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ACTAS

Policy options for Portugal in the field of over-indebtedness

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Introduction

Unfortunately we did not have a Portuguese National Report when we published our broad interdisciplinary study in the field of over-indebtedness of consumers in Europe (Nick Huls and others 1994). When we conducted our research in 1993, over-indebtedness apparently was not yet a problem in your country. The Conference in Coimbra indicated that this may be different in the near future, so this is a splendid opportunity to bridge the gap.

Portugal seems to be in the take off phase of becoming a credit society, with more characteristics of other European societies. Although it became very clear that Portugal has a strong national legal culture in this field, it was also considered that this country may learn from developments abroad. So, this paper is meant to offer the Portuguese policymakers some background for finding their own solutions. Sometimes it can be an advantage of lagging behind a little bit: you may profit from mistakes that other countries have made and you may pick and choose from the menu of options that exist abroad. This is what historians call «a premium of being backward».

In this paper I offer the findings of our work as a source of inspiration for the development of national Portuguese law and policy making as it is conceived by your Government. Europe is important for Portugal, because of the Second Banking Directive and fiscal policies, which have a strong impact on the development of your welfare state and the working of your local credit market. In our book we have made a Draft-proposal for a Directive, along the lines of the Safe Product Directive, but this has not lead to any initiatives at the European level, so far. The Member states still have a broad authority to regulate in this field.

My impression from the Conference was that the problem of over-indebtedness has not yet led to huge societal problems in your country. My suggestions would be, however, not to wait too long in taking new initiatives. It has some advantages to develop a new system in quiet times. Experience shows that bankruptcy laws which were conceived in hectic circumstances, often are very one sided

In the following I give an overview of our main findings.

1. The emergence of the credit society

The use of consumer credit in Europe started to grow in the 1960's. Over the past decades it developed rapidly in all European countries. Credit has become a feature of most of the member states. On the demand side of the economy, credit has become part of the way of life of millions of consumers in the Community. Broad parts of the population buy their homes on mortgage credit, finance their cars with a personal loan or a revolving credit agreement and use their credit cards to shop around. One can also see a democratisation of credit. On the one hand the taking out of a personal loan is no longer necessarily a sign of despair by the poor, on the other hand, the use of credit cards nowadays is no longer a restricted privilege of the well to do. The use of credit has become a normal feature of all industrialised modern societies.

On the supply side one sees that the granting of credit is a lucrative financial service which is offered by all big financial institutions on a massive scale. For the manufacturing industry, credit is an indispensable marketing tool; many products today simply can not be sold if no credit facilities are available. It is necessary for the vitality of many industries that consumer credit is widely available.

The increased use and availability of credit has many positive consequences. Most importantly, credit fuels economic growth. In modern society the use of widely available consumer credit is no longer seen as a sin, but as a contribution to the economy.

Because of these benevolent effects, it is not surprising that governments help stimulate the use of consumer credit, by regulating the provision of credit and by offering different types of tax incentive.

The most important form of consumer credit today is the mortgage. The provision of mortgages is an essential part of a policy that stimulates home ownership. To have one's own home is of great importance to many people. Mortgage credit has grown rapidly in recent decades, it accounts for the major part of the total credit held by consumers in Europe.

The second important form is non-mortgage consumer credit. A pattern in the provision of consumer credit can be distinguished. In the 1930s, finance companies in Europe started lending money which had a direct relationship with the purchase of consumer goods. Over the past thirty years or so, this relationship has diminished in importance since the big financial institutions entered the consumer credit market in a major way and introduced personal loans and, later, revolving credit. These forms of credit have little if any direct relationship with the sale of a particular good or service. Recently, there has been a reversal of this trend. New forms of credit arise that are again closely related to sale transactions. With new technologies it has become easier for retailers to sell their own products with the help of their own credit facilities. Many new forms of credit (e.g. bank credit cards, shop credit cards and debit cards) have been established and are being used more frequently.

Numerous factors put pressure on the modern consumer to incur liabilities which can lead to debts for reasons that the individual can exert influence on in only a limited way. Credit has become part of modern life-style, which fewer and fewer people can avoid or retreat from.

The European citizen today invests in his home; and handles personal financial management through the use of credit, insurance and numerous other financial services. He is becoming more entrepreneurial, more mobile and more willing to take risks. This readiness to take risk expresses itself, among other things, in the expansion of the use of consumer credit in Europe.

Over-indebtedness: a societal problem

Most experts agree that the primary cause of over-indebtedness is credit. Its rise has coincided with the rise in consumer debt. The data show that everywhere in Europe, over-indebtedness is today found more frequently than several years ago. For various reasons, many consumers are not able to pay back their debts. Such financial entrapment is not restricted to specific social or economic groups, but can happen to almost any user of credit.

Four different groups of overcommitted debtors can be distinguished. The first group is the group that runs into temporary misfortune (i.e. unemployment, divorce, illness, and so on). A second group consists of people that unconsciously become overcommitted. This group makes use of the widely available forms of credit, without realising that they might not be able to repay in the future. The third group are the «poor» who have to take credit in order to attain a reasonable standard of living. The fourth group is the smallest and covers both people that wilfully overcommit themselves financially and people that attempt to defraud their creditors.

The solutions suggested below — which focus on the European dimension — are mostly appropriate for those overindebted consumers that belong to the first and second groups. The third group will benefit only to a limited extent from the changes proposed, and the fourth group will not benefit at all.

Over-indebtedness in most European countries is associated with failure and bankruptcy. The term bankruptcy has stigmatic connotations as it puts the blame on the debtor. Bankruptcy is degrading and can reduce one's self-esteem which is reinforced by the disapproval of others. Until recently, defaulting debtors could be, and sometimes were imprisoned. Because of the stigma the term bankruptcy bears, the new approach that is suggested for Europe below will not be called «bankruptcy», but «debt settlement» instead.

The idea that insolvent people should be taught a lesson which they won't forget, does not fit an economic approach towards bankruptcy. The penal approach towards debtors is out of date, and also dysfunctional because it leads to adverse results.

Failure is as much a part of the market-process as is success. A certain amount of failure is taken into account by the creditors beforehand. For the creditor this is a routine part of the cost of granting credit. A society that accepts credit offered by the market, should also accept over-indebtedness as a inherent side effect. The fact that there are casualties shows that the market is working, because profit and loss are indissolubly linked with competitive market processes, and winners as well as losers are an outcome.

Insolvent people should not be treated as guilty until proven innocent, especially when the real reasons why such consumers become overindebted are accepted.

2. A european «new chance» policy towards over-indebtedness

2.1. Basic objectives

Generally, the basic objectives for modern insolvency law are the following (see Cork Commitee 1982). There are three parties: the debtor, his creditor and society. Society is concerned to relieve and protect the individual insolvent from the harassment of creditors, and to enable the individual to regain financial stability and to have a new chance. It accords the insolvent this relief in return for such contribution, not only from the realisation of his assets but also from his future earnings, as can reasonably be made by him without reducing him and his family to undue and socially unacceptable poverty and without depriving him of the incentive to succeed in this new chance. This leads to the following principles:

- To recognise that we are living in a society based on credit, which has brought us great prosperity. This requires, as a necessary result, proceedings to remedy the accidents of the credit society;
- It is better to diagnose and treat imminent insolvency at an early rather than at a late stage;
- Protection of the debtor and his family from undue demands and harassment by their creditors, and at the same time, to have regards for the rights of creditors, whose position can also be threatened;
- To prevent conflicts between individual creditors through a fair distribution of the proceeds among all creditors;
- To realise the non-exempt assets of the insolvent which should properly be taken to satisfy his debts, with the minimum of delay and expense;
- To establish and encourage professional and independent debt-counselling;
- To determine the causes of over-indebtedness and, if fraudulent behaviour is found, to take suitable measures;
- To guarantee the public interest which is at issue in cases of insolvency;
- To lower unproductive costs of ineffective debt-collection.

On the basis of these basic assumptions, it is possible to design a policy that has more to offer to all parties concerned than most present bankruptcy laws in Europe do. The important goal with respect to the debtor is to offer him a perspective by means of a discharge of the remainder of his debts after he has «done what he can» for a restricted period of time (maximum of 4 years). Creditors would achieve a bigger yield through a combination of assets and income that would be distributed more fairly, while the public interest would benefit from lower social costs.

A rehabilitative approach of debt settlement is not only profitable for the debtor and his family, but also for society as a whole. Putting the blame on the consumer and making him suffer for the rest of his life is a counter-effective response to the societal problem of over-indebtedness.

The new approach advocated here encourages parties concerned to looking to the future rather than to the past. The attention is not centred on the past, nor preoccupied with the question of who is to blame for the fact that the financial position of the debtor has gone wrong; the focus is instead on the future, and how the person can again participate independently in economic life, rather than remain dependent on his creditors or social security. Discharge restores to the debtor some measure of confidence in his capacity to arrange his future as he wishes, free from the dead hand of the past. Without such confidence, the debtor may lose even that minimum of self-respect that is a condition for his taking an interest in himself and his own life. The forgiveness of debt has a rehabilitative effect as an admission on the part of the debtor of his own inability to remedy past mistakes, and the recognition of the need to move forward with a more rational life plan.

Because of the rehabilitating function of debt settlement and the emphasis on the future, the debtor is encouraged to become an active member of society again, producing wealth rather than remaining nonproductive and draining the economic resources of society. Discharge reflects an awareness that the productive resources of every individual are significant, and that by releasing the debtor from his past financial obligations, his renewed vigour will benefit society as a whole as well as himself. Seen in this way, the new approach, which we call the «new chance» approach, contains utilitarian elements. The new chance approach may be justified from a public sector standpoint. By being allowed to regain his position in society, the debtor contributes to the «common good» through being a productive member of society. This benefit far outweighs the benefit to creditors and the community, than holding the debtor to repay heavy debts indefinitely without much likelihood of realistic yield. The public interest is thus well served with broad scale debt relief.

By introducing the new chance approach in Europe, it will be possible to give to consumers what entrepreneurs already have, a limited liability for debts. The reason that such a limited liability for persons engaged in business is accepted in a modern society is that it is a way to promote commerce, stimulate risk-taking, and to facilitate the necessary supply of capital for business enterprises. For entrepreneurs, bankruptcy or liquidation is part of the legal system that helps reduce the risk of starting a new business. Limited liability for debts stimulates risk-taking. This taking of risks is connected to economic growth and scientific progress. When a society puts too much emphasis on safety and security, it blocks new developments. The taking of risks stimulates progress through a process of trial and error.

The insolvent consumer, like the businessman, should be given a new opportunity in life, a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt. The debt settlement process therefore can be rather like an unhappy chapter in one's life than a life-long drama.

The former West-German Minister of Justice, Engelhard (1986), has called discharge in this connection not only a social ambition but also part of the pursuit of freedom. Discharge of debts is not only a social, but also a liberal objective. Thus, discharge can be seen as a reconciliation of free-market and social democratic principles. Engelhard also cites the judgement of the German Constitutional Court, that every person condemned to lifelong imprisonment in some way should have a «right to hope» according to the German constitution.

2.2. A text of hope

In Europe, bankruptcy often is associated with feelings of revenge and despair, because of the penal nature of the process and its indefinite impact. This is in sharp contrast with the American approach, where bankruptcy opens the way to a better future. However, in France, the law that replaced the old bankruptcy laws has been called «a text of hope». In order to guarantee a level of human dignity, this law mandates that the individual must be provided with the opportunity to provide for himself and his family without the burden of overwhelming debt. The new chance approach offers the overindebted person a possibility to escape from a dead-end situation and start again with new hope for a better future.

The concept of new chance is centred on debt forgiveness. Historically, the discharge of debts after a debt settlement process also has an equivalent in the practice of the Biblical Jubilee (15 Deuteronomy 1 et sq.) and the «seven year» release.

While traditional bankruptcy laws aim at a liquidation of assets in order to punish the debtor for past conduct, debt settlement stresses reorganisation of financial disorder in order to rehabilitate the debtor back into society. In order to give the debtor a new chance, it is essential that the individual's economic position is not undermined by a destructive procedure. The debtor must have a reasonable position to start from, not a ruinous or deplorable one. Therefore besides a discharge of debts, an equitable exemption scheme is essential as well. Exemptions leave the debtor with the basic necessities of life and place the debtor back on track for the reconstruction of his financial life. Exemptions reflect what society believes to be necessary for the individual good. Through exemption laws, which place some goods outside the reach of creditors, the debtor's family is protected from living on an unacceptable standard of living. Each national legislation must indicate which assets cannot be seized by creditors. Under a modern regulation of exemptions, «basic household goods» are protected from seizure and sale. This is an essential part of the new chance approach.

2.3. The risk of non-payment

The spreading of risk should be established in such a way that the interested party most capable of avoiding the financial problems, and who can also take suitable measures in the event of problems, bears the risk in the first instance. A party's ability to bear risk depends on its capacity to avoid adversities and also on its ability to insure efficiently against those events. As is explained below, it is both economically efficient and socially just to put this risk with the creditor.

The new chance approach aims to include the creditors as well. If there were no right of discharge, an individual who loses his assets to creditors might rely instead on social welfare programs. In contrast, discharge imposes much of the risk of poorly informed credit decisions on the creditors themselves. Thus increasing their responsibility if a transaction fails.

The present distribution of risk is inappropriate. The rule that everyone ought to pay back their debts, is meaningless for those who are simply not able to repay at all due to external circumstances, e.g. unemployment, which are normally outside the control of the debtor.

Therefore it is argued here that the creditors are the superior risk-bearers. Why is this the case? Firstly, we should recognise that debtors think individually and only consider their own individual circumstances when taking on credit. Borrowers usually do not know whether they will become unemployed or seriously ill within a short period of time. It is not the sort of events one takes into account when taking on credit.

The credit-grantor, on the other hand, thinks collectively. When commercial services are offered on a large scale, the creditor has to think collectively instead of individually. Risks are spread and absorbed as expenses. These risk expenses figure in the cost of credit and are borne by both consumers and taxpayers. Big lending institutions survey the market carefully and do not become vexed by the supposed reproachable conduct of particular borrowers and cost-consuming proceedings, because they calculate the risks precisely and spread these through the credit price to all their customers. Accordingly, large-scale credit granting procedures are impersonal and strictly based on actuarial principles. From a creditor's point of view, these impersonal transactions lack the moral and ethical foundation of agreements concluded between two persons and upon which the traditional concepts of contract law are built.

Professional creditors, having gained experience through dealing with countless debtors, are more adept than the individual at monitoring borrowing. The creditor can forecast quite accurately the percentage of borrowers that will become unemployed in the coming year. So the creditor knows beforehand the percentage of the outstanding credit which will not be repaid. Thus, the creditor can make a fairly good estimate of the risk he is running by lending the money, while the debtor often cannot. Write-offs are acceptable for creditors, provided that the cost is controllable

and (re)insurable. Because the professional lender knows the risks, they are taken into account in both lending policy and practices. Granting credit means accepting risks. A certain percentage of default is accepted as part of the costs for doing business and therefore treated as tax-deductible as well. Lenders can also often calculate for particular groups of borrowers, what is the respective risk of non payment. This is in turn reflected in different credit prices for the various risk groups.

By putting the risk of non-payment more upon the creditor's side, discharge of debt procedures contain preventive elements as well. A right of discharge could control the promotion of purely impulsive credit taking behaviour by encouraging creditors to supervise borrowing more closely. Therefore, through such a change creditors will have a strong incentive to prevent an individual from falling heavily into debt and losing therefore the ability to repay. Indeed aggressive forms of credit-granting, like sending unsolicited credit-cards by mail, might more easily be restricted or at least discouraged by such a change.

Furthermore, it should be emphasized that debt settlement is meant for the honest but unfortunate debtor. Although experience shows that most consumers feel morally obliged to pay back their debts, there must be checks to discourage fraudulent behaviour. It would be unjust to let the creditors share a greater risk in a system easily abused by dishonest debtors. Where such patent manipulation of debt settlement procedures occur, these must be dealt with in an appropriate way. The following paragraph deals with the ways of preventing the abuse of the system.

2.4. A balanced approach

The key question that comes to mind when we talk about the new chance approach for consumers, is whether this idea is not unfair towards the creditors. After all, their money is at stake.

To substitute the one-sided character of the existing laws with another one, this time in favour of the debtor, would not constitute a sound policy. The scale should not be tipped entirely in the other direction. Although it is argued above that more emphasis should be put on the needs of the debtor and the public interest, this in no way means that the interests of creditors should be neglected. A fair balance should be established between the conflicting interests of the debtor's desire for a new chance and the demand by the creditors for a full repayment of debts.

First of all, it should be realised that the original purpose of offering a discharge to honest debtors in the United States was to encourage such persons to cooperate in turning over all their assets to the bankruptcy court. Thus, the reasoning holds that creditors will benefit by gaining more assets at less expense. Through debt settlement, European insolvent persons will be given a greater incentive to cooperate in turning over their assets and to give information about their past and future financial position. This, in return, will be less costly to creditors, for they will not have to spend a great deal of money on, often ineffective, individual debt-recovery from their reluctant customers.

A proper collective procedure in cases of insolvency, whereby all creditors are compelled to take each other into consideration, averts a disastrous battle of interest among the creditors themselves. Leaving this problem for the market to resolve, leads to counter-effective consequences as individual creditor remedies are bad for the creditors *as a group* when there are not enough assets to satisfy all who are owed money.

The basic principle should remain that everyone ought to pay back the debts he has contracted. This principle should not be transgressed in an unacceptable way. The granting of credit would suffer if professional lenders could no longer rely on the fact that debtors are obliged to repay the money they have borrowed. Additionally for society as a whole, it would not be advantageous for the granting of credit to be hampered unnecessarily.

Therefore, it is fully recognized that there are legitimate creditors' interests that have to be taken into account in any new regulation. Sufficient incentives will have to remain for debtors to pay

back their debts, and there must be adequate opportunities for taking strong action against abuse by debtors (e.g. exceptions to discharge and a 6-year bar).

Every limitation on liability implies the possibility of abuse and improper use. As in every form of collective good or insurance, the danger arises of «moral hazard» created by the «free rider» who shifts the consequences of his own lack of responsibility to others. If debtors deliberately take on too much credit in order to harm creditors, or operate in any other dishonest way, there ought to be adequate sanctions which discourage such behaviour and which put the financial consequences thereof with the dishonest debtor. In return for a new chance, a debtor has an obligation to deal fairly with his creditors.

In trying to prevent abuse in the consumer sector, we can fully take advantage of experiences gained in fighting abuse by legal persons. In addition, lenders have, as a result of technological developments in the field of credit information, many effective other possibilities and mechanisms at their disposal for preventing debtors from making reckless use of debt settlement. The risk of breach of trust is restricted because the debtor usually has a permanent relationship with his creditors. Also in some member states, very sophisticated systems of credit referencing exist, which is making it steadily unattractive for a consumer to be registered or perceived as an intentional defaulter.

This does not mean that we should adhere to a view that everything that is in the interest of creditors is «ultimately» in the general interest. The extent of abuse can be put into perspective with reference to the US. *Luckett* has shown that the availability of credit in the United States has not decreased as a result of a higher bankruptcy rate. Most importantly, he notes that the losses for creditors have always been limited (i.e. bankruptcy losses amount to about 0.1 to 0.2% of total credit outstanding). Even in the period from 1984 to 1986, when the personal bankruptcies rose tremendously, the losses for the creditors rose by a mere 0.05%. This loss rate has had an almost negligible impact on profitability. *Luckett* concludes therefore, that even sharp increases in personal bankruptcy seem unlikely to endanger the financial health of lending institutions to any significant extent. For many credit grantors, money-lending is «the-only-game-in-town». Competition in a free market will ensure that certain groups of consumers will not be excluded from credit, or that the price of credit will rise to enormous heights.

All the evidence shows that most persons view debt payment as a moral duty. They repay their debts not so much because it will bring about the most good for themselves or for all, but because it is proper and right to pay one's debts. The research of *Sullivan et al.* (1989) shows that in the United States, only a few people file for bankruptcy who do not have overwhelming debts. Moreover, those who go bankrupt do not generally apply until they have tried to repay their debts for a period longer than was reasonable, considering the disastrous state of their affairs.

In the same research, it was found that only a few bankrupts were possibly abusing the system in the United States. Debt settlement should not be based only on a small group of potential abusers, but it should be an arrangement that helps those who need it. As was demonstrated by Professor Karen Gross at the Conference, the US Bankrupcty Code for consumers is amended in order to make it more difficult for consumers to get rid of their debts.

Bankers like to predict dramatic consequences for the availability and price of credit every time their rights of security are the subject of discussion. In 1970, a major decline of consumer credit was forecast in America when the law prohibited finance companies from taking all kinds of household furniture as a security. The legal change had no such affect and growth has steadily continued ever since. The intransigent reaction of creditors is understandable. Nobody voluntarily gives up a privileged situation, and lenders are no exception to the rule.

The vast majority of credit in the private sector is granted without collateral and is repaid without any problem. The future income of the private individual is usually, owing to social security, fairly predictable and therefore a reliable security. Still, it has not been proven that the banks' need for more security must be met, because otherwise the necessary credit loans would not be granted.

Furthermore, stipulations for security by one creditor often involve the overcharging for rights at the expense of other creditors.

Credit is based on mutual trust. Consumer credit could only develop because clients generally paid back the money lent to them. The entire credit system is dependent on the good faith of the debtor who feels compelled to pay. «Good faith is presupposed, bad faith has to be proven» is a fundamental rule of private and commercial law. It will not always be easy to establish when «unfortunate, but in good faith» passes into «culpable negligence» and that again into «wilfully in bad faith».

3. Towards a model solution: collective mechanisms for consumers with multiple debts

A combination of legal change and debt counselling

Over-indebtedness is traditionally dealt with in two separate spheres. Lawyers define it as part of the law of executions, while debt counsellors and social workers see over-indebtedness as a social problem. Defining the problem is very important, because it frames to a large extent the solutions one conceives. One of our aspirations with this Model is to bridge the gap between the legal and the social spheres. The most effective approach is a combination of the two: over-indebtedness should be dealt with as much as possible by professional and independent debt counsellors, while the law should be changed in order to facilitate and to strengthen voluntarily negotiated debt settlements. The member states have a double task to fulfil; they have to amend their existing legislation and they must resource and further the development of professional and independent debt counselling.

The ideal model is such that the law prescribes the basic requirements of a Debt Settlements. The debtor has to place a certain part of his future income at the disposal of his creditors for a maximum period of four years. In addition, the debtor must sell his non-exempt goods. This approach (a combination of chapter 7 and 13 of the American Bankruptcy Code) is adhered to by the French law and in the German and Dutch laws. The combination of the proceeds of the liquidation and the disposable future income is to be distributed among creditors. This combination of liquidation and a reorganisation plan has two advantages: it prevents bankruptcy planning by consumers and it aims at delivering substantial yields to creditors as it takes all resources of the debtor into account.

In return for turning over parts of his future income and his non exempt goods on the basis of an approved plan, the debtor receives a discharge from the remaining debts after a period that should not exceed four years.

The law should provide an orderly procedure that is fair to creditors, debtors and society at large. The legislator should set legal standards for several key issues (see 12.2 in Huls and others 1994).

Besides enacting new legislation, member states should establish and encourage professional and independent debt counselling that specializes in negotiating voluntary repayment plans with creditors on the basis of standardized norms and practices (see 12.3 in Huls and others 1994). The combination of the two responses most likely will produce the optimum results.

Debt issues should be kept outside the courts as much as possible. Professional debt counselling should play a vital role here. An adequate approach to the financial problems of private persons requires skills that lawyers do not acquire in the course of their education. Furthermore, the size of the debts outstanding is usually too small to justify calling in attorneys at commercial hourly rates.

The judiciary must be relieved from numerous individual proceedings, attachments and the like, which at present are often litigated at the same time against diverse creditors whose individual claims cannot be satisfied due to the insolvency situation.

A collective approach

Experience shows that despite all the attempts legislators have made to regulate the individual credit behaviour of banks and consumers, the emergence of overindebtedness could not be prevented. In order to respond adequately to this problem, it is necessary to broaden the scope of conventional policies.

In the first place, it is essential to shift from an individual to a collective approach. A consumer in financial trouble hardly ever has only one creditor. The general rule is that an overindebted debtor has many creditors who all want to get paid. In that case it is therefore necessary to face the problem of multiple debts. The troubled relationships between one debtor and his many creditors cannot be dealt with adequately on an individual basis. Thinking about debt settlement means thinking in terms of the collective of creditors.

Second, the scope should be broadened to other debts apart from credit. Typically an overindebted consumer has also housing-, tax-, utility debts and the like. For a really effective approach to the problem, one cannot restrict solutions to credit alone; the collectivity of debts must be covered.

The relevance of legal aspects

Although we are in favour of an extra-judicial approach, this does not mean that legal backing is not required. Often a voluntary workout is frustrated because one creditor does not want to cooperate. Because the other creditors only want to take part in a arrangement if all the creditors are included, it is necessary that debt counsellors have leverage to force unwilling creditors into the agreement. Although in many member states major commercial creditors have a growing inclination to take part in voluntary workouts, this is not enough to make the system work satisfactorily from the perspective of the consumer with multiple debts. Often, the creditor has the law on his side and he can not be persuaded to take part in the workout. Public creditors (utilities, public housing authorities, etc.) especially are often hard to persuade to cooperate. Here the assistance of the legislator is required.

In France, there is a Committee empowered to handle the solving of debt situations, it is possible to go to court if a creditor does not want to agree to a settlement which the Committee has proposed. The Judge can enforce such a settlement.

Legal intervention is also indispensable because assessment and restriction of property and of creditors' rights are at issue frequently, as well as for the regulation of legally approved methods of execution. Therefore the main principles of the new chance policy must be laid down in the law.

Two-tier system

The institutional framework we propose is such that voluntary workouts are negotiated as much as possible «in the shadow of the law». We propose a two-tier system in which the debt counsellor formulates proposals for repayment plans on the basis of the principles described in the law. In the first tier process the debt counsellor must determine the causes of the financial problems of the debtor. Advice can also be given about better budget management.

In an objective and expert way an analysis must be made of the debt position and the redemption capacity of the debtor, so that a realistic plan can be proposed. If the creditors agree, the proposal should receive the binding force of an agreement. The court can routinely confirm such a negotiated plan to give it a secure legal status. Only under narrowly defined circumstances, may the judge change or dismiss debt settlements that are agreed upon by all creditors.

If a voluntary agreement cannot be reached, the debt counsellor sends his proposal to the judge, who decides after a hearing. This is the second tier, where the judge acts as decision maker in contested cases. The court must not be inundated with routine cases in which the exact amount of the monthly rent or the value of a second hand car etc. is debated. We can learn from the

Danish experience that these questions do not relate routinely to legal matters that the judge should decide upon. This system has been chosen in the final version of the Dutch Act.

It is desirable that within the judiciary more attention be given to debt settlements for consumers. A certain specialization for judges is needed too, although it is by no means necessary to develop a separate Bankruptcy Court system along American lines.

How to avoid stigmatization?

The emphasis on debt counselling may contribute considerably to avoid the stigma associated with over-indebtedness. For almost any European debtor, going to court means to face loss, because the creditors have so many legal instruments at their disposal — bankruptcy being the most threatening. Turning debtors away from the court system is aimed at reducing this experience of failure and the stigma attached to over-indebtedness.

The change from liquidation to reorganization requires a language with new and unburdened legal definitions. New terms may help to strip over-indebtedness of its stigma. Here the vocabulary of the American Bankruptcy Code serves as an inspiration, too. For instance, the consumer in financial trouble is not called a delinquent or a bankrupt, but just «a debtor».

For this very reason it is important to define the problem in such a way that the relation with bankruptcy, failure, etc. is lost. Terms like «Geldsanering» (Denmark), «Verbraucherinsolvenz» (Germany), «Plan de redressement» (France) and «Schuldsanering» (the Netherlands) indicate that legislators recognize the need of this new vocabulary. In this report we propose to use the term Debt Settlement.

Another aspect that may contribute to reduce the stigmatic character of the procedure is to place the regulation outside the bankruptcy legislation in a separate Insolvency or Saneringsprocedure which is set apart from the Bankruptcy Laws. So far only Denmark and France have opted for this approach.

Restricted role for criminal law

One of the ambitions of our proposal is to deprive bankruptcy and over-indebtedness of its penal and criminal connotations. In most cases the denial of the discharge or the dismissal of the case, may be enough to guarantee honest behaviour by the debtor. This proposal does not aim to change the Penal Code, so explicit criminal behaviour can be dealt with via the criminal justice system.

3.1. Legislation

The legislation must prescribe an orderly procedure of the debt settlement and also provide for the basic elements of the substantive aspects.

3.1.1 The procedure

In the procedure, six successive stages may be distinguished: the application by the debtor and the automatic stay (the breathing space), the preparation of a proposal, the decision on the proposal, the period of the Debt settlement, the end of the procedure and finally, the aftermath.

A. Breathing space

Who is eligible?

It is realistic to follow the Danish, French, English, German and Dutch approach, and allow only debtors access to the procedure. Experience shows that a debt settlement can only succeed if the debtor himself believes in making real contributions to the plan over a considerable period of time. Therefore creditors cannot force a debtor into a debt settlement. They must have the possibility of raising objections with the judge if they think they are not being treated fairly in the proposed plan though. Creditors should not have the power to prevent a debtor from securing a new chance in life.

Indirectly, the creditors can force a debtor to a Debt Settlement, namely by filing a petition for his bankruptcy. Then the debtor has to make a choice: either endure bankruptcy or propose a Debt Settlement. In the Dutch Act, a debtor may convert a bankruptcy petition already filed by a creditor, into a Debt Settlement.

Consumers

This proposal concerns only consumers, so we don't have to answer the question whether the insolvent (former) self employed persons must be included. However, Denmark, Germany and the Netherlands open their procedure also for small businesspeople. Especially the (ex) self employed seem to be an important target group of a debt settlement.

The majority of consumers will be salaried workers or receivers of social benefits, but also free lance workers may use the procedure.

Debt limits

It may be wise national policy to stipulate that a debt settlement is not possible in the case of very large amounts of total debt. The proposed Model sets out to offer «the man in the street» a new perspective. For debtors with extremely large debts, it is less problematic to apply the existing general laws.

The upper limit should not be to low, because then the middle classes and especially home-owners are excluded, as experience in the United Kingdom shows.

On the other hand it is neither sound policy — as the Danish law does — to prescribe a rather high minimum level of debts. This constitutes a barrier to the poor consumer, to whose problems the law should also respond to.

Good faith

We can learn from the French experience that the rigid application of a good faith test at the beginning of the procedure easily leads to strong normative judgements of the life style of debtors and prevents him from securing a new chance. How many credit cards may this family use? How much debts is one allowed to contract? Especially if these questions are raised by opposing creditors in order to preclude the debtor access to a Debt Settlement procedure this will encourage fruitless discussions and investigations. One can also imagine that a debtor may respond likewise by raising counter-questions or allegations about aggressive lending policies of the creditors: «These unsolicited credit cards were sent to me by this bank», or, «That creditor persuaded me to raise my credit limit».

It is important that the Debt Settlement is not a haven for people who practise fraud but offers only relief for the «honest but unfortunate debtor». It is best to approach the problem of good faith in another way. As we have argued in chapter 10 (Huls and others) the principle «good faith is supposed, bad faith must be proven» is applicable here, too. To keep the system fair the law may declare some debts not susceptible to discharge.

The legislator may also set limits to repeated use of the protection of the law. It will not do for a debtor to be able to prevent his creditors from exercising their rights permanently. Therefore our Model contains a provision that, once a discharge has been obtained in the scope of a Debt Settlement, a discharge cannot be granted again within a specific period of time, say six years.

A third way to ensure that only honest debtors use the system is to give the judge authority to dismiss a case if a debtor does not behave responsibly.

Automatic stay of debt collection efforts

It is an essential part of the new chance policy that all executions of creditors are automatically stayed from the very moment the debtor applies for the protection offered by the law. Because the debt settlement has as its aim an orderly treatment of the collectivity of the creditors, all individual collection efforts of creditors must be stopped at once at the very moment the debtor decides he needs some breathing space.

All legal and informal procedures to collect a debt are suspended from the moment the debtor has applied to the court. Repossession of goods may not be carried out any further, and all garnishments or levies are suspended. Also an existing wage assignment is not valid anymore from the moment the debtor files his petition.

Who is protected?

If a head of a family files for a debt settlement it is logical that the dependent members are protected by the law as well. It may be practical to apply jointly for a debt settlement where partners have many debts for which they are both liable. Then both incomes can be used to draw up a realistic plan.

B. The preparation of a plan

A financial statement

Through the application debtor has to give a complete insight into his financial situation. It is necessary that the debtor and the debt counsellor meet personally. Details must be given of the earnings and expenses of the household. It must also be investigated whether or not income can be enhanced — for example, by claiming subsidies or benefits to which the debtor is entitled. On the expenditure side, consideration should be given to the question of whether particularly expenses can be avoided or reduced. The financial statement must also provide an overall picture of the debt burden.

For cost reasons, it is desirable that the debtor be subject only to the supervision necessary for the correct drafting and fulfilment of the plan. Therefore, the debtor's own statement should be the starting point, unless there are indications that verification is necessary. It is also advisable that random outside audits be carried out on these statements from the debtor to guarantee the fairness of the system.

If it appears that the debtor has acted fraudulently, or otherwise in a dishonest way, then the debt counsellor must decide whether the behaviour of the debtor is serious enough to preclude further cooperation. In the latter case, the debtor can still appeal to the judge.

The debtor is also obliged to state where specific goods are located. This is especially important when objects financed by a bank appear not to be in the possession of the debtor, or when certain valuable assets have disappeared — perhaps because they have been sold.

Furthermore, the debtor must list his monthly income, whether it is acquired by paid labour or by social welfare payments. Benefits such as children's allowance, alimony, rent subsidy, and the like should also be listed. If the debtor files an application with a spouse or partner, the other person should also provide the necessary data.

Finally the debtor must list his assets, such as his privately owned home, savings balances, pension rights, stocks, jewelled and durable consumer goods, and indicate their value.

On the basis of the data in the Financial statement, the debt counsellor and the debtor elaborate a proposal for a plan. Earnings minus fixed charges and essential expenditure equal the monthly amount available for the plan. This «disposable income», in combination with the value of the non exempt goods, constitute the basis for the redemption scheme in the plan.

It is important that a realistic proposal is made towards creditors. To establish the feasibility of a plan it is sensible that the debtor starts to make payments from the very moment that the proposal is formulated.

C. The decision about the proposal

The role of creditors

The proposal that is prepared by the debtor and the debt counsellor must be discussed with creditors as soon as possible, normally within two months. Creditors may question whether the

proposed settlement meets the requirements of the law and whether their position is adequately dealt with. Also they may object to their status in the plan, they may assert that the debtor has hidden assets, or has acted detrimental to the creditors etc. The debt counsellor will try to resolve the objections and problems by adjusting the proposed plan or by convincing one of the contesting parties to drop their objections. When unanimity is reached and the proposal has been approved by the creditors, the agreement should have binding force between them.

If the creditors do not agree on the proposed debt settlement, the law may rule that a qualified majority, say 75% of the creditors, can overrule a minority, which then leads to a composition. This has the same effect as an agreement.

The judge

It is also possible to give each of the dissenting creditors the right of an appeal to a judge. One can also leave absolute discretion to the judge to confirm the proposal where the creditors are in disagreement.

This stage of the procedure ends in a decision as to whether the debtor will receive the protection of the law or not. If the judge rejects the debtor's proposal, creditors regain their rights according to general debt recovery law and may continue to collect their claims on an individual basis.

The plan administrator

If the law applies, the judge will appoint a plan administrator — most likely the debt counsellor. In the Dutch Act an important role is conceived for the Municipal banks. However, it is not sound policy to create a legal monopoly for debt counsellors. The judge must have the discretion to appoint another administrator as well — for instance a lawyer when intricate legal matters are at stake or a specialized institute, e.g. if the debtor has severe personal problems.

D. Restructuring the household

If the proposal has been approved, the debtor must make payments to the plan administrator and his non exempt goods will be sold. During the plan, the debtor is restricted by the conditions of the plan.

The debtor may operate as independently as possible during the plan and should not be put in custody, as is the case in present bankruptcy law in the Netherlands and Germany.

The debtor retains his legal ability to act and his power of disposal to enter into agreements. One exception should be made: that the debtor only be permitted to conclude new credit agreements after obtaining the administrator's permission. For the rest, it is his own responsibility to ensure that the fulfilment of the plan is not endangered.

Modification

Experience shows that circumstances can change enormously in the years that a plan may last. A debtor may lose his income, he may inherit a fortune, or his wife may find a job. For these reasons it is important that modification of the plan is possible in the meantime. The law should provide for a flexible mechanism to adapt the payments of the plan to the changed position of the debtor.

Both the debtor and the creditors may apply for modification of the plan. Creditors may ask for higher monthly payments if the position of the debtor has improved. Debtors may ask for lower payments or a hardship discharge if their financial position has changed dramatically for the worse.

Role of the plan administrator

The plan administrator is an intermediary between debtor and creditor. He must certainly be capable of operating tactfully and cautiously between the Scylla of a therapist and the Charybdis of a debt collector.

His main task in the debt settlement procedure is monitoring the plan. It is not desirable for the administrator to inflict sanctions on the debtor; for that, the judge is the right person to decide whether the case of a debtor should be dismissed.

The plan administrator has the authority to submit to the judge for avoiding certain transactions that took place just before the application and were clearly intended either to benefit one creditor above the others or to withdraw assets.

Once the plan has been drawn up and accepted, the administrator takes care of the processing of incoming payments and payments to creditors. It is sensible to grant the administrator the legal power to collect payments from the debtor via his employer as well.

The plan administrator must also be a source of information for creditors, as he is looking after their interests as well. He is disbursing agent of the money that becomes available.

The plan administrator is appointed by and responsible to the judge. Its is therefore important that they cooperate.

E. The end of the procedure

Normally a procedure ends at the moment that is foreseen in the plan. Then the procedure ends with the judge's declaration that the debtor is discharged of the remainder of his debts.

If de debtor acts irresponsibly during the plan the creditors may file a complaint with the judge. If the judge, after a hearing, accepts the complaint, he may dismiss the case and decide what the consequences are in relation to the efforts already made by the debtor.

F. The aftermath

If a legally provided discharge comes about, certain creditors could still try to get their claim totally settled afterwards. For instance creditors with whom the debtor has a permanent relationship, such as the local shopkeeper, the landlord, the energy company or the bank could easily be tempted to make the continuation of the relationship dependent on payment of the remainder of the debt by the debtor. Such a practice must be regarded with great scepticism.

Closely related to the foregoing is the so-called voluntary payment by debtors of debts that have been discharged in the proceedings. For this reason the Dutch proposal does not give the debtor a real discharge of debts, he keeps an obligatio naturalis, a moral obligation to pay. Although it is impossible to deny a debtor his right to satisfy unsettled debts on a voluntary basis after the Debt Settlement, the legislator should not encourage this.

3.2. Substantive law

Under this heading, we describe the material contents of the Debt Settlement. The legislator should decide on the key issues that could not be left to the debt counsellors. We mention three issues, the requirements for a plan, the exemption scheme and the exceptions to the discharge.

Legal requirements for a plan

In order to be approved by the judge, a Debt Settlement must meet the following legal requirements:

a. best effort by debtor;

b. maximum period of duration of four years;

c. classification of creditors;

d. long term commitments;

e. no new interest.

ad a. *Best effort test*

From case to case it must be considered what may be reasonably asked from the debtor. In principle, it is assumed that he «is doing all he can» during the term of the plan. He should exert himself to the fullest to earn the premium, a discharge of the remainder of the debts.

In most European countries a debtor has some minimal amount available which can be contributed to the plan. Even the minimum wage or social security benefit, contains some margin. Debtors with a higher income must pay a higher monthly contribution. For this purpose, the standards developed by the jurisdiction concerning alimony and the expertise of the debt counsellors can be built on.

A legal debt settlement must also be available for people who are now turned down by debt counsellors, because of «lack of redemption capacity». It is our aim to offer a perspective even to these so called hopeless cases. For them a minimal percentage plan may constitute their best effort, and even «zero plans» should not be excluded.

ad b. *Maximum four years*

In France the duration of the plan is set at four years, in the United Kingdom it lasts for two to three years, in Denmark the duration of the plan is at most four to five years, in the Netherlands, the period is three years, but in Germany it is thought that seven years is suitable.

A legal maximum of four years for the duration of the plan seems optimal. At present a maximum period of three years is argued for by most debt counsellors. This seems to be the maximum period that consumers are willing and capable to expose themselves to the limitations of a plan.

Because our Model will have a greater range, and also includes the middle classes, who have bigger debts, some extension of the period of three year is needed. Four years is the legal maximum. In practice there must be a significant flexibility with respect to the duration of the plan.

ad c. *Classification of claims of creditors*

The amount and order in which claims are to be paid must be specified in the plan. For this purpose, claims need to be classified. First, the costs of the proceedings need to be paid; Second, the secured part of the secured claims. Third the preferential creditors and finally the unsecured creditors.

Cars, household goods, boats and caravans are commonly contained as securities in the consumer lending sector. The market value of these goods at the time of the application of the settlement should be appraised, after which the consumer has two options: a. either the security is given to the creditor, or b. the debtor keeps the collateral — in which case complete repayment of the value of the goods should be included in the plan. The remainder of the claim in both cases is dealt with on the same basis as unsecured claims.

Several creditors have preferences according to the national laws. The most important legal preferences are those of the taxman and the landlord. Apart from this, some creditors in practice have an «actual preference». Thus the energy company can refuse further fuel supplies if the debtor does not continue his payments, and banks can use the right to «sett off» claims.

It might be practical if the law provides that preferred creditors receive twice as much as unsecured creditors under a plan.

ad d. *Long term commitments*

The debtor must decide what he does with contracts that last longer than the duration of the plan, and that require payments during the plan, e.g. agreements concerning rent, electricity, life insurance and the like. He must keep up regular payments under these agreements, otherwise his contracting partner may terminate the agreement. Arrears may be cured under the plan, and a life insurance may also be liquidated. In some cases it might be necessary for a debtor to rent a cheaper house.

As far as mortgages are concerned, the plan must provide for the repayment of accumulated arrears and a continuing payment of the contractual instalments. It is also conceivable that the judge should be given the authority to stipulate that during the plan, payment of e.g. three quarters of the instalments would suffice. If it appears that the debtor cannot pay the instalments (which may have been adjusted by the judge), the dwelling must be sold. The remainder of the debt is an unsecured claim and may be subject to discharge, as is the case in France. If the debtor has equity in his home and the plan does not provide for total satisfaction of the creditors, they can ask the judge to declare that the debtor does not make his best effort.

ad e. *No interest accruing*

Interest is stopped from the moment the plan is filed. Only if the debtor is capable of paying off 100 percent within the legal framework and if there is also room for payment of interest should the plan provide it.

Besides the discharge of debts an adequate *exemption scheme* is of utmost importance for the new chance policy. So far, hardly any country has modernized its old exemption laws. Each member state should decide which assets and which part of the income it wants to declare outside the reach of creditors, even if it serves as collateral for a secured loan.

In many countries a certain percentage of the wages and social benefits, plus also (parts of the) pension schemes are immune for attachments and the like. So a basic level of the income is secured from the debtor's point of view to meet his daily expenses.

As far as goods are concerned, a broad consumer exemption of household goods and cars is needed in modern society. A legislator may also declare a certain equity in the house to be exempted if he wants to prevent forced sales of houses.

Some debts must not be susceptible to a discharge, because their payment serves a goal that ranks higher than the new chance policy. The law must contain some *exceptions to discharge*. A Debt settlement should not be allowed to free the debtor from alimony set by a judge. Although the person obliged to pay alimony can perhaps postulate rightfully that a lengthy alimony deprives him of any possibility for a new chance in life, the weighing of his interest versus that of his ex-wife and his children will have to take place within the scope of divorce and alimony.

Furthermore, liabilities as a consequence of criminal intent or gross negligence should not be eligible for a discharge, For the same reason, criminal law fines may not be discharged. Also credit agreements concluded during the plan, which are entered into with the consent of the plan administrator cannot be discharged.

Public debts (tax, utilities etc.) should be included in a legal debt settlement procedure, possibly with some restrictions for student loans.

3.3. Professional and independent debt counselling

In most countries, money advice and budgeting help is part of social work in general. It is emphasized here that financial counselling requires specialization. Professional debt counsellors must have the following tools at their disposal:

3.3.1 Tools

Information and advice

Information and advice is given by almost every debt counsellor. It suffices for many clients that they get information about what their rights are, how they have to respond to a summons of a creditor or whether the loan they have contracted is in accordance with the law.

Most of the advice and information is given on an individual basis, but there are promising examples of collective information and advice as well. In the United Kingdom especially, the Money Advice Centres are active in promoting self help among their clients. Leaflets inform the consumers how they can handle their own financial problems. Also the National Debt line service

developed in the United Kingdom is an example of a promising new form of debt counselling, whereby clients are provided with self help kits, information and support over the telephone to enable them to negotiate with creditors and courts themselves.

In the USA the CCCS bureaux have a toll free telephone number that connects and directs clients to the nearest Consumer Credit Counselling Bureau.

Budget advice

The next step in debt counselling is advising consumers how to manage their financial affairs in a more efficient way. Here the debt counsellor intensifies his contact with the client, and the latter is encouraged to inform the former about his then total income and outgoings. The counsellor supports the client in a double way: by advising on maximizing income and minimizing outgoings.

Fortunately, technological developments offer promising possibilities for professional debt counselling. Numerous computer programmes have been developed in several European countries to standardize budgeting, money and legal advice. Two in particular CALS and CADAS, are broadly used in Germany, and are being adapted for the Belgian, British and Irish debt counselling context as well. In some programmes even detailed legal information is included (NIBUD, CALS).

Bargaining with individual creditors

While budgeting restricts itself to the relationship between counsellor and client, the next step may be to contact a creditor. Often counsellors assist the debtor in bargaining an out of court debt rescheduling arrangement with individual creditors. In most European countries, the assistance of a lawyer is needed where a creditor has already gone to court and the debtor needs legal representation.

Debt settlement

The help required is particularly intensive where the debtor has more than one creditor. In such circumstances the need for the drafting and bargaining of a debt settlement with all the creditors is vitally important. Here France has developed a legal basis for out of court arrangements, but unfortunately only for 100% plans. This constitutes an unnecessary restriction of the activities of the debt counsellor. The experience in the Netherlands shows that creditors are willing to accept percentage plans — including the discharge of debts — if the debt counsellor proposes on the basis of equitable principles.

Social loans and guarantee funds

In Ireland, the Netherlands and Germany local or national governments have created Funds that back loans to overindebted consumers. If the voluntary workout fails for one reason or another, the execution of the plan is guaranteed via the Fund which pays the creditors directly.

In the Netherlands, the Municipal Credit Bank (MCB) go even further; they provide social loans as a way of debt settlement, the MCB bargain with all the creditors for a certain percentage of their claim and pay them off at once via a loan to the consumer. Afterwards, the latter must repay the loan — at a modest interest rate — to the MCB. In such a case the MCB has become the only creditor of the consumer.

3.3.2 Specialization and professionalization

It follows from the above that debt counsellors need to have knowledge of financial, legal and social aspects of over-indebtedness. Because money is involved, the quality of the assistance must be of a professional nature. A counsellor should have insight into how financial markets work; how banks operate; what the debt enforcement strategies of mail order houses are as well as what the disconnection policies of utilities are. Creditors have a material interest at stake and operate both aggressively and diligently to make sure that they get their money back. Especially in the case of consumers with multiple debts, counsellors have to defend their clients on several

fronts. Moreover, they must be able to do basic accounting and have understanding of welfare law. They must handle computerized advice assistance programs; they must know key areas of debtor-creditor law and must also have insight into the ways creditors operate.

Specialization and professionalization are thus the key words for debt counsellors. They must be knowledgable in household economics, they must develop bargaining skills and they must possess the necessary social skills to understand the problems of their clients. Increasingly, detailed legal knowledge must become a part of their professional aptitude.

Debt counselling is often provided by social workers with strong political and social beliefs which they easily impose on their clients and the creditors. An empathic attitude is very important to act convincingly as a debt counsellor. It is essential that a debt counsellor gains the confidence of the debtor.

3.3.3 Independence

Independence creates the basis for the establishment of trust. Independence vis à vis the creditors, and also vis à vis the State. It is not acceptable that the State is critically important for debt counsellors. It is not acceptable that the State, in return for financing the debt counsellor, acquires a privileged position in the Debt Settlement. As the State is often a major creditor, it is as important for the debt counsellor to be independent from the State as it is to be independent from commercial creditors.

It is also essential for their acceptance by the credit community that debt counsellors do not present themselves as the advocates of their clients and operate from an antagonistic point of view. The ideal debt counsellor is a mediator. In cases of a debtor's incapacity to pay, there are normally no distinctly opposed interests with respect to the joint creditors that need to be fought out in adversarial procedures. Debt counsellors should behave according to principles of distance and objectivity.

3.3.4 Code of Conduct

The acceptability of debt counselling can be improved further by establishing a Code of Conduct that is known to both the creditors and the public at large. Debt counselling on a professional basis must operate routinely on the basis of general rules, although there must always remain some room for discretion because of the idiosyncrasies of each case.

It is desirable that debt counsellors develop generally accepted standards of their profession. Principles should be adopted as regards to questions like: how the ability to pay is determined, how much supervision of the debtor is needed etc. These standards should be discussed with the umbrella organizations of creditors (i.e. financial institutions and public creditors). The optimal result would be that an agreement is reached on a voluntary basis as is the case in the Netherlands where the Municipal Credit Banks have reached agreement with the commercial banking world in the Debt Rescheduling Code.

3.3.5 Debt counsellors as plan administrators

If the independent and professional position of debt counsellors is guaranteed, we see no impediment for an appointment as plan administrator. We think the credibility of the profession will increase, if this official task is part of the counsellor's activities as well.

I realize that this task requires a change of attitude. As a plan administrator, the debt counsellor must assume a neutral position between the creditors and the debtors, where traditionally he sees himself as an advocate of the debtor. Social workers often don't see it as their task «to collect money for the creditors». We think this adversarial attitude is dysfunctional in the case of an overburdened debtor, where no one gains in bitter fights from ideological positions.

3.3.6 Who should pay?

The experience in the United Kingdom shows that costs can constitute a barrier for the consumer to enter into bankruptcy proceedings. Costs should not prevent the consumer to seek the relief that the law offers. Traditionally the State and private organizations are the main fund raisers for the debt counsellors in most Member States. In Denmark the State pays the Trustee in the «sanering-procedure». As many states face budget restraints, and charities are unable to meet the demand for budget help, it is necessary to look for supplementary funding.

I adhere to the principle that all parties benefiting from the procedure should be asked to contribute a reasonable share. From this it follows that the debtor should pay a limited amount, e.g. ECU 100, which may be included in the plan.

There are strong arguments for financial support from the government. We have seen that credit has been stimulated everywhere by the Member states. So the State has a responsibility as well. The public interest is also served by a good Debt-Settlement procedure. Investments will be necessary to set up a network of debt counsellors with nationwide coverage. It is also necessary that the plan administrators or trustees are properly equipped to fulfil their legal duties. Extra staff will have to be contracted and trained.

I have no reservations concerning the request for contributions from the creditors as well, because their interests are also protected, as each creditor is prevented from trying to get paid at the expense of other creditors. Moreover, the plan administrator makes inquiries into the debtor's payment capacity, which the creditors would otherwise have had to conduct themselves (recourse information). From the viewpoint of the bank, the activities of the social worker are costly like those of a debt collector. A contribution of ten percent of the money received under a plan by the creditor is reasonable.

In the USA creditors do contribute to the CCCS programmes. From the creditors point of view a repayment plan is just one of the many ways to get paid. Professional creditors take into account beforehand that debt collection implicates certain costs. As long as they can control and calculate these costs beforehand, they should not in principle be opposed to contributions, especially if these costs of business are deemed fair and if all other creditors pay as well.

On the other hand many debt counsellors are virulently against receiving any money from the «other side». They deem this to be incompatible with their independence and the ethics of their profession. Ideological reasoning of this kind is not a sound basis for the discussion. It should be remembered that creditors contribute already considerably to the plans in the form of losing interest and parts of the principal in accepting a percentage plan. So I do not see any principal objections to creditor contributions to the plans. Much more important is that neither public nor private creditors dominate the supervising bodies of the debt counselling agencies.

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