiated consumer bankruptcy proceedings.

Among the person questioned, 1226 confirmed that they were additionally prepared to provide their home address in order to take part in a repeat survey.

Building upon this study, at the recommendation of the SCHUFA consumer board, and thus financed by the SCHUFA corporation, a repeat study of these affected individuals was conducted.

Among 1226 affected individuals, after a three year interval, 857 were still locatable—about 13% of Germans relocate in any year, and these addresses are lost to follow-up.

A total of 754 completed questionnaires were available for evaluation. In addition, eight individuals who returned the questionnaire with the comment that their process had been terminated must be added to this total, raising the overall number of participants to 762.

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4 I want to express my gratitude to my project co-workers, Katja Maischatz and Wolfram Backert, for their organizational efforts during the implementation of the survey

5 Lechner/Backert 2007, Lechner/Backert 2008 Lechner 2010a, Lechner 2010b

6 Founded in 1927, SCHUFA is the oldest credit information agency in Germany and one of the first in the world. Today it is the market leader in the field of credit data and score card development in Germany.

If we compare this number to the initial study with 1622 participants, this comes to a re-survey rate of 47%—an excellent value for panel surveys.[7]

The 47% of the individuals remaining to be surveyed very closely represent the total survey population: of course, the oldest person interviewed (born in 1923!) is no longer among them, but otherwise, the years of birth between 1924 and 1985 are represented in the same proportion in each wave of the study.

The proportion of males changed from 53.3% in the first wave to 54.6% in the second, but this had no effect upon the findings.[8] The distribution of education levels in the first and second waves of the survey may be the source of some concern, since a specific bias crept into the second wave of the survey: Certainly, educational biographies are quite dynamic, and in 18 of 22 cases, it could be plausibly shown that educational advancement takes place over the course of this survey.

Three Types of Insolvent Individuals

In order to divide insolvent persons into meaningful groups, it makes sense to begin with the reasons cited by affected individuals for their becoming insolvent. In principle, there is widespread agreement regarding the principal causes for insolvency across a broad range of studies: insolvent individuals most frequently cite unemployment, followed by "lost track of things" and separation/divorce.[9]

In the first wave of the survey, affected individuals had a choice from among 31 options for the reasons leading to their insolvency and we hoped to find specific connections between these cited reasons.

Significant patterns of the sort, "whenever someone fails in building a house, the marriage also fails," or "substance abuse problems often occur together with loss of employment as initiators of an insolvency crisis" were not to be found—the complexities of social reality precluded any such attempts.

However, sometimes sense is constituted alongside the meanings of things and the correlation of causes and effects that pervade our everyday lives.

In this instance, a meaningful categorization arises not from the singular significance of the response categories, but instead from the *number* of responses endorsed by each individual who was surveyed.

Many affected individuals only cited a single cause for the occurrence of their insolvency situation, while others named 18—on average, four reasons were cited.

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7 From among the 757 individuals presumed to be still reachable, the rate comes to a remarkable value of 89%.

8 This was surprising, since in general, women are likelier to respond to surveys than men

9 Lechner/Backert 2007

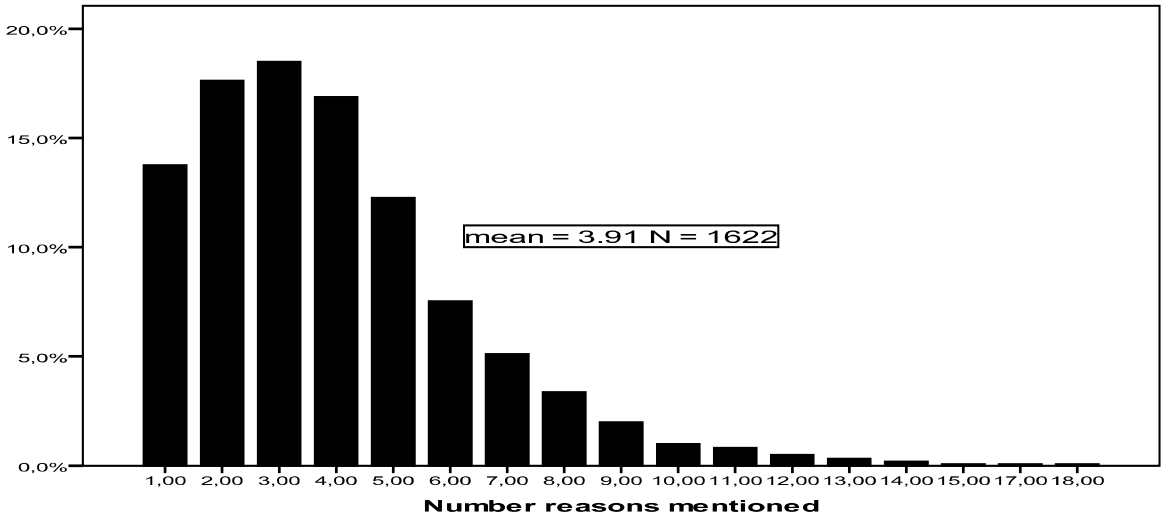

Figure 2

Three groups can be constructed according to the number of reasons cited, resulting in the emergence of a meaningful interpretive pattern from the tangled web of possible reasons for the occurrence of insolvency.

The first group, representing about half of those surveyed, cites up to three reasons for the escalation of their financial difficulties. The second group (42%) checks off four to seven reasons on the questionnaire, and the final group, about eight percent, cites between eight and eighteen reasons.

Eight reasons for insolvency emerge from the total of 31 choices that permit differentiation between these groups or types according to content.

These eight answer categories aggregate in a manner that cannot be observed for the remaining 23. The first type reaches only about a third of the ”expected number“ of cited reasons, whereas Type 3 reaches about three times of this ”expected number.” Otherwise stated, if this typology were meaningless, then Type 1 should have shown three times the actual number, while Type 3 should only have cited a third as many reasons as actually observed. The citations for Type 2 lie above the expected values by a factor of 1.3.

Reasons for overindebtedness mentionend

Reasons mentionend (n = 1622)	Typ 1	Typ 2	Typ 3
Family problems	8%	28%	62%
Sustained low income	7%	25%	52%
Psychological problems	4%	20%	58%
Bought too much	8%	28%	63%
Inability to follow a planned household-budget	4%	25%	59%
Lack of experience with money	6%	24%	59%
Lack of experience with banks	9%	29%	56%
Loss of financial control/overview	16%	53%	86%

This combination seldom occurs in Type 1, arises more often than average in Type 2, and in Type 3, occurs three times as frequently as would be expected.

The substantive picture hidden behind this typology of insolvent consumers, initially derived from the number of cited reasons, becomes even clearer if we select out the three most frequent reasons for insolvency cited by each of these types.

The three most frequent reasons cited by Type 1, and thus by half of those surveyed, are unemployment (29%), separation/divorce (27%) and failed self-employment (23%).

For Type 2 (about 42% of those affected), the following reasons were most frequently named:

unemployment (53%), losing track of one's personal financial situation (53%) and separation/divorce (43%).

Type 3 respondents (the remaining eight percent of insolvent consumers) most frequently cite:

losing track of one's personal financial situation (86%), unemployment (70%) and buying too much (63%).

If one combines these findings, a differential picture of insolvent consumers emerges:

For Type 1, a major event occurred that must rank as one of the day-to-day risks in the framework of modern societies. Practically nobody outside the public service sector is safe from the risk of unemployment. Marriages sometimes fall apart, and professional self-employment always comes with the risk of failure. This type represents the general existential risk of modern life. Here, insolvency is not a biographical aberration outside the norm, but rather an occupational accident of everyday life.

Type 2: Here, family problems are combined with these modern everyday risks. In tandem with now more frequently observable naïve financial behavior, individuals slowly lose track of their personal financial circumstances. This reason for insolvency comes up for the first time here as one of the three most common citations.

Almost every person surveyed in Type 3 includes losing track of personal financial circumstances among up to 17 other reasons that precipitated their insolvency crisis. From the eight reasons for insolvency that make this typology seem initially plausible, this nexus of financial naïveté, loss of control, lack of resources and day-to-day chaos reaches a level of 60% among individuals of this type.

Whereas Type 2 also reveals the gradual loss of control in day-to-day life, Type 3 shows the picture of a multiply overburdened debtor.

This typology is based on data from the first wave of the survey at the beginning of 2007.

As a result of the second survey of the same insolvent consumers conducted at the end of 2009, it is now possible to reappraise the typology. Here, additional data were collected that permit a substantive weighting of the concept. Furthermore, it is now possible to demonstrate what effects the "good conduct phase" has had and continues to have on integration and inclusion for each of the different types. In this presentation, we will confine ourselves to selected aspects of this analysis.

In the first survey, we presented the question about the *reasons* for the occurrence of insolvency with 31 possible responses, but in the following survey wave, we asked about the *principal reasons* with 13 possible responses. With the help of a correspondence analysis, it was possible to show that the responses span a dimensional space that is demarcated at one pole by the principal reasons, "losing track of finances," "addiction/illness" and "claims resulting from a criminal action that they had committed," and at the other extreme is marked by the citations of "failed self-employment," "failed mortgage," and "guarantees and joint liability." In this dimensional space, the three types are divided along the patterns sketched out above. The Type 1 pole ("failed self-employment," "failed mortgage," and "guarantees and joint liability"—behind which a failed relationship often is hidden), is above the Type 2 pole in the middle, while Type 3 occupied the other pole with "losing track," and "addiction/illness." This pattern is a sign of the validity of the typology.

The focus of this article will now shift from the reasons cited for insolvency that form the basis for this typology to differential aspects of integration and inclusion of affected persons connected to these different types.

Social Integration: The Economic Habitus, Resources and Labor Market Integration of Different Types of Insolvent Persons

Consumer bankruptcy proceedings have a discernible impact upon the economic habitus of those affected. The most objective aspect of this change is apparent in the transformation of the need structures of those who were surveyed.

Three years ago, we asked affected individuals what they were no longer able to afford because of their insolvency prior to the bankruptcy procedure. A very similar question was included at a later point in the repeat survey: In general, we wanted to know in detail what the individuals surveyed could no longer afford and missed.

The twenty possible responses remained the same, ranging from an automobile to a vacation to membership in an association, and thus facilitated the creation of a differential indicator.

We wanted to know if needs had been met, that is, were there needs mentioned at the time of the first survey that were no longer mentioned at the time of the second survey, from which we could conclude that this particular consumer need no longer existed. Needs could also persist and new ones might additionally arise over time.

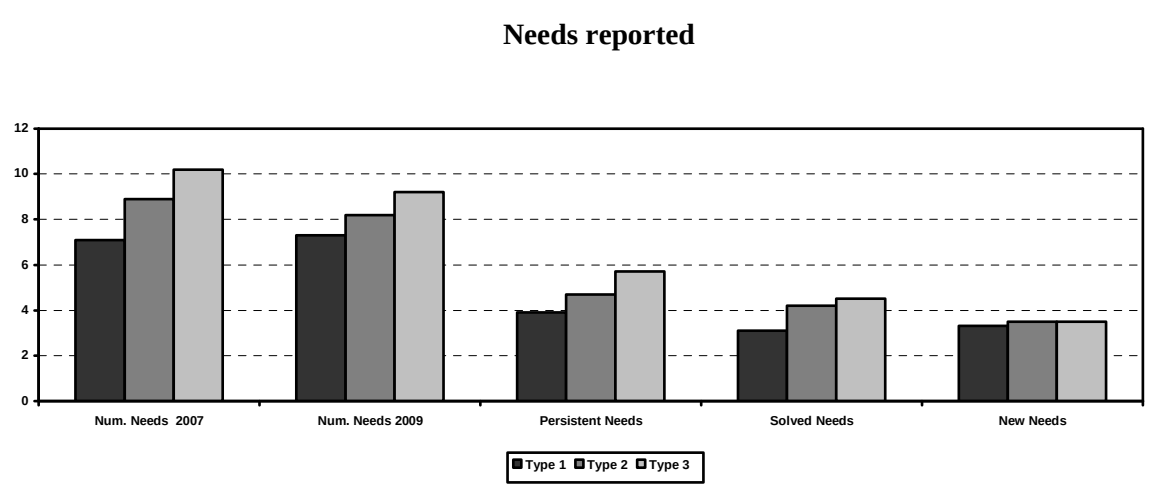

Figure 3

The three types of insolvent households do not differ with respect to the number of newly expressed needs. Looking into the future, these are very similar for all three groups: among the three most frequently cited are the yearning for freedom on the seat of a motorcycle, for the security of owning one's own home, and a "health element," of a fitness studio for Types 1 and 2 and, for Type 3, a garden.

All other aspects of the needs structure described here differed substantially and to a statistically significant degree[10] between the individual types. Types 1 and 3 represent the extremes. Type 3 always expressed the largest number of unmet needs, and while significantly more wishes are overcome here, at the same time, more of them remain open. Type 2 finds itself in the middle between the extreme positions.

It is not a very long step from having unfulfilled needs to incurring new debts. Thus, it would be a good time to take a look at the evolution of the income situation for affected individuals according to type during the past three years.

[10] of at least $p < 0.01$

Av. Per Capita Income per Year

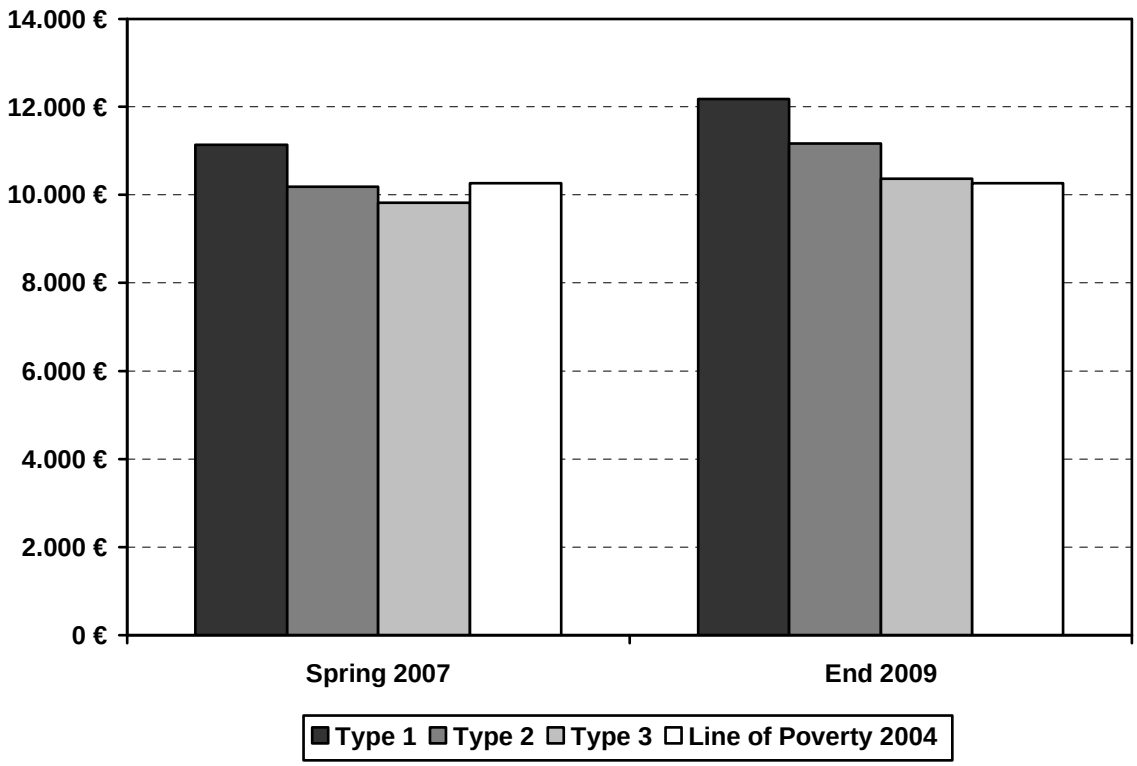

Figure 4

On average, over the past three years, all three types of insolvent individuals reported earned income above the poverty line of 60% of median income in the year 2004.

Once again, one finds the characteristic stepwise pattern: Type 1 earns the highest average income, Type 3 the lowest, and Type 2 is in the middle.

We explain the obvious improvement in income situation over time primarily on the basis of improved labor market integration over this time period. Does this affect all types of insolvent individuals to the same extent

Beginning from extremely different base levels, the unemployment rate was reduced over the three year period between surveys by 7% for Type 1, by 10% for Type 2 and by almost 20% for Type 3.

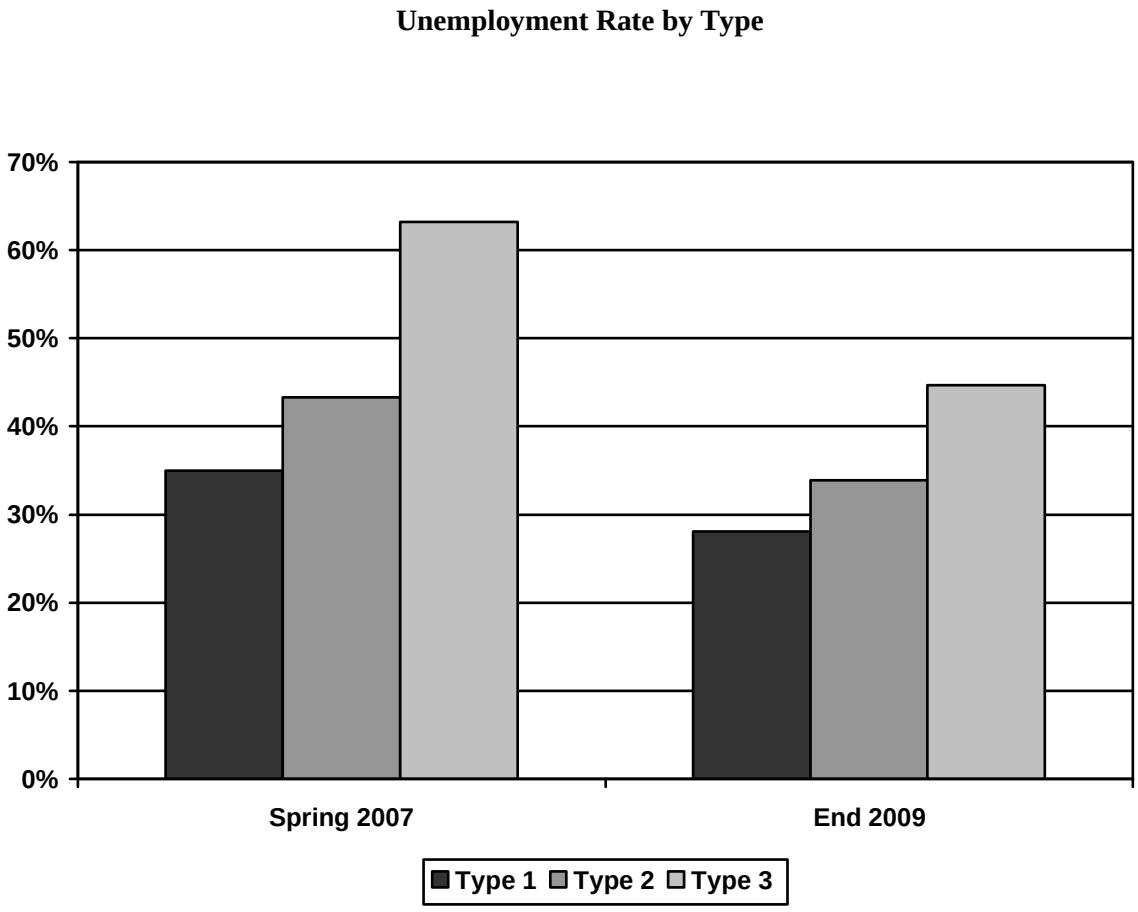

Figure 5

However, their relative relationship remained the same, as can be clearly seen: Comparing Type 1 and Type 3, the unemployment rate for Type 3 is 50 percent higher.

It should be noted at this point that the comparison of formal educational level between the three types shows no differences that might explain this distribution.

Thus, nominal labor market integration improved most markedly for Type 3, but at the same time, with an unemployment rate of over 40%, we cannot truly speak about full integration. Over time, this rate is more than five times the average for the overall population—for Type 1, this relationship remains stable at under four times the average.

Unemployment is the key activator par excellence for insolvency crises. The equation of unemployment = insolvency requires at least two necessary and thus commonly occurring constraints. In order for indebtedness to result in a condition of insolvency, one must first go into debt, and the loss of income through unemployment must be so great that debt service can no longer be maintained with the income that remains after deducting for recurrent necessary expenditures (alternatively, the magnitude of the debt service may be introduced as a variable here).

Another connection between unemployment and indebtedness or insolvency is created by the relative relationship between the aspiration level in an individual's life style and available income. If this coordinate system remains consistently balanced at or below the minimum socioeconomic level, then a reduction in income resulting from unemployment may not lead to insolvency problems (of course, this is only true if the affected person succeeds in mobilizing all the options of the welfare state): In

Germany, the welfare state assures this quality of life through ALG II (unemployment compensation) for individuals capable of working, and approximately equivalent levels for the remainder of the population by means of social security in accordance with SGB XII (The Social Security Code).

So as not to create any misunderstanding at this point: We are only speaking here about the maintenance of a socially defined minimum standard of living.

This extensive thought experiment is necessary in order to frame the reflections that follow.

Anyone who contemplates a bankruptcy process does so in the hopes of achieving freedom from a life of indebtedness. This can only succeed, however, if the affected persons do not incur any new debts during the course of the bankruptcy process that they will be predictably unable to service.

Such new debts lead directly toward the revolving door of consumer bankruptcy proceedings, so to speak, and to new insolvency crises.

Affected individuals cite income problems as a major reason for the renewed incurrence of debt. Beyond all the typologies, however, fewer than a third of all persons surveyed with an income below the poverty level acknowledged having incurred new debts. Unemployment does not deterministically lead to new debts, either: once again, only a third of those surveyed who were unemployed at the time of the second survey reported that they had gone into debt again.

The issue of renewed assumption of debts is a condition for the possible failure of debt relief efforts, and thus for a revolving door effect of "Get out of debt, bring on the debts." Once again a familiar pattern emerges according to the typology of insolvent persons developed here.

On Debt Again by Type

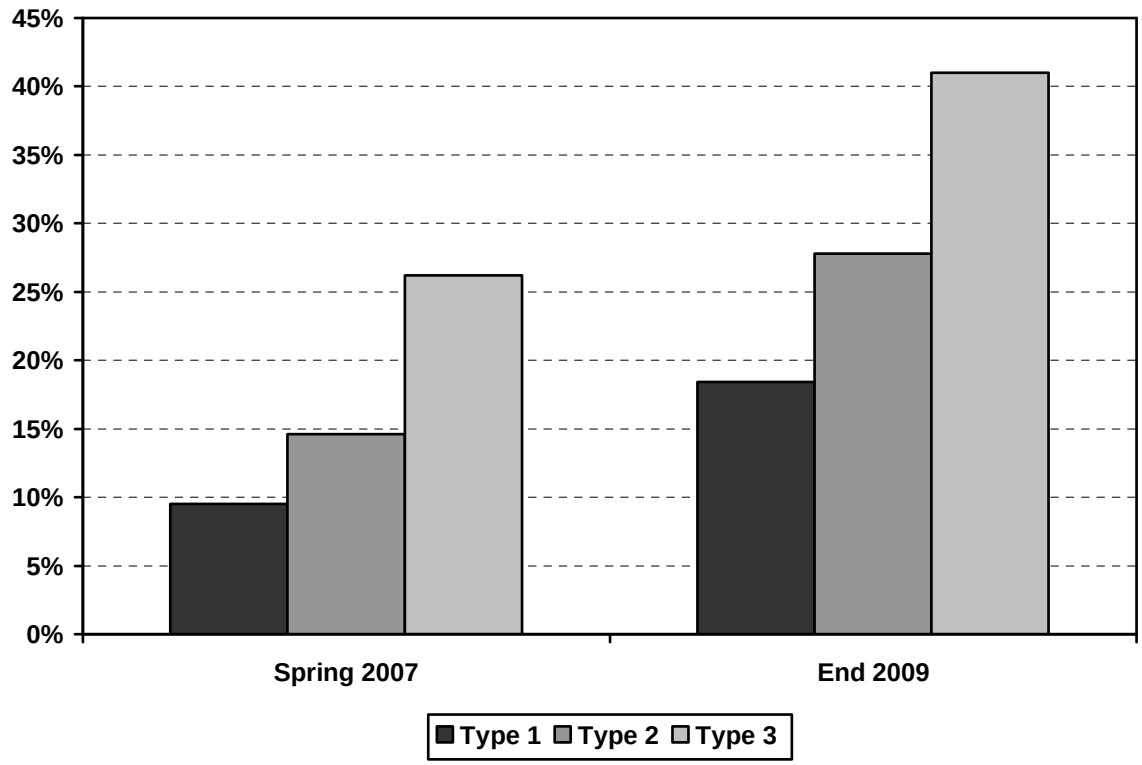

Figure 6

Individuals surveyed at both time points who are in Type 3 are more than twice as likely to have acquired new debt as individuals in Type 1. It is not deterministically established that such new debts will lead to individual insolvency crises in every instance. However, all other things being equal, the chances that affected individuals in Type 3 will find themselves in the notorious revolving door are twice as high as for those in Type 1.

Three Types of Insolvent Persons – Three Patterns of Subjective Inclusion

Up to this point, our description of different types of insolvent consumers has followed more or less objective indicators for social integration. In conventional social reports such as the SOEP-Monitor,11 inclusion is operationalized in terms of area-specific life satisfaction.

If the provisions of the consumer bankruptcy process constitute a functioning method for the reinclusion of these excluded members of society, then all involved persons should demonstrate a similar ”profile of inclusion.”

Family, Friends and Acquaintances

Affected persons in Types 2 and 3 cited family problems at a disproportionate frequency as reasons for their slide into insolvency. This statement is significantly supported by the level of life satisfaction reported[12] by affected individuals in the area of family—a major index for the validation for our classification according to different types.

[11] The socioeconomic panel study is a long-term social scientific study with annual repeat surveying of a sample representative of the general population that has been conducted since 1984.

[12] The course of the curve for life satisfaction with friends and acquaintances shows a virtually identical progression. Satisfaction of affected persons with their immediate social environment differentiated itself over time from the other indicators for social inclusion. A possible cause for this difference may be identified as the problems experienced by affected individuals in gaining access to the regular credit market.

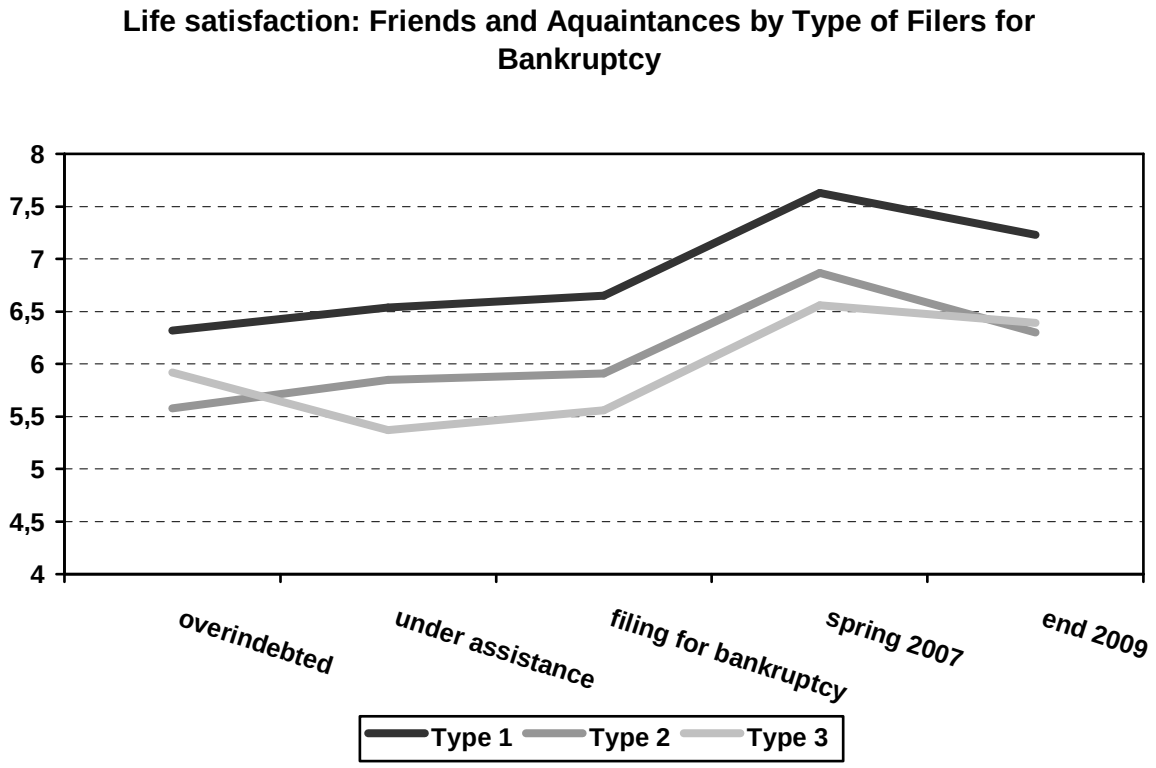

Figure 7

Persons in Type 1 expressed the highest level of life satisfaction with their immediate social environment. Type 3 showed the lowest levels, with Type 2 in the middle but trending toward Type 3. Among the three types, over time, Type 1 reached the highest measure of inclusion, and even their minimum level of expressed satisfaction at the time point of the insolvency crisis still lies at the maximum level for Type 3.

This indicator does not permit a comparison of the degree to which inclusion has been restored with any reference values for the general population, and its significance is limited to a comparison between different types of insolvent persons—but the following indicators for social inclusion can be factored into the general population.

Health

Insolvency makes people ill and the initiation of the bankruptcy process results in the greatest relief from psychosomatic conditions.13

At the beginning of the debt relief process, as affected individuals realize that they can no longer manage their financial problems on their own, all persons report that their health situation is bad to some degree.

[13] Lechner 2010a

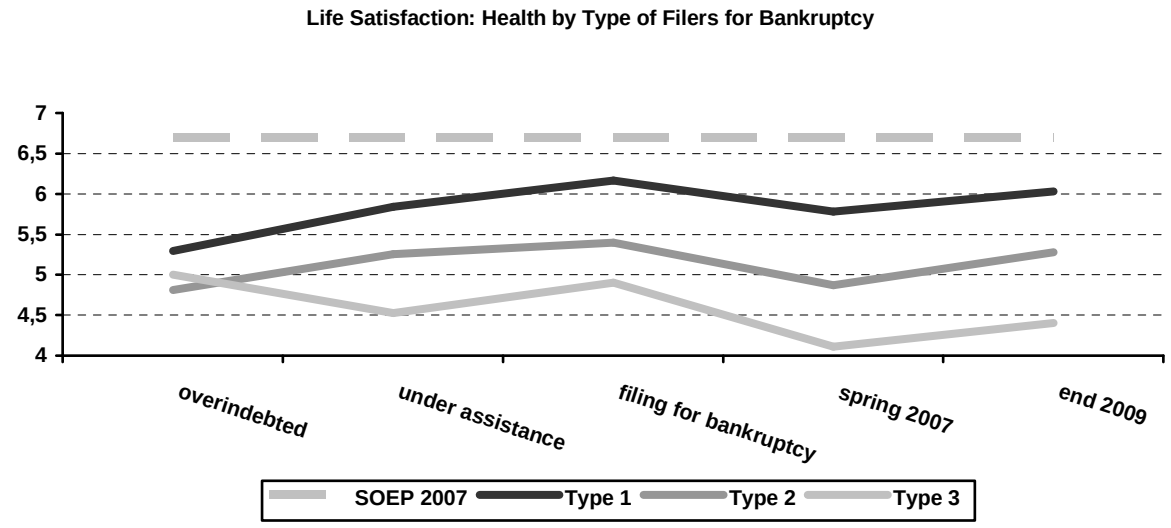

Figure 8

At this time point, the gap separating these individuals from the general population is enormous on a scale from 0 to 10. Over the course of the insolvency process, however, the inclusion indicator of satisfaction with one's personal health shows a very different time course depending on the type of insolvent person.

For surveyed individuals in Type 1, satisfaction rises continuously from the time the bankruptcy process is initiated, then shows the characteristic[14] interim low after the first year of the "good conduct phase," and thereafter begins to approach the average of the general population—from all appearances as a result of their having the very best prospects for complete reinclusion.

Type 2: Surveyed individuals of this type benefit considerably less from the implementation of the process. The omnipresent kink in the curve after the first year of the compliance phase brings them back to their initial unhealthy level, and the subsequent increase does not suggest that it will reach levels comparable to the general population any time soon.

Instead of back and forth improvement in health over the course of the process, affected individuals surveyed who are in Type 3 show deterioration over time, and unlike the other groups, their health becomes even worse than it was at the time of their acute insolvency crisis. The experience of having such limited options and incurring new debts obviously proves to be a pathogenic combination for them.

Work

On average, surveyed individuals who have a job are just as satisfied with this area of their lives as the rest of the population. "Work" is the only area in which insolvent persons attain an inclusion level equivalent to that of the general population. In our interpretation, this finding indicates that affected individuals experience public recognition in this area, which is denied to them in other areas.

In this area as well, the initiation of the bankruptcy process maximizes life satisfaction, and fluctuations over the time period from the initiation of the process until the present time, after more

[14] We can explain this interim low with the perspective of an additional five years of "good conduct."

than four years of good conduct, are minimal when compared to other inclusion indicators. In this area of life, the person who has a job feels part of the mainstream. This applies to the average consumer in insolvency, but does it extend similarly to all three different groups of affected individuals?

This example is particularly cogent for demonstrating the analytical value of differentiating between types of insolvent individuals in evaluating the success of the German Consumer Insolvency Statute.

On a scale from 0 to 10, the data from affected individuals at the time of insolvency are broadly similar across all three types, and altogether differ by only half a point from the average in the general population.

Life Satisfaction: Work by Type of Filers for Bankruptcy

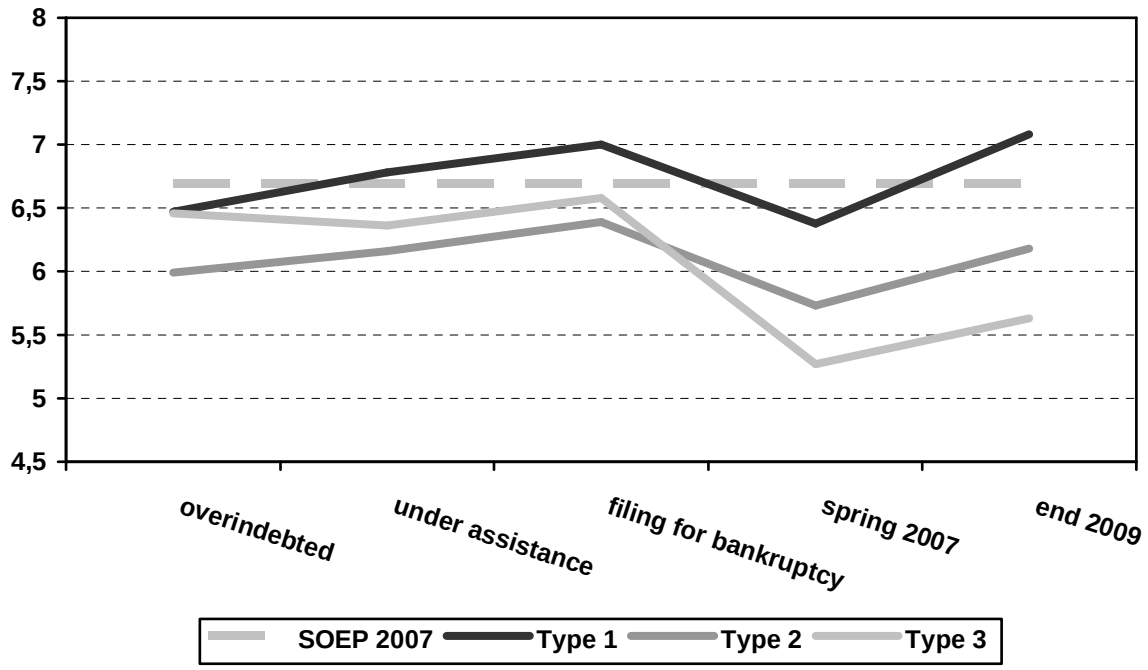

Figure 9

Even though Type 1 and Type 3 represent extremes, at this time point their satisfaction in the area of work is unexpectedly identical. It is also striking that for all inclusion indicators that were previously compared, Type 3 always started out at a higher level than Type 2.

To explain this anomaly, it is necessary to make a brief methodological digression:

The ratings of surveyed individuals for the first three time points were collected retrospectively at the time of the second survey wave in 2009, and the ratings for 2007 were collected at the time of the first survey of affected individuals. The last two values are thus contemporaneous measurements, whereas the first three ratings for satisfaction depend upon recollections by the persons surveyed reaching back over five years.

Retrospectively, surveyed persons in all three types report the highest level of satisfaction with work shortly after the initiation of the bankruptcy process, but for Type 3, this value absolutely plummets at the time of the first survey in 2007 and never reaches its initial value again, and thus we cannot speak any longer of general inclusion here.

Individuals in Type 3 emerge from the cocoon of the "good conduct phase[15]" in the areas of work and health in a pattern fraught with drama, and after an interval of at least five years, everything appears subjectively to have been better in the past, even during the condition of acute insolvency.

After at least four years of the "good conduct phase," the by now familiar relationships begin to emerge once more. Type 1 and Type 3 form the extremes, where Type 1 has achieved a degree of social reinclusion that already extends beyond the average for the general population.

As one would expect, Type 2 again falls in the middle, in a similar pattern as seen earlier with the indicator of health: on average, a considerable gap remains before they will have truly achieved inclusion into the mainstream.

General Life Satisfaction

The "global indicator" for inclusion used in social reporting is consolidated under the category, "general life satisfaction." The idea behind this expression can be expressed as follows: Generally speaking, social participation leads to a satisfying life. Thus, if members of different social groups are asked in quite general terms about how satisfied they are with their lives, this indirectly constructs a picture of the degree to which these persons are integrated and included in all conceivable areas of social life.

"General life satisfaction" thus semantically amalgamates the individual findings in the considerations presented up to this point about the level of social inclusion of the different types of insolvent consumers.

The SOEP-Monitor study has been documenting this indicator for inclusion/exclusion since 1984, and the most recent values are from the year 2007.

[15] In question 24, we repeated the statement: "Launching the German Insolvency Statute proceedings was the best thing I could do" from the first survey. Between the time points of the two surveys, agreement with this statement only decreased for persons in type 3. The level of agreement with this statement remained very high even for this type of insolvent consumer, and the retreat only amounts to one fifth of a response category, but it is significant at a level of $p < 0.05$.

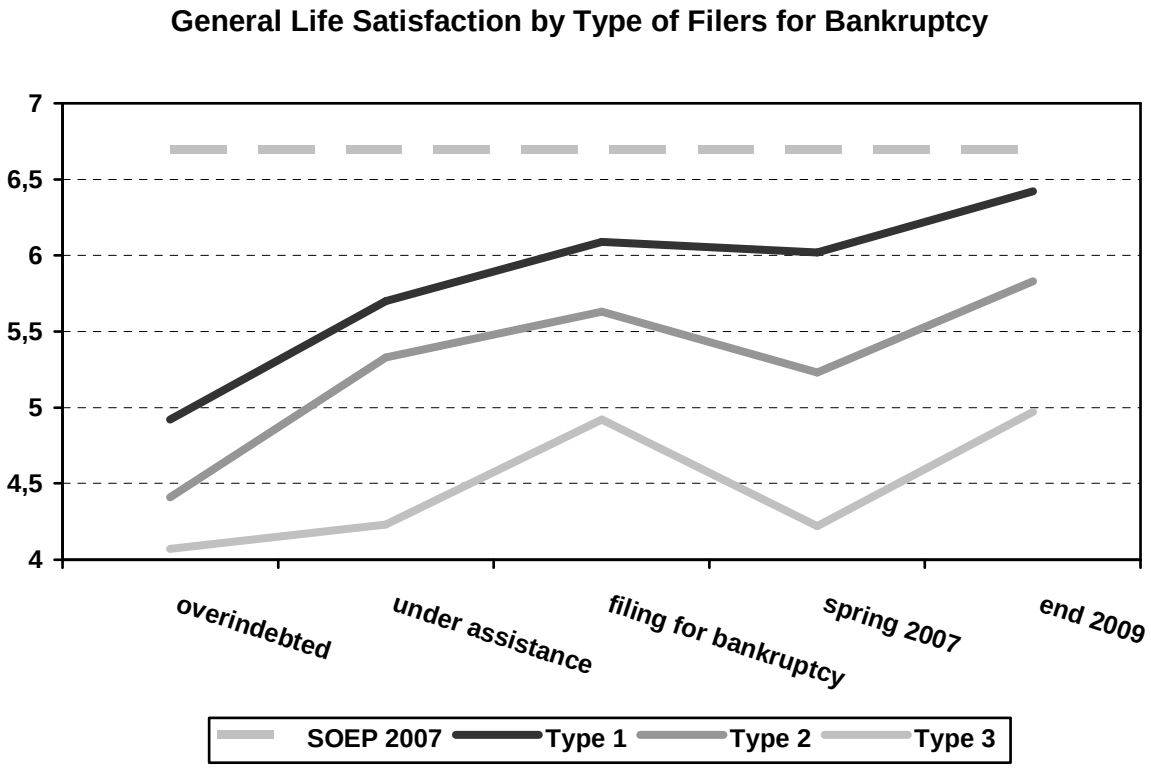

Figure 10

On a scale from 0 to 10, the value for "general life satisfaction" has varied between 6.65[16] and 6.91 during the years from 2003 to 2007, thus in a markedly narrow range.

In the diagram that follows, this level of variation in average life satisfaction for all adults in Germany only extends across half the distance between two horizontal lines.

Against this background, the evolution of values for the general inclusion indicator of "overall life satisfaction" for all three types of insolvent persons over the period of their more or less successful social reintegration is striking.

In addition, one can establish a number of very remarkable differences in the progression of these curves:

Type 1: For this type, general life satisfaction among insolvent persons rises step by step over the course of the process and the increasing social inclusion associated with it. After four years in the "good conduct phase," interviewed persons of this type had returned to the social mainstream.

Type 2: Starting out with greater inclusion deficits (compared to Type 1), affected individuals in this type report that following their exhilaration at the time of initiating bankruptcy proceedings, they experienced a significant decrease in life satisfaction during the early "good conduct phase." However, over the further course of this stage of the process, the inclusion effect of the bankruptcy proceedings

[16] The lowest value in this time series is 6.65 and the highest, 7.39, found at the time of initial measurement in 1984, a value that has never been reached since then.

rises markedly for this type as well, even though it remains significantly lower than the level of satisfaction of the general population.

Type 3: Persons of this type report the lowest value for social inclusion at the time point of their acute insolvency crisis. If in interpreting this finding one recalls the foundation for the current typology, then this finding should no longer be surprising, and it speaks strongly for the validity of the typology.

After significant rises and falls over a four year period during the "good conduct phase," affected individuals of this type only once reach the inclusion level shown in Type 1 at the time point of their state of insolvency. We cannot possibly speak of reinclusion through the bankruptcy process here.

Three Types of Insolvent Persons—The German Bankruptcy Process Is Poorly Adapted for All of Them

At the beginning of this article, a typology of insolvent person was drafted based upon the numbers of reasons for the occurrence of a personal insolvency crisis cited by each individual participating in the 2007 survey.

By means of the repeated survey of the same affected individuals at the end of 2009, additional material was elicited for a reappraisal and meaningful enhancement of this typology.

Now it was possible to estimate the success of debt relief through bankruptcy proceedings and its effects upon integration and inclusion.

About half of affected individuals were classified as belonging to Type 1.

The highest levels of available income for any of the types combined with the best level of integration into the labor market and the most defensive needs structure form the foundation for the lowest rates of new indebtedness. Thus, this type of insolvent individual has the best chances of being spared from new indebtedness after discharge from residual debt through the insolvency process.

Survey respondents of this type are better included in society at every time point of the insolvency and debt relief process than those in the other types. After four years in the "good conduct phase," interviewed persons in Type 1 had returned to the social mainstream. Had the "good conduct phase" not been quite so prolonged, the success in integration for this type of insolvent consumer could already have been observed after only two to three years.

Insolvent individuals who ultimately came to a point where they needed to initiate insolvency proceedings *only* because of everyday risks such as unemployment, failed self-employment or the collapse of a relationship/marriage have the best chances of creating a new beginning for themselves through this process alone. However, the six-year long "good conduct phase" for "resocialization" makes no sense for them.

"Victims of modern biographical risks"

simply need the chance to start over.

Type 2:

By all the criteria presented here for successful reintegration through the consumer bankruptcy process, this type of insolvent person, which comprises about 42% of those affected, clearly comes out in a worse position than Type 1. A needs-oriented value structure clearly leads to more unfulfilled wishes in this group. When combined with demonstrably deficient resource availability, the risk increases that they will fall back into the debt trap once more.

When compared to the affected individuals in Type 1 described above, all indicators of social inclusion point to the fact that inclusion deficits already exist at the time of the insolvency situation, which cannot be managed by the insolvency proceedings alone. Of course, the process generally

seems to promote reinclusion of those affected, but it is also unmistakably clear that after four years of the "good conduct phase," the road towards social normalcy is still a long way from completion for this type.

These affected individuals still need a bit of time and help: Help that can serve to protect

"insolvent individuals with problems of orientation"

from renewed financial catastrophe and smooth the way back to the mainstream of society. With the benefit of such help, social reinclusion could probably succeed in a time period significantly shorter than six years.

Type 3: If, as "victims of modern biographical risks," Type 1 represents the extreme of insolvent consumers who are especially capable of (re)integration, then those surveyed individuals who are in Type 3 represent the other extreme. In any event, Type 3 only accounts for 8% of the individuals affected, while Type 1 represents half.

Whereas Type 2 also reveals a gradual loss of control in day-to-day life, Type 3 shows the picture of a multiply overburdened debtor.

This state of being overburdened is particularly evident during the "good conduct phase" in the form of the highest rates of reindebtedness in comparison to the other types of insolvent consumers.

By the various objective and subjective criteria for exclusion, affected individuals of this type remain stuck at the same level after four years of the insolvency proceedings—which are intended to promote reinclusion—as those surveyed in Type 1 prior to the initiation of the bankruptcy process. In comparing these groups, there are major problems demonstrated in integration in the labor market along with associated reductions in opportunities for earning income. The ramifications of this integration deficit then lead to problems of inclusion in the immediate social environment.

While all other insolvent persons report steadily rising levels of satisfaction in the areas of work and health, these values fall for Type 3—affected individuals recall the period prior to their insolvency with more satisfaction than is provided to them by the present.

Considering the picture of Type 3 individuals that must be drawn based upon the empirical evidence, it would be one-sided to completely negate the advances in integration and inclusion brought by the bankruptcy process, but without competent assistance after the initiation of the proceedings, the chances are all too great that

"insolvent individuals with an ongoing need for counseling"

will pass once again through the revolving door of the bankruptcy process into repeated problems of insolvency.

"Victims of modern biographical risks," "insolvent individuals with orientation problems" and "insolvent individuals with ongoing needs for counseling:" In consumer bankruptcy, people are put through a standardized procedure, but they come to this process from different starting points and benefit in different ways from its configuration. The image of the "honest debtor," who proves his honesty in the "good conduct phase" and thus deserves the discharge of residual debt needs to be reevaluated on the basis of these principles.

About half of those affected are irreproachable, and the extended time of probation only serves to hinder their reintegration into social normality.

For the other half, the following makes sense: After initiation of the insolvency proceedings, the consumer bankruptcy process should be supplemented with differentiated offers of assistance in order to minimize the revolving door effect: “out of debt—bring on the new debts.”

References

Backert, Wolfram, Lechner, Götz (2000) ...und befreie uns von unseren Gläubigern. Auf der Suche nach dem redlichen Schuldner in einer individualisierten Gesellschaft. Baden - Baden: Nomos.

Brock, Ditmar, Lechner, Götz, & Backert, Wolfram (2008) Restschuldbefreiung und Verbraucherinsolvenz. Probleme und Lösungsansätze bei der rechtlichen Regelung privater Überschuldung ais rechtssoziologischer Sicht. Zeitschrift für Rechtssoziologie 29, Heft 2: S. 235 – 260

Bundesministerium der Justiz (2008): Restschuldbefreiung: Eine neue Chance für redliche Schuldner. Berlin

Kohte, Wolfhard (2005) Restschuldbefreiung, Verfahrenskostenstundung, Darlegungslast des Schuldners. VuR 20, S.268 -272

Kohte, Wolfhard (2006): Frankfurter Kommentar zur Insolvenzordnung. Vierte Auflage. Neuwied: Luchterhand

Lechner, Götz (2010a): ”Exploring Private Bankruptcy in Sociological Perspective. Results and Methodological Aspects.” Im Erscheinen

Lechner Götz (2010b): Das Verbraucherinsolvenzverfahren: Integration zeigt alte und neue Muster sozialer Ungleichheit in der Risikogesellschaft.

Lechner, Götz, Backert, Wolfram (2005) Dynamik des Verbraucherinsolvenzverfahrens. Regionale Disparitäten und aktivierende Wirkungen. BMFSFJ, Materialien zur Familienpolitik Nr. 21

Lechner, Götz, Backert, Wolfram (2007)**:** Leben im roten Bereich – Daten zum Leben in der Verbraucherinsolvenz. In: SCHUFA Holding AG (Hrsg.): Schufa Schuldenkompass . Wiesbaden: SCHUFA Holding AG: S. 117 – 130.

Lechner, Götz, Backert, Wolfram (2008) Menschen in er Verbraucherinsolvenz. Rechtliche und soziale Wirksamkeit des Verbraucherinsolvenzverfahrens einschließlich der Darstellung der Haushaltsstrukturdaten des untersuchten Personenkreises S.33 – 54 in Materialien zur Familienpolitik Nr. 22/2008: "Lebenslagen von Familien und Kindern" / "Überschuldung privater Haushalte"

Niemi-Kiesilainen, Johanna (1999) Consumer bankruptcy in comparison. Do we cure a market failure or a social problem? Osgoode Hall Law Journal, Vol.37, 474 - 502

Reifner, Udo/Knobloch, Michael (2009) Iff Überschuldungsreport 2007. Private Überschuldung in Deutschland. Hamburg: IFF

Kohte, Wolfhard (2005) Restschuldbefreiung, Verfahrenskostenstundung, Darlegungslast des Schuldners. VuR 20, S.268 -272

Kohte, Wolfhard (2006): Frankfurter Kommentar zur Insolvenzordnung. Vierte Auflage. Neuwied: Luchterhand

SOEPmonitor 1984-2007 (2008): Zeitreihen zur Entwicklung ausgewählter Indikatoren zu zentralen Lebensbereichen. Berlin

Springeneer, Helga (2006): Überschuldung der Privathaushalte in Deutschland. S. 15 – 119, in Schuldenreport 2006, Berlin.

Statistische Bundesamt (2006): Armut und Lebensbedingungen. Wiesbaden

Zimmermann, Gunther E. (2008): Entwicklung des Ausmaßes überschuldeter Privathaushalte 2007. Wiesbaden: Schufa

Managing Household Debts in the EU[1]
An Integrated Approach to Service Provision and the Interaction with Legal Arrangements

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Introduction

Appropriate laws and regulations can avoid over-indebtedness and provide a way-out, helping households to see light at the end of the tunnel, while at the same time being fair to creditors and discouraging for people from over-committing themselves again. Nevertheless, actual implementation of legal consumer bankruptcy and debt settlement procedures can be costly and tends to be an unpleasant experience with often unsatisfactory outcomes for creditors, debtors and tax-payers alike. Here is where quality social services can play an important role, with effective counselling and informal agreements potentially preventing or facilitating legal procedures.

This discussion paper aims to stimulate dialogue between the legal and social policy-making spheres. As a start, we investigate the impact of the crisis on the prevalence of over-indebtedness. Next, we discuss the nature of social services for the over-indebted in the EU. The need for a multi-faceted but integrated response is stressed, with well-balanced, customized attention to legal, welfare, financial, health and social aspects of the problem. The paper looks to connect the institutional environment with such integrated service provision, tentatively exploring how current institutional dilemmas could be addressed with social service provision. Finally, some conclusions are drawn, in the context of Eurofound's 2011 project on quality service provision in managing household debts.

Predicting Consumer Bankruptcy: Over-Indebtedness in the Financial Crisis

When examining the impact of the financial crisis on prevalence of over-indebtedness, assessment of changes within countries in frequency of consumer bankruptcy and debt settlement procedure are one approach. However, households usually pass through several months, and often years, of over-indebtedness before they apply for such legal procedures, if they do so at all. People's own perception of the risk of being over-indebted, and of falling behind in payments, are among the very first indicators of future problems. Next comes, depending on availability and on the consumer's knowledge thereof, demand for social services for the over-indebted. We first look at recent trends in these immediate indicators.

[1] This paper is an adapted version of the one presented at the 28-30 October 2010 Consumer Bankruptcy conference at European University Institute, organized by Professor Hans-W. Micklitz, with the support of SCHUFA Holding AG. The paper benefited from discussions with participants.

Reported over-indebtedness has increased throughout the crisis. This increase did not yet come to an end over the past year. The overall proportion of EU residents of 15 years and older who reported feeling very or fairly at risk of being over-indebted remained basically unchanged across the EU27 between the autumn of 2009 and 2010, at about 27% (EB 2010, 2011). Nevertheless, when respondents were asked specifically to what extent they felt at risk of falling behind with certain payments over the next year, they did report consistently higher risks in autumn 2010 than in the previous year. In particular utility bills and consumer loans were seen as potentially problematic (see Table 1), with a 4%-point rise in the rate of households reporting to be at risk of falling behind with payments. This corresponds approximately to a 20% increase in the number of respondents reporting to be at risk of running into arrears. These consumer perceptions resonate with company data, with e.g. mortgage arrears at Irish banks rising by 13% in the first 3 months of 2010.

There are many possible explanations for the discrepancy between the stable perceived risk of feeling over-indebted and the increasing numbers who feel at risk of falling behind with payments. Lack of clarity concerning the term 'over-indebted' is one of them. Another interpretation of the observed difference is that some of the defaulting households might not have anticipated their defaults caused potentially by unexpectedly becoming unemployed, and that the first is more a predictive measure while the second deals with the past.

Table 1 Recent increase in reported arrears and financial strain

	Not being able to cope with an unexpected expense of '*60% of the national at risk of poverty threshold*'	Falling behind with paying mortgage on time	Falling behind with repaying consumer loans (to buy electrical appliances, furniture, etc.) on time	Falling behind with paying utility bills (electricity, water, gas, etc.) on time
2009 (August-September)	37%	13%	18%	19%
2010 (August-September)	40%	15%	22%	23%
Change (%-points)	+3%	+2%	+4%	+4%

Note: those responding there to be at risk of falling behind or of not being able to cope with payments. Comparison of data from the February 2010 report Poverty and Social Exclusion, and 2011 EB reported results. The 2009 data are from the Eurobarometer 72.1 wave from 28 August to 17 September, and the 2010 data are from Eurobarometer 74.1 wave, from 26 August to 16 September.

As discussed elsewhere (Dubois and Anderson 2010), demand for social services for over-indebted households seems on the increase across the EU as a result of the crisis. For example, calls to the Debtline of the Finnish Guarantee Foundation (GF) more than doubled between 2007 and 2009. The UK Citizens Advice Bureau reports enquiries about debt to have doubled over the past decade and observed further sharp increases as a result of the crisis (CAB 2009). An enquiry among a group of social service providers in the EU, revealed debt counselling to be most likely to face increased demand out of a number of different types of services (Eurodiaconia 2010).

Increased unemployment as a result of the crisis, in conjunction with several long-term developments (Dubois & Anderson 2010). In Germany, a regular enquiry among a large number of debt advice users showed that in the 4th quarter of 2008, 39.8% of service users reported unemployment or reduced working hours to have contributed to their over-indebtedness. A year later, in the 4th quarter of 2009, this increased to 41.7%, indicating a relative increase of 4.5 %. The share of households reporting unemployment to be the main reason for their over-indebtedness increased even more sharply, from

26.4% to 28.9%. (Knobloch et al. 2011) The European Social Network (ESN, 2010) also reports new clients of debt advisory services in the EU to be typically lower-middle class families whose wage-earner(s) became unemployed.

Recently there are signs that the situation is improving in some countries, such as Germany, due to falling unemployment rates (Knobloch et al. 2011). Furthermore, while in some countries lending is picking-up again, both banks and consumers seem to have become more cautious. For example, a survey by GfK Polonia for Rzeczpospolita (a daily newspaper) revealed that in Poland the percentage of people who spent over half their income to finance their loans has shrunk to 3% by late 2010, from 9% the previous year. On the other hand, lagged effects can still be expected (Dubois & Anderson 2010). For example, a study in November 2010 in ten countries by ING Group (2011) reports that one-third of EU citizens had no emergency funds. The situation seems worst in Romania, Spain and Belgium where respectively 42%, 36% and 34% had not accumulated savings to confront emergency payments. While this was no longitudinal study, several of these citizens without emergency funds may have only recently ran out of them. They might well have drawn on emergency funds during the start of the crisis, to pay their own bills or those of people close to them.

Social Service Provision: Nature, Access & Quality[2]

In short, while for some countries the worst might have passed, for other countries lagged effects will still be felt and it is clear that the financial crisis increased the problem of over-indebtedness and triggered greater demand for debt services. We will first discuss who provides help, what kind of help is provided, and then move-on to looking into how access to services can be problematic and how increased integration can enhance service quality. This section partly draws upon Dubois and Anderson (2010: pp. 13-16).

Who?

Social services for over-indebted households are not offered to an equal extent in different countries. Some (e.g. Denmark, Lithuania) have little specific debt advice services at all in place. It should be noted though that help can come from agencies which are not specialized in debt advice, but which do contribute to fighting the antecedents[3] and symptoms of over-indebtedness.

Overall, a broad spectrum of debt advice providers can be identified across the EU. Help for over-indebted households frequently comes from governments (often local) either funding or actually providing services. These can be services specifically designed to help those in trouble (e.g. MABS in Ireland or municipal debt services in Finland) or more general social services where over-indebted turn to when debt advice is no explicit government responsibility (e.g. Danish municipal social and health services). Nevertheless, non-government organizations are also important. Frequently these initiatives stem from non-profit organizations, in particular consumer associations (e.g. AICAR-ADICAE in Spain) and relief organizations (Caritas in parts of Italy, St Vincent de Paul in Ireland, etc.). The private, for-profit sector also has a role to play, either providing services themselves or facilitating services provided by others. Some companies provide debt counselling services to employees. For instance, the German airline Lufthansa has been running a relief fund (*Lufthansa Unterstuetzungswerk*) for almost 50 years. This fund supports employees who suddenly find themselves in financial difficulty. These employees may be entitled to an interest-free loan. If a loan

[2] The analysis in this section was enriched by discussion during the 19-20 October European Year 2010 focus week, with David Šmejkal (*Poradna při finanční tísni*) and Colette Bennett (MABS).

[3] Analysed extensively in Dubois and Anderson (2010).

cannot be granted, Lufthansa supports the indebted employees in obtaining specific counselling. Dutch telecom company KPN and - in the public sector at the organizational level - the Dutch Ministry of Foreign Affairs are two other examples of organizations which provide either anonymous counselling services or have a relief fund established. A major bank in Portugal, Millennium BCP, supports employees who need financial support, for example for medical reasons. Help can also be provided at the sector-level. An example includes Perennial, a UK charity providing help for horticulturists, which employs debt advisers. Within the context of corporate social responsibility (CSR), several NGOs receive funding from the private sector. For example, the Finnish GF receives funding from the Finnish Slot Machine Association. Lastly, there are for-profit debt counseling agencies. Some EU countries have established institutional arrangements to avoid aggressive approaches by costly debt settlers whose activities do not always improve households' situation (Goodman, 2010; Reddan, 2010). Examples include regulations that prohibit certain kinds of debt counseling in France, and licensing requirements in Austria, Belgium, Germany and Luxembourg (Niemi-Kiesilainen and Henrikson, 2005). For-profit counseling services receive fees from indebted clients but sometimes also operate on behalf of the creditor.[4]

What Services?

Over-indebted households can be offered different types of social services. Broadly, we distinguish four categories of -what we call- debt advisory services. We discuss each of them in turn, including an assessment of some success factors.

1) *Financial*. While targeted financial education and appropriate institutional arrangements can prevent households from becoming over-indebted, customised financial advice in particular plays a role after the problem has occurred. It can prevent over-indebtedness from getting worse and from re-occurring after the household becomes solvent again. A principal activity of debt counselors is to provide over-indebted citizens with a perspective to regain control over their financial situation. This includes realistic plans to settle debts, drawing-up expenditure plans, or even taking over the management of the over-indebted consumer's bank account. An important element can be to restructure multiple loans into one, with a lower overall interest rate and potentially an extended payment plan. An example can be found in Finland. Besides municipal money and debt advisers, Finland has a national GF which offers guarantees for bank loans of private persons in excessive debt. With such a guarantee, banks are likely to grant 'restructuring loans', which are used to merge several debts into one. Social service providers can not only play a role here in terms of knowledge, but also help gain confidence of creditors in negotiating terms and conditions. Mediation between debtor and creditor is an important element. Mediation with third parties can also help. For example, the special relationship of the Irish Money Advice and Budgeting Service (MABS) with Ireland's extensive credit union network, which helps clients to open budgeting accounts and obtain affordable credit, has been argued to contribute positively in particular to the quality of services provided (Korczak, 2004). Country experts for a European Commission report (2008) suggest the following key ingredients for a successful non-judicial debt settlement scheme. First, there should be built-in incentives for creditors to participate and disincentives for them to use judicial procedures. These include supervision of the debtor, realistic payment plans, and lower fees than cost of judicial alternatives. Secondly, there need to be incentives for debtors to participate, such as: time limits on payment plans, partial debt write-off (following

[4] It should be noted that charging fees for counseling is not restricted to for-profit agencies. It is not uncommon for NGOs or public services to charge clients at least some minimum payment (for example, MABS in Hungary).

consideration of whether both lending and borrowing were responsible for the debt), advice and support on budgeting to make payment easier and relapse less likely.

2) *Welfare*. Here we refer both to a very broad range of financial transfers and to services in-kind, such as employment services, childcare services, housing services, etc. An important aspect here is to help households which run into trouble to make them aware of benefits they are entitled to and help them get access to them. For example, the Personal Finance and Debt Advice Project in Liverpool in the UK helped 1,500 clients to collectively increase their income by around GBP850,000 by helping them claim relevant benefits and tax credits (CAB, 2009). Immediate relief (financial or in-kind) can also be part of the service package. For example, NGOs that are more generally fighting poverty provide small payments to avoid people being cut off from utilities. Over-indebted households have been shown to economize on food in order to pay creditors (Riga Welfare Department, 2009; Dearden et al, 2010). To avoid the deterioration of the quality of life of over-indebted households beyond a basic level, Latvian municipal social services are considering providing these households with food vouchers instead of direct financial relief. On the other hand, financial support aimed at helping households pay their creditors may also be mismanaged by households and end up being used inappropriately. When creditors are utility companies, such mismanagement can result in being or remaining cut-off from electricity, water and/or gas. Mismanagement of funds would thus result in deteriorated living conditions. To avoid this, Hungarian public social services are considering making payments directly to utility companies instead of the current system of optionally directing them through the household's own accounts.

3) *Health and social support*. For most households in trouble, psychological help is an important service. Overall, it can be offered in two forms: directly by a professional psychologist, but also indirectly by providing a listening ear or a helping hand. Thos who suffer from a chronic disease are more likely to be over-indebted. Over-indebtedness can be a cause of unexpectedly rising health care cost associated with a chronic disease, or decreasing income because of illness-related inability to work. In turn, over-indebtedness can cause stress with associated physical conditions. Social services can prove important to break such a vicious circle, or to keep it from spiralling further out of control. Other areas where social services can help, include treating additions to e.g. alcohol, drugs or gambling. For example, Finnish A-clinics traditionallylimited their work to reducing addictions. Nevertheless, recently they became involved in debt-advisory services. With regard to social exclusion, the role of services can be similar. While lacking social networks can make households more susceptible to becoming over-indebted (Dubois & Anderson 2010), it is also true that over-indebtedness can be a strain on relations within the household and beyond (e.g. Dearden et al. 2010; Orton 2010). Social services can help here.

4) *Legal*. Debt counselling agencies often help people to increase understanding of existing regulations. For instance, the threat of being cut-off from energy supply, when households cannot pay their utility bills, can be immediate. Some EU Member States have measures in place to ensure access to utility services (Reifner et al, 2003). In the UK, for example, gas and electricity can be disconnected but, since 1999, water companies can no longer disconnect domestic water supply. In order to maintain access to these basic services, agencies make consumers aware of their rights and might help enforce them. Besides, debt service providers

can help over-indebted households to file for personal bankruptcy or debt restructuring. For instance, in the Czech Republic, one of the principal activities of debts advisory centre *Poradna při finanční tísni* is to help people fill out forms correctly in order for their application not to be dismissed on formal grounds.

Quality social services should provide a well-balanced, tailor-made package of combinations of these four different groups of services. A smart, integrated approach should be taken, where the symptoms of over-indebtedness are dealt with, but deeper causes also receive attention. While debt-advisory agencies can provide these partly themselves, effective and consistent referral systems are usually required.

Overall, for all types of services discussed, local partnerships form an important part of effective, integrated service provision. For example, MABS offices in Ireland are organised and managed by local community-based committees which typically consist of representatives from the Credit Union, Society of St Vincent de Paul, Community Welfare Service, Department of Social Protection, Centre for the Unemployed, Citizen's Information Service, local authority and a variety of local community groups. These committees ensure that services respond to the needs of the local community while still being linked to the national structure. Similarly, MABS in Hungary cooperates with local authorities, family support centres, childcare services and the energy sector. Further examples can be found among the numerous good practices identified by a 2006 FES conference and a survey with 39 responding stakeholders (FES, 2007). Such partnerships have been identified as success factor (Korczak, 2004).

The third year-results of a UK study that is following low-income debt advice users over a period of six years shows that users find three elements of advice most helpful: having someone to talk to; being given information and options; and enhancing the ability to deal with creditors. Nevertheless, users of the services recognise that advice has limits in what it can achieve (Orton, 2010).

Access

Besides the actual content of the services, an important aspect of quality of debt advisory service provision is accessibility. People in severe financial need might turn to relatively aggressive creditors, which tend to drive people into stressful situations when collecting payments. When debtors are struggling to find a way out of their debts, this can impact on their health and overall well-being. Delays in contacting debt counseling services are not uncommon. For example, in Ireland, in-depth interviews among 38 MABS clients revealed that over 85% felt they should have approached the organisation at an earlier stage (FLAC 2009). An example of a pro-active approach can be found in Amsterdam with its "Vroeg Eropaf" [Approaching Early] initiative. This organization is informed by housing corporations, utility companies and health insurers when households are two months behind in payments. It then sends debt advisors to these households to help them address their problems. There are signs of positive outcomes, with decreasing evictions. Nevertheless, it is hard to distillate the precise impact of the service on this decrease. Some down-sides of the service have been reported as well, with defaulting renters perceiving these debt advisors as being payment-collectors, complicating establishment of contact.

An often-ignored component of access is whether those in need are aware of the services' existence. This is a relevant issue in the case of debt advice services. For example, in an Irish study, 58% cited lack of awareness of available services (FLAC, 2009). In Finland, around 40% of the population was found to be unaware of the existence of municipal debt counseling services (Veikkola, 2010).

One-door policies can enhance accessibility. They can make it easier for people to find the assistance they need in a complex web of services. The French 2003–2005 National Action Plan, for example, mentions the regional *commissions desurendettement* (over-indebtedness commissions) guaranteed by

the French central bank. These commissions serve as a single-entry point providing personalised solutions for over-indebted households seeking help.

Along with fear (for the future) and guilt (not being able to take care of themselves), shame towards family and friends is common among the over-indebted (ING Group 2011). The fear of being judged is another important reason for delayed contact with social services, cited by 21% of defaulters in the FLAC (2009) study mentioned above. Other potential reasons for delayed contact with social services, include households' desire to solve problems themselves, debt advice centres lacking the capacity to assist people at an early point, and the debt advisory centre's incentive structure with, for example, reimbursements depending on the number of insolvency registrations it performs (Knobloch, in press).

An important element of limited accessibility concerns the fact that services have some entitlement requisites. For example, to access the Finnish GF's services, households are required to show they can honor their commitments once they would have restructured their debt. Local government services in Hungary require households to have debts above a certain threshold, having gone through at least six months of over-indebtedness and earning less than a certain amount. Over time, these requirements have been adapted. For example, households whose utilities have been cut off also became entitled to help, even when being over-indebted for less than six months. This was because utilities tend to be cut off after two months of arrears, thus leaving households for four months without utilities before being entitled to assistance.

The medium through which advice is given, can play an important role in constraining or facilitating access. Face-to-face advice services are generally seen as most effective, albeit expensive. A cheaper alternative includes telephone counseling. 'Debt lines' were pioneered by the earliest debt counseling service in Europe, the Birmingham Settlement Money Advice Centre set up in the UK in 1971 (Conaty 1986, cited in Huls et al, 1994). Organisations in many countries, such as GF in Finland and MABS in Ireland, currently have such debt lines. These phone lines potentially improve access to debt counseling services, with guaranteed anonymity. The same holds true for the many internet services currently available. Several websites have been developed, such as the European Commission's Dolceta, with the facility to calculate usual expenditure patterns and obtain online financial advice. Internet-based services are even more anonymous, and accessible 24-hours a day, 7 days a week. The GF in Finland, for example, launched online debt services in April 2010. By June, 60 (mostly young) people had registered for the service. In comparison, the Foundation received 22,920 calls to its debt telephone line during 2009 (Veikkola, 2010).

Institutional Dilemmas and their Relation to Social Service Provision[5]

How do the current discussions in consumer bankruptcy law relate to social service provision? And, does it make sense to discuss this at the EU level? Legal institutional arrangements, such as consumer bankruptcy, mean something different in each EU member state, and situations differ largely. Nevertheless, discussions concerning how to deal with the issue also show some similarity across the EU. Furthermore, laws and regulations implemented in one Member State can have implications for effectiveness and legitimacy of laws and regulations in other Member States. Consequently, it is both possible and relevant to make some general observations. The focus is on how the legal institutional framework interacts with optimal service provision. This is not a comprehensive overview; rather, we highlight briefly some institutional issues, in each of the different potential stages of over-indebtedness. Stages range from before any problems might have started, to the situation where the household is over-indebted but no legal procedures have yet been initiated, to the potential stage of

[5] This section draws gratefully on discussions with Katharina Jahntz, Victor Tsiafoutis and Tuula Linna. The authors bear sole responsibility.

legal procedures. Furthermore, rather than a descriptive account of how these institutional arrangements interact with service delivery in reality, we provide mainly a hypothetic analysis, occasionally drawing on examples from across the EU.

Avoiding Over-Indebtedness

Some laws and regulations can play a role in avoiding over-indebtedness. Such arrangements interact with the need of social services and with their optimal design. Two types of arrangements are discussed with one specific, timely example of each. These are certainly not the only institutional arrangements which can help avoid over-indebtedness. Others include e.g. improved debt registries. In March 2011 the European Commission is expected to propose legislation for 'responsible lending and borrowing'. This proposal includes a range of preventive measures such as requiring a standardised pre-contractual information sheet, have a mandated period where the borrower has the right to withdraw, and regulating advertisement and testing credit worthiness, etc.

a) Measures aimed at decreasing repayment costs: rate-caps

Credit rates of well-over one thousand percentage points above the standard rate have been reported on usually relatively small, instant loans to low-income households. Such rates easily make loans spiral out of control, with rapidly accumulating interest commitments. Government-imposed interest caps can protect households from such excesses. While such caps might push borrowers into the illegal market, this might be less likely to happen when caps are set at e.g. five hundred percent above an ECB reference rate. If too high, though, these caps lose effectiveness. If it would stimulate the illegal market, illegality might provide a clear signal that it is unwise to borrow money at these rates, and make it harder to obtain such loans. There has been ample experience with such caps, e.g. in the US (Grossman 2010) and the EU (Reifner et al. 2010), usually at much lower levels than the example presented. The European Commission recently commissioned a study on interest caps in the EU (Reifner et al. 2010). The report gives a comprehensive overview of the types of interest rate restrictions that exist in the EU Member States and gives an assessment of the impact of these on both credit markets and people. Overall, rate-caps seem not to be unambiguously advantageous, and further legislative action by the EU is unlikely in the near future.

Such institutional protection of consumers makes certain aspects of financial education somewhat less urgent as they are institutionally protected from making certain particularly costly decisions. It may somewhat decrease the potential of debt restructuring programmes. Usually such solutions, e.g. offered by the Finnish GF, aim to merge several expensive small debts into a single, cheaper, loan. When the cost of the small loans decrease, the benefit of collapsing them into a lower-interest loan also decreases. Furthermore, if successful, interest caps should make the group of households in need that have been forced into high interest lending smaller with respect to other groups. The overall service balance can be expected to shift toward other groups, such as those in difficulties because of unexpected life events.

b) Measures aimed at preventing instant lending: paper contracts

In Finland, elderly women are a group particularly at risk of becoming over-indebted. One underlying reason is the relatively high prevalence of gambling addictions among this group. While gambling addictions generally trigger over-indebtedness, an important factor is the availability of instant borrowing facilities with little control of debtors' creditworthiness. In Finland, for example, there are so-called 'SMS loans'. Sending-out a single SMS is enough to receive an instant transfer of a relatively small amount of money (e.g. 100EUR), against ultra-high interest rates. Variations include phone or internet borrowing, with similarly lack of attention to the financial capacity of the borrower.

In Finland, recently the problematic nature of such loans was acknowledged and 24-hour service was prohibited, only allowing SMS-borrowing during daytime. Some other EU Member States have measures in place which bar such borrowing. For example, in Germany the client's signature is needed in order to borrow money, requiring a paper contract. It is explicitly not allowed to enter into the contract only in electronic form, i.e. via e-mail or SMS.

The interaction with debt service need and design is similar to that of rate caps discussed previously. Nevertheless, protection against instant borrowing is more specific in its interaction with social services. Gambling addicts and several other groups potentially in need of instant borrowing tend to know that decision is unwise, but their impulsive need is stronger than this knowledge. It can thus be questioned whether education alone would have helped in the first place. Discouraging impulsive loans potentially decreases the demand for social services and it avoids re-occurrence for a specific risk group, making it a little harder to fall back into old habits. Still, the long-term solution lies in addressing the gambling habit.

Over-indebted, But Not (Yet?) Bankrupt

The stage where households start running into trouble, but have not (yet?) reached an entirely hopeless situation, is the period when debt advice services can contribute most, in the ways described above. We focus on two areas where the institutional framework interacts with social service provision if an appropriate fit is to be achieved: the overall characteristics and quality of the legal framework and – more specifically– the complexity of the legal (and benefit) system.

a) Overall characteristics and quality of the legal framework

It is clear that countries have moved toward a system where debt adjustment laws are in place. In most EU Member States, debt discharge is conditional on a partial payment obligation and on a number of requirements concerning the debtor's behaviour. In the United States (US), discharge is conditional to a lesser extent. Nevertheless, it should be noted that the spectrum is broad in the EU, with the UK coming closest to the US system (Reifner et al, 2003; Gerhardt, 2009; Frade, 2010). Some Member States do not provide the option of a debt discharge. Spain, for example, passed a bankruptcy law (*ley concursal*) in 2003 which provides for debt settlement plans that can result in a reduction of the debt (maximally half of the amount) or an extension of the payment period of maximally five years (Gerhardt, 2009), but it does not foresee debt discharge. Overall, though, the number of EU member states without a consumer bankruptcy law is decreasing, with Greece recently (September 2010) having established such law, and Hungary, Italy and Lithuania in the process of drafting it (Niemi 2010).

This development has implications for the type of social services needed and for the overall need of such services. In absence of legal alternatives, certain aspects of the legal side of debt advice are irrelevant such as helping households to consider and file for bankruptcy. On the other hand, the importance of other elements of debt advice become all-the-more urgent. Households can be left on their own, or have to seek support from their social networks if they are lucky enough to have such networks. Similarly, in systems with legal solutions in place, but where legal roads are particularly unattractive or uncommon for other reasons (e.g. Ireland, Portugal, Sweden), certain social services can be expected to be of more immediate help. For example, in such systems, mediation between creditors and debtors can be particularly useful. When the legal road is relatively unattractive, debt advice agencies can further take-over roles played by legal processes elsewhere. An example is debt restructuring, which in the Netherlands is often an out-of-court, legal-binding debt settlement procedure with authorities keeping close eye on households' accounts, while in Ireland debt advisory agency MABS assists consumers to manage their household accounts and, where necessary, provide

additional supports for clients of the service. When the social cost of the specific debt settlement and consumer bankruptcy procedures are high, the 'pre-legal' stage becomes more important. Also, a looming consumer bankruptcy process where creditors will be re-paid only a small part of their funds, or nothing at all, can push them into informal settlements, potentially facilitating the role of a debt advisory service as mediator. When legal arrangements are well-developed and well-communicated, consumers might still be refused access to these services because of failing to fulfill requirements. In such cases, where the legal institution takes such a prominent place that they are the first point of contact of an over-indebted household, it is important for these institutions to not merely discharge households, but to have appropriate systems in place to refer them e.g. to debt advice services.

b) Complexity of the legal (and benefit) system

The complexity and the pro-activeness of the social benefit system, as well as regulations regarding access to utilities and enforcement thereof, also play a role. More complex, less pro-active systems will imply more work for social services to help guide households to their rights, and legal advice will have more weight in the debt advice package. Furthermore, when private bankruptcy and legal debt settlement options are less complex and better communicated, households are more aware of a way-out when things might turn for the worse. This can alleviate them from stress, thus potentially reducing the need for certain psychological services.

Alleviating the Process of Consumer Bankruptcy

In most countries, the number of people declaring bankruptcy is relatively small. While it is thus arguably more relevant to look at the interaction of these laws with debt advisory services for the groups who potentially might face bankruptcy at some point rather than on those who actually going through it, it is also important to dedicate part of the discussion to the interaction of the precise arrangement and social service provision during the process. Firstly, households going through such processes might need advisory services to cope with endured hardship during the process. Secondly, merely dismissing one's debts through bankruptcy laws does not prevent the problem from arising again. In general, it can be argued that it is crucial for insolvency procedures to provide tools for advice and help during the period following the declaration of insolvency. It has been stressed that debt advice, a supervised rehabilitation period, financial education and social support to find sources of income and to manage household expenditures better need to be equally provided during this period of rehabilitation (Reifner et al, 2003; Gerhardt, 2009; Frade, 2010).

a) Customized legal procedures in tune with customized social services

Different types of filers for bankruptcy have been identified (Lechner 2010), and one-size-fits-all debt settlement laws are being challenged. One dimension of the consumer bankruptcy arrangement that could vary according to the type of debtor is length of the 'clearance period', the period during which a household has to live on a minimum before being cleared of debts. During this period, earned income above this threshold has to be transferred to administration (and subsequently to creditors if administrative deductions permit this) transferring additional income. Longer clearance periods work better as a deterrent and inhibit re-occurrence. Such longer clearance periods are expected to be an effective deterrent for certain debtors, including households which got into trouble because of excessive luxury good consumption and strategic defaulters, having planned their over-indebtedness and default. Shorter periods might be needed for a second group of households for which business failure spilled-over into the private sphere, for households which took out reasonable loans but then went through an unexpected life event such as job-loss, or for those households who have been tricked into high-interest lending to finance basic necessities.

In general, systems with tailor-made laws can be expected to require fewer social services. Mechanical application of consumer bankruptcy laws regardless of the debtor's individual circumstances leads to frustration and additional stress. Nevertheless, with tailor-made laws, legal advice becomes more important. Likely, the law will become more complicated. This implies better perspectives for those who are able to find their ways through the legal system, and worse for those who are less able to do so.

It should be noted that, to be both effective and efficient, the social services themselves should be tailor-made. Overall, social services might be of less immediate need for the first group of households, which got into trouble because of excessive luxury good consumption and strategic defaulters. For the second group, optimal service mix can differ among the sub-groups. Those struck by a life event would benefit from support specific for the life event (e.g. employment services, medical services). Those tricked into high-interest loans would gain more from support with arranging their finances, with potential for debt restructuring beyond entering into legal procedures. Strategic defaulters, in contrast, are less likely to benefit much from any of these mentioned services.

b) Structural characteristics of the bankruptcy procedure: length and minimum living conditions

As in reality most Member States apply a one-size-fits-all consumer bankruptcy arrangement, a more immediate discussion involves the general length of the bankruptcy clearance period. While there is no optimal length, there seems to be some consensus among EU law-makers regarding the extremes. The 1-year period in the UK is generally regarded too short. It was originally designed for business bankruptcy, in an attempt to stimulate entrepreneurship, inspired by US practices (Ramsay 2010). Nevertheless, consumers found their way to this law too, and it is now reported to occasionally be used even by students to deal with their student debt. In contrast, the 6-year period in Germany, and the 14-year waiting period in Ireland are often seen as too long, and are both currently under review. In terms of the interconnectedness of the length and accessibility of the procedure on the one hand, and social services on the other hand, the point is straight-forward. In a system where personal bankruptcy is quick, easy and relatively painless, social services are less of an issue, except for legal debt advice for the less-informed. In systems with tougher laws, where it is more difficult to be admitted to bankruptcy procedure or where the process takes longer and where the minimum allowed income during the clearance period is lower, psychological hardship will require more attention.

Differences among EU Member States in the clearance period create incentives for well-informed over-indebted households to take-up residence in a country with more lenient bankruptcy laws to be cleared of their debts. Free movement of persons is a fundamental right guaranteed to European Union citizens. While there are legal obstacles, there seem to be possibilities, for example with Germans finding their way to the UK (Gerhardt 2010). With the recent surge in over-indebtedness in Ireland, the UK also became an increasingly popular 'bankruptcy tourism' destination for the Irish. The UK system is not only more advantageous to debtors than the Irish system in terms of length of the period, but also in exempting certain pension benefits from being affected by bankruptcy. (O'Carroll 2011) Here the legal framework interacts with social services at a different level. If bankruptcy tourism becomes more common-place, countries with lenient laws might face increased demand for social services at the stage of the bankruptcy process. As suggested in our 2010 workshop report, the interaction between different consumer bankruptcy procedures and the EU right of free movement of persons, which lies at the root of bankruptcy tourism, might well require a response at the EU level.

Many of the current legal consumer bankruptcy arrangements lack incentives for the person who is going through the legal procedure to find employment, or –if already employed– to put effort into earning more. The reason is that all income above a minimum should be transferred, and the clearance period is not shortened if more payments are made. The Austrian system is an exception. It allows for a potential clearance period reduction if more than a certain proportion of outstanding debts has been

repaid after three years into the procedure. From a theoretical point of view, the incentive to find employment stimulates people to see future opportunities and to remain socially integrated by means of employment. While it is hard to see how this institutional arrangement would interact with legal debt advisory services, it seems reasonable to expect that the incentive to remain socially included and the additional income generated through labour (or shorter clearance period) decreases the need for social/health-related and welfare services. Design of financial services can also be expected to differ, in particular if households can keep part of the additional income, e.g. focusing more on effective saving. Psychologically it has also been argued to be crucial that debtors see that funds are used to pay-off creditors rather than to cover administrative costs. Administrative cost have been reported to be a reason why the general opinion in society was that debtors do not pay the money back (Koark 2010). Knowing that creditors are repaid could also lessen feelings of guilt among some debtors. Efficient, transparent systems can be expected to result in less frustration and less need for psychological support.

In some systems, the allowed minimum subsistence level during the clearance period is the same all across the country. This does not necessarily relate to the size of the country. For example, in Germany the allowed minimum (*Pfändungsfreigrenze*) is the same all over the country. The amount is currently fixed at EUR985.15 for a single person (without any obligation to pay alimonies to anyone). In Finland, in contrast, the minimum is set at different levels for regions depending on cost of living. Intuitively, such geographical differentiation in minimum levels makes sense. Nevertheless, arguments against such diversity include potential for misuse (signing-up for residence elsewhere), disputable levels (depending on individual consumption baskets), and residence being a variable that is in people's own hands anyhow as they are free to move. Being single or having children is more difficult to change, and are a more common way to have variations in subsistence levels across the EU. In terms of social services, those living in relatively expensive (usually urban) areas, in countries with fixed minimum levels, can be expected to bear more hardship than those living in less expensive areas. In general, systems with fixed levels can be expected to require more heterogeneous social service provision, from an equity perspective.

It is considered a crucial issue whether the over-indebted are protected to retain their homes. For example, the Greek consumer bankruptcy law, in force since 1 September 2010, for example, provides extensive options for this. The debtor can maintain her/his main residence if she/he can credibly show that she/he will be able to pay 85% of the commercial value of the house in at most 20 years. Other residences are liquidated. If someone owns only one house and her/his partner does not own an immovable that can be used as a residence, the person can maintain the house even when not living there. This often concerns a household owning a house in the countryside, usually a property which has been in the family for long, or someone who due to business reasons has to live somewhere else. In countries with low home-ownership rates, rent-dependent minimum subsistence levels (e.g. in Finland) are a variation on such arrangements. When a household consistently lived beyond its means, or when rents are way beyond the normal, blind support of keeping people in their homes might not be socially desirable. This explains for example that the basic idea behind the design of the Greek law is that a person needs one house only, and not two or more. For the less fortunate though, having a home-protection provision gives some comfort, if these rights are well-communicated and enforced. This is where social services can play a role. They can serve as an important moderator of whether home retention elements in the law achieve their objective. Financial (advisory, refinancing) and welfare (housing support, social security) services have been identified as key elements in helping households avoid foreclosure (Holm and Astrup 2009). With better protection against foreclosure, these services will be of less immediate need. It should be noted that similar arguments can be made with regard to the legal arrangements concerning the right to retain access to utilities.

Conclusion

In the midst of the crisis, several countries are looking into revising their legal institutional frameworks with regard to over-indebtedness. In turn, social service providers are adapting to changed service needs and limited public funding. This paper emphasizes and illustrates that the legal sphere and the social service spheres are not two different worlds, but are highly connected. While we presented some general thoughts on how debt advice services are interrelated with the institutional framework, we do not go into great detail with regard to the precise nature of the different service types. While some research has been done considering which services work best in which circumstances, evidence is still limited in this regard. Early 2011, Eurofound launched a study to fill some of this gap. The project will assess how to improve access to and quality of service delivery in an integrated response to over-indebtedness. It will examine what debt-counseling practices have been successful, and in what circumstances. It will draw upon reports from several EU27 Member States, with case studies of service providers in respective countries.

References

CAB (2009) Managing money, helping people with debt, London, Local Government Association, Citizens Advice Bureau, (available on-line: http://www.lga.gov.uk/lga/publications/publication-display.do?id=2171209).

Conaty, Pat (1986). The need for Money Advice centres, in G. Hormann (ed.) *Consumer Credit and Consumer Insolvency*. Bremen: Universität Bremen, pp. 321-344.

Dearden, C., Goode, J., Whitfield, G. and Cox, L., Credit and debt in low-income families, York, Joseph Rowntree Foundation, 2010, available online at http://www.jrf.org.uk/sites/files/jrf/credit-debt-low-incomes-full.pdf

Dubois, H.F.W. and Anderson, R. (2010) Managing household debts: Social service provision in the EU. Workingpaper. Dublin: Eurofound (available on-line: http://www.eurofound.europa.eu/pubdocs/2010/70/en/1/EF1070EN.pdf).

Eurobarometer (2010) Report on Poverty and Social Exclusion. Brussels: TNS Opinion & Social.

European Social Network (ESN), Managing social services in times of crisis. Promoting care and inclusion in a difficult economic and social environment, Brighton, European Social Network, 2010.

Eurodiaconia, The social cost of the crisis: even more in need and more needed. Report on the social repercussions of the economic and financial crisis, Brussels, Eurodiaconia, 2010.

European Commission (2008) Towards a common operational European definition of over-indebtedness. Brussels: European Commission.

Financial Education Survey (FES), Better access to financial services and financial education: report of the survey on financial education, Ref. No. VS/2006/0319, Brussels, L'Observatoire du Credit et de l'Endettement, 2007, (available online at http://www.asb-gmbh.at/ecdn/index.php?option=com_docman&task=doc_view&gid=205).

Free Legal Advice Centres (FLAC), To no one's credit: the debtor's experience of instalment and committal orders in the Irish legal system, Dublin, FLAC, 2009.

Frade, C. (2010) 'Managing household debts: a legal perspective', presentation at Eurofound's 'Managing household debts' workshop, Brussels, 25 June (available on-line: http://www.eurofound.europa.eu/areas/socialprotection/householdebts.htm).

Gerhardt, M. (2010) 'Managing household debts: a financial perspective', presentation at Eurofound's 'Managing household debts' workshop, Brussels, 25 June (available on-line: http://www.eurofound.europa.eu/areas/socialprotection/householdebts.htm).

Gerhardt, M., Consumer bankruptcy regimes and credit default in the US and Europe: a comparative study, CEPS Working Document No. 318, Brussels, Centre for European Policy Studies, 2009, available online at http://www.ceps.eu/files/book/1887.pdf.

Grossman, Richard S. (2010) *Unsettled account: the evolution of banking in the industrialized world since 1800,* Berlin/Heidelberg: Springer-Verlag.

Holm, A. and Astrup, K.C. (2009) *Evictions and forced sales*. Oslo: NIBR.

Huls, N., Ackermann, H., Bourgoignie, T., Domont-Naert. F., Haane, B., Van Huffel. M., Reich, N., Reifner, U., and Roseval, L., Over-indebtedness of consumers in the EC Member States: facts and

search for solutions, Advisory report to the European Commission, Diegem, Louvain-la-Neuve, Kluwer Editions Jurisdiques Belgique, Centre de Droit de la Consommation, 1994.

ING Group (2011) ING International Consumer Resourcefulness study. Amsterdam: ING Group (available online: http://ing-group.pressdoc.com/12531-most-consumers-want-to-be-better-at-money-but-dont-know-where-to-start).

Knobloch, M., 'Unemployment and over-indebtedness in Germany', in Niemi, J., Block-Lieb, S. and Backert, W. (eds.), Contemporary issues in consumer insolvency, in press.

Knobloch, M., Reifner, U. and Laatz, W. (2011) Iff-Überschuldungsreport 2010, Hamburg, Institute for Financial Services, 2011 (available on-line: http://www.verantwortliche-kreditvergabe.net/media.php?t=media&f=file&id=3933).

Koark, A. (2010) Insolvent and nevertheless successful: a debtor's point of view, presentation at the 28-30 October conference on Consumer Bankruptcy in Europe: Different Path for Debtors and Creditors. Florence: European University Institute.

Korczak, D., The Money Advice and Budgeting Service (Ireland). A service to help people with financial problems and to tackle over-indebtedness, Peer review in the field of social inclusion policies, Brussels, European Commission, DG Employment, Social Affairs and Equal Opportunities, 2004.

Lechner, G. (2010) Social and economical inclusion as a result of the German insolvency statue, presentation at the 28-30 October conference on Consumer Bankruptcy in Europe: Different Path for Debtors and Creditors. Florence: European University Institute.

Niemi-Kiesilainen, J. (2010) Consumer insolvency: a social or commercial matter?, presentation at the 28-30 October conference on Consumer Bankruptcy in Europe: Different Path for Debtors and Creditors. Florence: European University Institute.

Niemi-Kiesilainen, J. and Henrikson, A-S., Report on legal solutions to debt problems in credit societies, CDCJ-BU (2005) 11 rev., Strasbourg, Council of Europe, Bureau of the European Committee on Legal Co-operation, 2005.

O'Carroll, L. (2011) Irish investors crushed by housing collapse turn to bankruptcy tourism, *The Guardian*, 19 February, p. 41.

Orton, M., The long-term impact of debt advice on low income households. The year 3 report, Warwick, University of Warwick/Friends Provident Foundation, 2010.

Ramsay, I.D.C. (2010) Contemporary issues and challenges in European consumer bankruptcy regulation, presentation at the 28-30 October conference on Consumer Bankruptcy in Europe: Different Path for Debtors and Creditors. Florence: European University Institute.

Reddan, F., 'Facing up to the reality of living beyond your means', The Irish Times, 26 July 2010.

Reifner, U., Kiesilainen, J., Huls, N. and Springeneer, H., Consumer overindebtedness and consumer law in the European Union, Brussels, European Commission, 2003, available online at http://iaclaw.web.its.manchester.ac.uk/Research_papers/iff_OverindebtednessandConsumerLaw.pdf.

Reifner, U., Clerc-Renaud, S. and Knobloch, M. (2011) *Study on interest rate restrictions in the EU*. Hamburg: iff.

Riga Welfare Department, Riga city social assistance applicants survey, Internal paper, Riga, Riga Welfare Department, 2009.

Veikkola, 2010 presentation at Eurofound's 'Managing household debts' workshop, Brussels, 25 June 2010 (available on-line: http://www.eurofound.europa.eu/areas/socialprotection/householdebts.htm


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