The regulatory framework of consumer over-indebtedness in the UK, Germany, Italy, and Greece: comparative profiles of responsible credit and personal insolvency law*

Federico FERRETTI, Riccardo SALOMONE***, Holger SUTSCHET****, and Victoras TSIAFOUTIS*****

ABSTRACT

This article compares and analyses the regulatory framework addressing consumer over-indebtedness in the UK, Germany, Greece and Italy against the policy and law of the European Union. It aims to capture the preventive and the curative measures against over-indebtedness in the selected Member States to assess the impact that EU policy and law is having on the internal market and effectively tackle a problem that affects millions of European consumers. The ultimate goal is to identify good practices and major shortcomings that the EU should attend to repair failures that an uncoordinated nature of national regimes could generate in a common market and its side-effects, as well as the economic and social cohesion of its citizens. The paper concludes that if Member States to some extent have harmonised their preventive measures – yet with differences that need attention – the cure of over-indebtedness remains to individual but uncoordinated national initiatives that expose an under resourced strategy at EU level.

1. Introduction

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** Principal Investigator. Senior Lecturer, Brunel Law School, Brunel University London (UK). Avvocato, High Courts of Italy. Member of the Financial Services User Group (FSUG). The FSUG is an expert group established by the European Commission to advise and provide opinions on the preparation of legislative acts or policies affecting users of financial services and their practical implementation. The usual disclaimer applies.

*** Associate Professor of Labour Law, Faculty of Law, University of Trento (Italy) on Italy.

**** Professor of Commercial Law, Labour Law and Comparative Law at University of Applied Sciences Osnabrück (Germany) on Germany.

***** Lawyer (Athens Bar) and Legal Advisor of EKPIZO (Greek Consumer Association with the aim of protecting consumer rights and improving the quality of life) on Greece. The usual disclaimer applies.

This paper compares and examines the legal framework of consumer over-indebtedness in four selected Member States against the policies and law of the EU. It aims to capture the real extent to which the EU addresses a problem that affects one in nine people across the Union[1] and that impacts severely on the lives of those who are affected, at the same time carrying great social and economic costs for the EU and the integration of its markets. By overviewing the selected national regimes, the ultimate goal is to assess the impact of EU policies and law and the resulting implications for the internal market, including the economic and social cohesion of its citizens. It purports to establish the extent of shortcomings of the EU legal framework and capture national good practices that could serve for future legislative actions. To do so, it will look at both the preventive and the curative measures of over-indebtedness, claiming that harmonisation of one without the other results in an ineffective legal regime. The selected Member States are Germany, Greece, Italy, and the UK. The regulatory regimes of these jurisdictions have been chosen to offer samples of diversity in terms of legal tradition, historical and current attitude towards personal debt, and the scale of pre-crisis household indebtedness.[2] These jurisdictions also offer an interesting comparative view from the perspective of the impact of the current economic crisis and its effect on the levels of over-indebtedness, since they are at extreme ends of the spectrum. According to the latest findings, each jurisdiction belongs to a different grouping/cluster of countries divided as being 'very high' (Greece), 'high' (Italy), 'moderate' (UK), or' low' (Germany) in terms of frequency of household arrears and percentage of total population with arrears on key commitments.[3] The selection of countries that are mature in their membership of the EU is intentional to avoid issues of financial sectors typical of the new Member States that have been through structural changes in a relatively short period of time and, consequently, have common structural characteristics that may have exacerbated the effects of the financial

[1] Eurostat, "Over-indebtedness and financial exclusion statistics", data from September 2012, available at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Over-indebtedness_and_financial_exclusion_statistics

[2] On the different legal traditions and cultural issues of personal debts see Gelpi and Julien-Labruyère, *The History of Consumer Credit* (Basingstoke, Macmillan Press 2000); Graeber, *Debt – The first 5,000 years* (Melville House 2011); La Porta; Lopez-de-Silanes, Shleifer, and Vishny, "Law and Finance", 106(6) *The Journal of Political Economy* (1998), 1113-1155; Beck, Demirgüç-Kunt, and Levine, "Law and finance: why does legal origin matter?", 31(4) *Journal of Comparative Economics* (2003), 653-675. On the statistics on level of personal indebtedness see OECD, "Household debt", in *OECD Factbook 2014: Economic, Environmental and Social Statistics* (OECD Publishing, 2014). http://dx.doi.org/10.1787/factbook-2014-27-en; See also Eurostat, *supra* at 1.

[3] Civic Consulting, *The Over-Indebtedness of European Households: Updated Mapping of the Situation, Nature and Causes, Effects and Initiatives for Alleviating its Impact* (Brussels, 2014); Bouyon and Boeri, *ECRI Statistical Package* (ECRI 2014).

turmoil or have impacted differently on the causes of over-indebtedness (e.g. borrowing in foreign currencies, heavy reliance on influx of foreign capital, transition to market economy and sudden growth in house prices with following severe negative equities, etc.).[4]

To address the questions that it raises, this paper first sets the background of the concept of consumer over-indebtedness in its EU dimension, policies, and related legal framework. Following, it presents an overview of the four national laws aiming at tackling consumer over-indebtedness from both angles of prevention and cure of the problem. As the current analysis aims to show the extent of major current shortcomings of partial harmonisation, a comprehensive account of each law lies outside the scope of this analysis and only key and summarised elements are presented. The final part of the paper draws together and analyses the presented legal regimes to identify good practices and shortcomings affecting the common market and its citizens.

2. Background

2.1 EU Consumer Over-indebtedness

Over the years there have been several attempts to understand and define consumer over-indebtedness.

On many occasions, the phenomenon has been associated with financial credit, whose cultural approach and use vary significantly from one Member State to the other. This suggestion mostly derives from the liberalisation and expansion of credit markets alongside the inevitable increased availability of credit from financial institutions to feed the consumption model of the modern society. Market deregulation, coupled with an incomplete social safety net, is often recognised as structural conditions that lead to an environment hospitable to financial difficulty.[5]

[4] E.g. see European Central Bank, *Banking Structures in the New EU Member States* (January 2005), at https://www.ecb.europa.eu/pub/pdf/other/bankingstructuresnewmemberstatesen.pdf; Farkas, "The Impact of the Global Economic Crisis in the Old and New Cohesion Member States of the European Union", 57(1) *Public Finance Quarterly* (2012), 53-70; Koyama, "Economic Crisis in New EU Member States in Central and Eastern Europe: Focusing on Baltic States", 5(3) *Romanian Economic and Business Review* (2010), 31-55.

[5] Ramsay, "Between Neo-Liberalism and the Social Market: Approaches to Debt Adjustment and Consumer Insolvency in the EU", 35 *Journal of Consumer Policy* (2012), 421-441; Micklitz, "Access to, and Exclusion of, European Consumers from Financial Markets after the Global Financial Crisis", in Wilson (ed.) *International Responses to Issues of Credit and Over-indebtedness* (Ashgate, 2013), 47-77; Braucher, "Theories of Overindebtedness: Interaction of Structure and Culture", 7 *Theoretical Inquiries in Law* (2006), 323-346.

But, if lending/borrowing certainly give rise to indebtedness, to what extent the latter turns into over-indebtedness and it is responsible for it is not straightforward and it remains doubtful.

Over time a growing number of EU commissioned studies, academic literature, but only one policy document have attempted to define the exact and univocal terms or boundaries of the phenomenon.[6] However, as such efforts have been the result of the observation of national situations characterised by structural or prolonged difficulties in repaying personal debts, a common definition or measurement at EU level has not emerged.

Even the study that makes the closest effort towards the establishment of a common definition of over-indebtedness at EU level concedes that the concept varies too broadly across the Member States. Despite attempts to identify common elements, this study has unveiled many national discrepancies in the measurement unit (the 'household' vis-à-vis the 'individual debtor'), the length of time of the financial difficulty, the type of financial commitment (e.g. the inclusion ore exclusion of the costs of living), etc. What in the end remains the common denominator in the various jurisdictions is the payment incapacity to honour the contracted obligations, but without commonality of the type of commitment.[7]

Nonetheless, despite highlighting terminological and conceptual divergences, the study has captured a multi-dimensional nature of the problem. This includes an economic dimension of over-commitments, a time dimension over a long period which makes it structural, a social dimension leading to exclusion, and a psychological dimension of stress and health harm.[8]

These conceptualisations may be a helpful resource in the understanding or recognition of the scope of the problem but its multi-dimensional notion proves difficult for a practical application, especially if it has to be translated into supranational law and the ensuing

[6] For a complete overview of these studies see Kilborn, *Expert recommendations and the evolution of European best practices for the treatment of overindebtedness, 1984-2010* (August 21, 2010), available at SSRN: http://ssrn.com/abstract=1663108 or http://dx.doi.org/10.2139/ssrn.1663108. E.g. see Reifner, Kiesilainen, Huls, Springeneer, *Consumer Overindebtedness and Consumer Law in the European Union*, Final Report, Contract Ref. B5-1000/02/000353 (September 2003); Huls, Reifner and Bourgoinie, *Overindebtedness of consumers in the EC Member States: facts and search for solutions* (Kluwer, 1994); Group of Specialists on Seeking Legal Solutions to Debt Problems (Cj-S-Debt), Final Activity Report of the Group of Specialist for Legal Solutions to Debt Problems (CJ-S-DEBT), *CJ-S-DEBT (2006) 6 Final* (Strasbourg, 18 January 2007); OCR Macro, Study of the problem of Consumer Indebtedness: Statistical aspects, *Report submitted to the Commission of the EU DG Health and Consumer Protection, Contract n. B5-1000/00/000197* (October 2001); see also Niemi, "Overindebted households and law: prevention and rehabilitation in Europe", in Niemi, Ramsay, Whitfords (eds.), *Consumer Credit, Debt and Bankruptcy. Comparative and International Perspectives* (Hart 2009), 91-104; Vandone, *Consumer credit in Europe* (Physica-Verlag 2009). For the one EU document on over-indebtedness see Recommendation CM/Rec(2007)8 of the Committee of Ministers to member states on legal solutions to debt problems (20 June 2007).

[7] OEE Etudes, *Towards a Common European Operational Definition of Over-Indebtedness*, report prepared for the use of the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (February 2008).

[8] Ibid.

conferment of a status to the situation of over-indebtedness and the scope of application of its norms. Recent scholarship has acknowledged that the continuing vacuum of a clear content-based notion of over-indebtedness not only makes the comparison between Member States difficult[9] but also a European response problematic.

The most recent study on the mapping of the situation, its nature and its causes reveals empirically how time may have come to abandon attempts to precisely define a term that the large majority of stakeholders at all levels seem to find unhelpful - from the industry to civil society organisations and from public authorities to independent experts. Consumers are considered over-indebted if they are having – on an on-going basis – difficulties meeting (or falling behind with) their commitments, whether these relate to servicing secured or unsecured borrowing or to payment of rent, utility or other household bills. This characterisation is not limited to the issue of debts stemming from financial credit but it includes all consumer essential outgoings and it is tied to income.[10]

The major causes for consumer over-indebtedness, which the literature had already acknowledged,[11] have been confirmed to be life-time events such as illness or divorce, or macro-economic factors like unemployment, declining wages, or generally low income.[12]

2.2 EU Policy and Law

Until the Maastricht Treaty in 1993 and the establishment of the single market, over-indebtedness was perceived as a problem to be addressed by national legislators. Following the opening-up and integration of national credit markets an increasing number of reports and literature have started pointing to the adoption of common principles or convergence towards a European approach to the over-indebtedness of consumers.[13]

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[9] Micklitz, "The Regulation of Over-Indebtedness of Consumers in Europe", 35 *Journal of Consumer Policy* (2012), 417-419.

[10] Civic Consulting, *supra* note 3.

[11] See, e.g., Ramsay, *Consumer Law and Policy* (Hart 2007), sp. 578-580; Caplovitz, *The poor Pay More: Consumer Practices of Low Income Families* (Free Press 1963); Adler and Wozniak, "The Origins and Consequences of Default – An Examination of the Impact of Diligence", *Research Report n. 6*, (Scottish Law Commission, 1980); Berthoud and Kempson, *Credit and Debt: The PSI Report* (PSI, 1992); Hoermann (ed.), *Consumer Credit and Consumer Insolvency: Perspectives for Legal Policy from Europe and the USA* (ZERP, 1986); Elliott, *Not waving but drowning: Over-indebtedness by misjudgment* (CSFI, 2005); Balmer, Pleasence, Buck, and Walker, "Worried Sick: the Experience of Debt Problems and their Relationship with Health, Illness and Disability" 5(1) *Social Policy and Society* (2006), 39-51; Dominy and Kempson, *Can't Pay or won't Pay? A Review of Creditor and Debtor Approaches to the Non-Payment of Bills* (DCA 2003) Vandone, *supra* note 8; Niemi, "Consumer bankruptcy in comparison: do we cure a market failure or a social problem?" 37 *Osgoode Hall Law Journal* (1999), 473-503.

[12] Civic Consulting, *supra* note 3.

[13] See the literature and reports cit. supra note 6. See also *Opinion of the Economic and Social Committee on 'Household over-indebtedness'*, (2002/c 149/01); *Opinion of the Economic and Social Committee on 'Consumer protection and appropriate treatment of over-indebtedness to prevent social exclusion' (Exploratory opinion)*, INT/726 (Brussels, 29 April 2014).

However, in line with the efforts to achieve a single market in credit for consumers, the EU policy response has been limited in terms of preventively delivering a credit market that is 'responsible'. The main objective of EU measures to achieve the common market points to the creation of a regime which encourages vigorous competition, innovation and choice within a trusty framework that rejects unfair and irresponsible practices. But the main drive remains the economic one of enabling consumers and businesses to take full advantage of the single market.[14] By contrast, debt restructuring or consumer insolvency measures have been largely neglected under EU policy and law.

In this way, over-indebtedness has become incorporated in the rhetoric of 'responsible lending and borrowing' in the form of an introduction of best market practices to be achieved by means of public intervention on the behaviour of the contracting parties of credit agreements.

The Consumer Credit Directive (CCD)[15] provides a clear example of a full harmonising measure attempting to extend the internal market for financial services to the specific field of consumer credit.

In the original intention of the Commission the CCD aimed at avoiding the consumer's over-indebtedness by evading unreasonable credit contracts, introducing duties of lenders to assess and advise consumers on the risks of default and holding them responsible during all phases of the contractual relationship.[16] However, the final version of the CCD remains anchored to the usual paradigm of transparency and information requirements by both lenders and borrowers, adding a focus on a new requirement of creditworthiness assessment.[17] Thus, the significance of responsible lending becomes limited to duties to explain and disclose, and an undetermined obligation to assess the creditworthiness of consumers once again based on information. In particular, Article 8 of the CCD states that creditors have to make such an assessment on the basis of sufficient information obtained from the consumer and, where it is necessary, on the basis of a consultation of the relevant database.[18]

[14] See e.g. European Commission, *Discussion Paper for the Amendment of Directive 87/102/EEC concerning consumer credit* (2001); see also the Recitals of the Consumer Credit Directive, infra note 15 and the Mortgage Credit Directive, *infra* note 21.

[15] . Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, L 133/66.

[16] Rott, "Consumer Credit", in Reich, Micklitz, Rott and Tonner (Eds.), European Consumer Law (Intersentia 2014), 197-238.

[17] See Articles 4-6 CCD.

[18] For the interpretation of Article 8(1) CCD see *CA Consumer Finance SA v Ingrid Bakkaus, Charline Bonato, née Savary, Florian Bonato* (Case C-449/13) of 18 December 2014, according to which it "must be interpreted to the effect that, first, it does not preclude the consumer's creditworthiness assessment from being carried out solely on the basis of information supplied by the consumer, provided that that information is sufficient and that mere declarations by the consumer are also accompanied by supporting evidence and, secondly, that it does not

In general, the CCD has been criticized not only for not imbuing proper responsible lending in its provisions but especially for insisting on the ability of informed, confident and rational consumers as drivers of economic efficiency[19] but not caring about the socially and financially vulnerable consumers[20] such as those who become over-indebted.

To some degree, the Mortgage Credit Directive (MCD)[21] insists and reproduces the information and transparency model of the CCD in the advertising, marketing, product specifications, pre-contractual and contractual information (including intermediaries and representatives), etc.[22]

The novelty is the introduction of a number of norms that in principle may better correspond to the concept of responsible credit explicated in the policies. These contain provisions on: the financial education of consumers in relation to responsible borrowing and debt management, including guidance to consumers in the credit granting process;[23] conduct of business obligations and product suitability more tailored on individual circumstances, together with methods of incentives or remuneration for staff or intermediaries;[24] and methods for calculating interest rates transparently.[25]

The creditworthiness assessment of consumers features robustly in the MCD as the most reliable tool capable of fostering responsible lending. The EU legislator believes that imposing such a duty will enable lenders to determine the ability of consumers to meet their obligations under the credit agreement, and thus a tool to detect or prevent over-indebted consumers.[26]

What probably represents the most innovative institution of the MCD is the enactment of high-level principles on arrears and foreclosures. This is the first attempt to introduce a sort of curative, as opposed to preventive, measures under EU law. In its preamble, the MCD acknowledges that foreclosure can have significant consequences on consumers and it asserts that it is appropriate to encourage creditors to deal proactively with emerging credit risk at an early stage. It considers important to have in place the necessary measures to ensure that lenders exercise reasonable forbearance and make reasonable attempts to resolve the situation

require the creditor to carry out systematic checks of the veracity of the information supplied by the consumer".

19 Micklitz, Op. cit. *supra* note 5; Nield, "Responsible lending and borrowing: whereto low cost home ownership". 30(4) *Legal Studies* (2010), 610-632

20 Micklitz, Op. cit. *supra* note 5.

21 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, L 60/34.

22 See Articles 8, 10, 11, 3, 14, 15, 16 MCD

23 Article 6 MCD.

24 Article 7 MCD.

25 Article 17 MCD.

26 Articles 18 and 20 MCD.

through other means before foreclosure proceedings are initiated.[27] Article 28 of the MCD sets out provisions on arrears and foreclosure, and specifically requires that Member States adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated.

The MCD is still new and it needs to be implemented by the Member States, but at first sight its renovated primary focus on creditworthiness assessment induces to make the same considerations that Weatherill has advanced in the context of the CCD, that is that behind its thin provisions lies the real debate about the proper reach of EU intervention in this domain, and the continuing opposing thrust of EU policies in opening-up credit markets instead of focusing on over-indebtedness.[28]

3. Germany

3.1 Provisions on Responsible Lending

3.1.1 Consumer Credit

As far as consumer credits are concerned, the CCD has been implemented in German law by ss.491 ff. of the German civil code (BGB) and s.18(2) of the Banking Act (*Kreditwesengesetz* - KWG). The latter provision states that credit institutions assess the creditworthiness of the consumer in case of consumer credits. The basis for the assessment can be information provided by the consumer and, if necessary, information obtained from organisations which specialise in providing credit information. Data protection rules are not affected by this provision. S.18(2) KWG also introduces a duty to re-assess the creditworthiness in case of a significant increase of the credit sum and a duty to update the information in any case of amendments to the credit sum.

There is an argument between scholars about the legal nature of the bank's obligation to carry out a creditworthiness assessment. At least until recently it was the majority's opinion that this obligation is a public law duty only.[29] As a result of this a breach of this duty could only

[27] Recital 27 MCD.

[28] On the original consideration on the CCD see Weatherhill, *EU Consumer Law and Policy* (Edward Elgar 2013), 102-103.

[29] Schürnbrand, in: Münchener Kommentar zum BGB (6th ed., 2012), § 491a at 62; Schürnbrand, in: Bankrechtstag 2009, S. 173, 183 f.; Schürnbrand, ZBB 2008, 383, 388 f.; Herresthal WM 2009, 1176, 1178; Nobbe WM 2011, 625, 629 f.; Rösler/Werner BKR 2009, 1, 3; Wittig/Wittig ZInsO 2009, 633, 639; Merz in: Kümpel/Wittig Rn. 10.168; Palandt/Weidenkaff Rn. 6; Staudinger/Freitag (2011) § 488 Rn. 36; Buck-Heeb, BKR 2014, 221.

trigger any remedies laid down in the KWG itself. The sanction system of the KWG however is minimalistic. Under s.6(3) KWG the financial supervisory authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – ‚BaFin') can take such measures in respect to institutions and their chairmen as are necessary and appropriate to avoid infringements of the duties under the KWG or to discontinue any bad practices which otherwise may be an obstacle to the proper dealing with banking transactions. BaFin hardly ever makes use of the powers which they are given under this provision and no single case is known where this instrument had been used in respect to banks' duties under s.18(2) KWG. There are no other sanctions in the KWG for the infringement of the duty to assess the consumers' creditworthiness. While the duty to check the financial situation of a borrower under s.18(1) (which relates to credits for more than 750.000 €) can lead to a fine being imposed, this sanction is confined to s.18(1) but does not apply to a breach of the duty under s.18(2). The view of what at least until recently was the minority is that the duty to carry out the creditworthiness assessment under s.18(2) is a duty owed to the debtor, so it is by nature either a private law duty or a duty with both public and private law character.[30] According to this view, breach of this duty entitles the debtor to damages. As a result the creditor would have to put the debtor in the situation he would have been in had the duty not been breached. Under this theory the debtor could claim that, had the creditor carried out the creditworthiness assessment (properly), either the creditor or the debtor would not have entered into the loan agreement. Hence the creditor has to pay for every loss suffered by the debtor as a result of having entered into the contract. This does not only include costs and interest but can also extend to the loan itself.[31] Also, if the debtor became insolvent as a consequence of taking out the loan the creditor would have to pay for any loss resulting from the insolvency.

Interestingly, the German law makes a distinction between loans on one side and other financial accommodation on the other side. While the duty to carry out the creditworthiness assessment in case of loans has been made part of the bank supervision regime, the same duty in respect to other financial accommodations has been made part of the German civil code (s.509 BGB). The legislator has justified this distinction on the basis that no supervisory regime exists in respect to other financial accommodation.[32] Commentators have concluded that, while s.18(2) KWG lies in the public interest only, s.509 BGB introduces a duty to carry

[30] Ady/Paetz WM 2009, 1061, 1067; Heße/Niederhofer MDR 2010, 968, 972; Hofmann NJW 2010, 1782, 1784 f.; Grunewald, FS Schneider, 2011, S. 401, 403 ff.; Knops in: Bankrechtstag 2009, S. 195, 223; Rott/Terryn/Twigg-Flesner VuR 2011, 163.

[31] See Schürnbrand, in: Münchener Kommentar zum BGB (6th ed., 2012), § 509 at 9.

[32] BT-Drs. 16/11643, p. 95 f.

out the creditworthiness assessment in the interest of the debtor. As a result, the debtor is entitled to damages in case of breach of this duty.[33]

3.1.2 Mortgage Credit

In respect of the MCD, it is to be expected that artt. 18-20 of that directive will trigger rules on the creditworthiness assessment different from the provisions which implement the CCD. However, the argument about the nature of the duty to carry out the creditworthiness assessment is likely to extend to the MCD as well[34]; especially in light of recital 83: ‚Member States may decide to transpose certain aspects covered by this Directive in national law by prudential law, for example the creditworthiness assessment of the consumer, while others are transposed by civil or criminal law, for example the obligations relating to responsible borrowers.‘

3.2 Provisions on Personal Insolvency

3.2.1 Debt Relief

Unlike in the UK, there is no system of financial difficulty resolution outside the insolvency procedures. Under the Insolvency Act (*Insolvenzordnung* – InsO) natural persons can undergo a process for a number of years at the end of which they will be granted debt relief (s.286 InsO). The process is initiated by an application to the insolvency court (which is the county court, s.2 InsO). The application can be submitted by the debtor or any creditor (s.13 InsO). The process will be initiated even if it is clear that the debtor is not even able to cover the costs of the procedure (ss.26, 4a InsO); in such a case the debtor’s duty to pay the costs of the procedure will be postponed until after debt relief.

3.2.2 Assignment of Salary

Under the insolvency procedure the debtor must assign any part of their income above certain limits to a trustee. The limits are laid down in ss.850 ff. Civil Procedure Act (*Zivilprozeßordnung* – ZPO). Under s.850c ZPO, the limits are dependent on how many people the debtor needs to pay maintenance for (mainly spouse and children). The following table shows some examples for limits, taking into account the net income and the number of dependants:

[33] Schürnbrand, in: Münchener Kommentar zum BGB (6th ed., 2012), § 509 at 7.
[34] See Rott, BKR 2015, 8, 11; Buck-Heeb, BKR 2014, 221 (222).

Net income per month (€)		amount beyond limit number of dependants					
		0	1	2	3	4	5 and more
Up to	1.049,99	-	-	-	-	-	-
1.050,00	1.059,99	3,47	-	-	-	-	-
1.440,00	1.449,99	276,47	0,83	-	-	-	-
1.660,00	1.669,99	430,47	110,83	1,02			
1.880,00	1.889,99	584,47	220,83	89,02	1,03		
2.100,00	2.109,99	738,47	330,83	177,02	67,03	0,86	
2.320,00	2.329,99	892,47	440,83	265,02	133,03	44,86	0,52

In terms of gross salary, a single person with no dependants can – depending on a number of circumstances – earn around 1.420 € before going beyond the limit; a person with one dependant can earn 1.810 €, with two dependants 2.135 €, with three dependants 2.490 €, with four dependants 2.870 € and with five dependants 3.245 €.

3.2.3 Duration of Procedure

The debtor has to assign the part of their salary beyond the respective limit for a period of six years to a trustee who will pay the costs of the proceedings out of these monies and distribute the remainder amongst the creditors according to an insolvency plan. After six years the debtor can be granted debt relief.

In two cases debt relief can be granted earlier than six years from the opening of the insolvency proceedings have elapsed:

- Firstly, if the debtor has managed to pay off 35% of his debts; in this case debt relief can be granted after three years following the opening of the procedure.
- Secondly, if the debtor manages to pay the costs of the insolvency procedure; in this case debt relief can be granted after five years following the opening of the procedure.

These possibilities to reduce the time until debt relief is granted have been introduced in 2014[35]. Experts expect that only very few people will be able to obtain debt relief after a three-years-period while a good proportion of debtors may be able to obtain debt relief after five years.[36]

[35] Act of 15.7.2013 (BGBl I S. 2379).

[36] See e.g. Stephan, in: Münchener Kommentarzur Insolvenzordnung (3rd ed., 2014), § 300 InsO at 8 and at 22.

3.2.4 *Reasons for not granting debt relief*

There is a number of reasons why debt relief can be refused (ss. 300(3), 290(1), 296(1), 296(2)(3), 297, 297a, 298 Insolvency Act):

- in case of the debtor having been found guilty of having committed a criminal act related to insolvency within a five years period before applying for insolvency proceedings or in the course of insolvency proceedings;
- in case the debtor has in writing submitted wrong information in respect of his financial situation with a view to obtain credit or social benefits or to avoid having to make payments to governmental institutions;
- in case the debtor has voluntarily or negligently accumulated inappropriate debts or wasted money or delayed the opening of necessary insolvency proceedings within a three years period prior to applying for insolvency proceedings;
- in case the debtor fails to honour any duties to give information or assist otherwise under the insolvency act;
- in case the debtor makes knowingly or with gross negligence wrong statements about his financial situation within the insolvency proceedings;
- in case the debtor violates their duty to take on appropriate work;
- in case the debtor fails to honour any of his duties under the insolvency act in the course of insolvency proceedings;
- in case the debtor fails to give account of his performance of duties in the course of insolvency proceedings;
- in case the debtor fails to pay the minimum fee to the insolvency trustee (unless the duty to pay the costs of the proceedings has been postponed).

Once debt relief has been granted it can be repelled within one year if it comes to light that the debtor has intentionally breached their obligations under the Insolvency Act or if it comes to light that the debtor has been found guilty of having committed a crime connected to bankruptcy within the course of insolvency proceedings or if the debtor intentionally or with gross negligence failed to honour their obligations to give information after debt relief has been granted (s.303 Insolvency Act).

3.2.5 Scope of debt relief

Debt relief does not mean that the debtor will be relieved from all their debts. Certain debts are excluded from debt relief:

- obligations arising from intentional torts;
- debts from maintenance arrears;
- tax debts if the debtor has been found guilty of having committed a crime by not paying these taxes;
- fines;
- debts arising from loans that have been granted to pay the costs of the insolvency proceedings.

These exclusions have attracted criticism by consumer protection organisations which claim that especially the exclusion of child maintenance arrears from debt relief will often prevent debtors from having a ‚fresh start'.[37]

4. United Kingdom

4.1 Provisions on responsible lending

4.1.1 Consumer credit

The UK has implemented the CCD with the Consumer Credit (EU Directive) Regulations 2010, SI 2010/1010 (hereinafter '2010 Regulations) which revise the Consumer Credit Act 1974 as amended in 2006 ('CCA'). The CCA is the law that provides a framework to protect consumers when dealing with licenced lenders engaged in consumer credit business and/or ancillary credit business.

All regulated consumer credit agreements entered on or after 1 February 2011 and certain aspects of pre-existing agreements entered before that date have to comply with the new amended regime (Regulations 99 and 100 of the 2010 Regulations).

As demanded by the CCD, Regulation 5 of the 2010 Regulations introduces a new section 55B into the CCA requiring lenders to assess the borrower's creditworthiness before concluding a credit agreement, or before significantly increasing the amount of credit to be provided under an existing agreement or the credit limit under a running-account agreement.

[37] See e.g. http://www.schuldnerhilfe-direkt.de/ab-01-juli-2014-neues-insolvenzrecht-teil-1/, retrieved 20 March 2015.

However, Section 55B does not specify how lenders should assess creditworthiness. It requires that this must be based on sufficient information obtained from the borrower where this is appropriate, and from a credit bureau (also known as credit reference agency) where this is necessary.

As far as responsible lending is concerned, the UK has shown particular attention in issuing additional guidance or rules in addition to the implementing legislation of the 2010 Regulations.

The Financial Services Act 2012 has introduced a new regulatory framework for the financial system. Under the new structure, the Financial Conduct Authority ('FCA') is the regulator in charge of ensuring the proper functioning of the financial market and the protection of consumers. It takes-over the functions previously exercised by the Financial Services Authority ('FSA') and the Office of Fair Trading ('OFT'), and it has set its rules in the Consumer Credit Sourcebook ('CONC'), which regulates credit-related activities.

Under this restructuring, from 1 October 2014 the FCA has issued new rules drawing upon previous guidance on irresponsible lending by the OFT.[38]

Given the high levels of consumer debt and over-indebtedness, the focus of responsible lending by the FCA is in terms of affordability and creditworthiness assessment. The relevant provisions are found in CONC 5 which applies to firms engaging in consumer credit lending. Before the conclusion of the credit agreement CONC 5.2.1.R(1) provides that firms must undertake an assessment of the creditworthiness of the customer. In so doing, it must consider the potential for the commitments under the regulated credit agreement to adversely impact the customer's financial situation. The lender must take into account the information known at the time of the making of the credit contract and the ability of the customer to make repayments as they fall due over the life of the agreement. The creditworthiness assessment must be based on sufficient information obtained from the customer and a credit bureau where necessary.

Previous guidance issued on the 2010 Regulation implementing the CCD explained that it is for lenders to judge when information should be sought from a borrower or a credit bureau.[39] In essence, Section 55B of the CCA is interpreted as requiring lenders to independently decide what factors should be taken into account when assessing creditworthiness.

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[38] Financial Conduct Authority, *Consumer Credit Sourcebook (CONC)*, CONC 5 (1 April 2014) replacing Office of Fair Trading, *Irresponsible lending – OFT guidance for creditors* (March 2010 - updated February 2011).

[39] Department for Business, Innovation, and Skills, *Consumer Credit Regulations - Guidance on the regulations implementing the Consumer Credit Directive updated for EU Commission Directive 2011/90/EU* (effective 1 January 2013), (August 2010 - Chapter 5 Revised November 2012).

In turn, CONC 5.2.2 R is concerned with the assessment to be undertaken in relation to certain credit agreements which are excluded from the above requirements but still demand an assessment of the potential for the commitments under the agreement to adversely impact the customer's financial situation.

According to CONC 5.2.3.G the extent and scope of the creditworthiness assessment or the assessment required by CONC 5.2.2.R should be dependent upon and proportionate to one or more of the following: the type, amount and cost of credit; the financial position of the customer at the time of seeking the credit, the customer's credit history and any past or present financial difficulties; the customer's existing and future financial commitments; any future changes in circumstances which could be reasonably expected to have a significant financially adverse impact on the customer; and the vulnerability of the customer in terms of mental capacity limitations.

CONC 5.2.4.G concedes that the consideration of all the factors set out in the previous provisions in all cases is likely to be disproportionate. Therefore, a firm should consider what it is appropriate dependent upon, for example, the type and amount of the credit being sought and the potential risks to the customer. It should also consider the types and sources of information to use in the assessments required of it, including its record of previous dealings, evidence of income and expenditure, a credit score and a credit bureau report, and information provided by the customer.

The following CONC 5.3 on the conduct of business in relation to creditworthiness and affordability provides that in making the assessments lenders should take into account more than the customer's ability to pay. It should also take reasonable steps to assess the customer's ability to meet repayments in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences. Evidence of future increases in income and decreases in expenditure may be taken into account if the repayments are expected to be sustainable in the light of those changes. Any assumption regarding future income should be reasonable and capable of substantiation in the individual case.

To comply with the above requirements, lenders must establish and implement clear and effective policies and procedures (CONC 5.3.2.R).

4.1.2 Mortgage credit

Member States have to implement the MCD by 2016 but, in the wake of the financial crisis, the UK has been a precursor and since the FCA has replaced the FSA as the mortgage regulator it has introduced new rules (Mortgages and Home Finance: Conduct of Business

Sourcebook – 'MCOB') following a review of the mortgage market ('MMR') that came into force from 26 April 2014.

Under MCOB, the focus of responsible lending rests on the assessment of affordability. But, unlike CONC, the term 'creditworthiness' does not appear.

Generally, the MCOB requires lenders to treat customers fairly by assessing whether they will be able to repay the sums borrowed and interests before entering into a mortgage contract. By express provision, it aims to ensure that customers are not exploited by lenders where the customers are self-evidently unable to repay through income and have no alternative means of repayment.[40]

Lenders must assess whether the customer and any guarantor will be able to pay the sums due and they are precluded from entering into the transaction unless they can demonstrate that the mortgage and interests are affordable for either of them.[41]

When assessing whether a customer will be able to repay, lenders must not base the assessment of affordability on the equity in the property which is used as security, or take account of an expected increase in property prices. Instead, they must take full account of the income of the customer, net of income tax and national insurance, as well as the customer's committed expenditure, the basic essential expenditure and basic quality-of-living costs of the customer's household.[42]

By express indication, lenders must not rely on a general declaration of affordability by the customer.[43]

Next, MCOB fixes detailed rules on how to assess income, expenditures, future changes to income and expenditure, and issues surrounding the effects of interest-rate raises.[44]

Finally, lenders are obliged to operate in accordance with an own written policy setting out the factors it will take into account in assessing a customer's ability to pay the sums due. Such a policy must set out transparently the method of assessment of all the above requirements and their calculation, including details of the types of income which are acceptable and the acceptable evidence, and how other commitments and basic essential expenditures are taken into account when assessing affordability.[45]

Generally, the FCA can use any of its powers if a firm doesn't carry out a creditworthiness assessment under CONC or an affordability assessment under MCOB. That would include

[40] MOCOB 11.5
[41] MCOB 11.6.2.R
[42] MCOB 11.6.5.R
[43] MCOB 11.6.6.R
[44] MCOB from 11.6.7.G to 11.6.19.G
[45] MCOB 11.6.20.R

anything from fines through stopping the lender carrying out lending activities, or taking away authorisation altogether. For consumers the position is not so clear-cut. If they believe they have been treated unfairly they can complain to the Financial Ombudsman Service (FOS). The FOS is a statutory Alternative Dispute Resolution body which has taken has made explicit that "unaffordable lending means lending that the consumer could not reasonably afford at the time it was taken out".[46]

If the FOS is satisfied that the lending was unaffordable when the loan was made, it considers how this has affected the consumer. This includes looking at what the loan was used for and what effect it had on the consumer's overall financial position. Depending on what is appropriate for the individual case, the FOS may consider one or more of the following measures as fair redress:

- re-scheduling the lending onto affordable terms;
- providing an interest-free period or a lower interest rate;
- writing-off some of the lending;
- exceptionally, writing-off all the lending.

4.2 *Financial difficulty, personal insolvency or debt solutions*

Legislation addressing debt solutions for consumers has a long tradition in the UK.[47]

The law is designed offering multiple procedures and levels of debt solutions, at the choice of the consumer, with the twofold objective of stabilising and rescheduling debts over a period of time, and cancelling them after the conclusion of such a rescheduled repayment.

Under the County Court Act 1984, the instrument of County Court Administration Orders ('CCAO') was introduced as a mean to facilitate the recovery of small debts protecting the consumer from harassment in the debt recovery. It applies for debts not exceeding GBP 5.000 when the creditor has sought to have enforced in courts at least one debt. Debtors may file a CCAO request to the local Court which considers if the debtor has sufficient means to service the debt in instalments over a reasonable period of time. The County Court orders the routine repayment under which creditors cannot take further action. If the Court establishes that there are insufficient funds, or the debtor or creditor object to the plan, the case proceeds to a District Court which eventually defines a plan. Provided that the debtor pays the Court's fees

[46] Financial Ombudsman Service, at http://www.financial-ombudsman.org.uk/publications/technical_notes/financial-hardship-unaffordable-lending.htm

[47] E.g. see Bankruptcy Act 1861 which personal insolvency was extended to non-traders natural persons.

and honours the new repayment plan, s/he is entitled to have any remaining debts written-off. This procedure has fallen largely in disuse.

However, with the Insolvency Act 1986, now the UK legal system favours an out-of-court settlement procedure which creates alternative arrangements chosen by the debtor which in most cases impose a debt reorganisation and new plans on lenders.

Under the Individual Voluntary Arrangement ('IVA') procedure, debtors are entitled to seek a composition with creditors. This is statutory agreement of contractual nature where the debtor proposes a repayment plan to creditors through a licenced insolvency practitioner. To go ahead, the plan needs the approval of the three-quarters of the creditors by value. Usually, insolvency practitioners and lenders have established standard terms alongside a protocol for treating standard cases. The Courts have a limited role of supervision under the IVA procedure, and dissatisfied creditors can appeal approved repayment plans to the Courts.

Alternatively, those debtors unable to repay their debts may apply for bankruptcy, which is a full asset liquidation and debt cancellation procedure. It is a procedure led by the Courts where the debtor's assets are sold and a repayment plan is established for a period of up to three years. Debts outside the plan are discharged after one year. New mechanisms of Bankruptcy Restrictions Orders and Bankruptcy Restrictions Undertakings have been introduced to sanction debtors who have acted irresponsibly or dishonestly, prohibiting them from engaging in a number of professional activities for up to fifteen years.

Finally, under the Debt Relief Order ('DRO') procedure, debtors with no assets, low disposable income and debts of up to GBP 15.000 are eligible to apply to enter into this administrative procedure provided that they have not benefited from it in the previous six years. If accepted in the procedure, debtors become protected from enforcement for one year and they are released from their obligations. This procedure has very tight access requirements for the maximum of GPB 50 per month available income for creditors.

Within the described legal framework for debt solutions, the FCA considers that mortgage lenders and administrators still need to place greater emphasis on delivering fairer outcomes for customers in the management of arrears based on their individual circumstances.

Therefore, under FCA regulation lenders are obliged to follow the regulatory framework established by MCOM. In addition to an overarching principle requiring lenders to treat their customers fairly, MCOB 13 specifically requires them to deal fairly with arrears.

As a general principle, lenders should repossess the property where all other reasonable attempts to recover the debt have failed. So, where a customer has a payment shortfall in relation to a mortgage, a lender must abide by a set of procedures established by MCOB 13.3

aiming at not oppressing the debtor. Likewise, under MCOB 13.4 lenders have to keep customers fully informed of the debt amounts, charges, further consequences, sources of advice, and the steps required before actions of repossession.

A number of unfair or oppressive debt collection procedures are prohibited under MCOB 13.5.

Finally, MCOB 13.6 is concerned with repossessions and ensuring that all steps are taken to sell the repossessed property as soon as possible and obtain the best price that might reasonably be paid under the market conditions.

5. ITALY

5.1 Provisions on responsible lending

5.1.1 Consumer credit

As far as consumer credit is concerned, Italy has implemented the CCD as a result of the entry into force of Legislative Decree 141/2010. A new section was introduced into the consolidated Banking Act (*Testo Unico Bancario*, 'TUB') and the original framework has been replaced by specific provisions related to consumers. These regulations deal with credit agreements (consumer credit, mortgage loans and payment services) but also include rules concerning financial agents and credit brokers operating in the banking sector, with a wider regulatory framework for microcredit loans in Italy[48]. Under this restructuring, all the operators need to be listed in a special register and a more stringent supervision by the Bank of Italy is provided for. The process was completed by relevant provisions issued by the Bank of Italy on 9 February 2011[49] and further additions were then made as a result of Legislative Decree 169/2012, which also implemented the CCD.

The discipline provides a new framework to protect consumers when dealing with lenders aimed at increasing fairness and good faith in agreements between financial operators and consumers. The provisions include different obligations on lenders with

[48] From the point of view of economists, it is only over the last decade that consumers in Italy have increased their propensity towards debt and banks have definitively turned their attention to consumer credit: see Cosma and Gualandri (eds.), *The Italian Banking System, Impact of the Crisis and Future Perspectives* (Palgrave Macmillan, 2012).

[49] Bank of Italy, *Trasparenza delle operazioni e dei servizi bancari e finanziari. Correttezza delle relazioni tra intermediari e clienti* (9 February 2011).

the aim of informing consumers of the terms of the loan and its consistency with their needs (article 124 TUB). As demanded by the CCD, the framework was strengthened focusing in particular on the lender's liability. However, it is important to note that Italy did not introduce a separate duty to provide the consumer with additional assistance: assistance means simply "assistance" in the sense of article 5 of the CCD.

As a result of the implementation process, a general duty to explain and pre-contractual information offered to consumers are undoubtedly more precise and clear. In accordance with the CCD, the TUB indicates a list of basic information that must always be reported to consumers: the interest rate, the total amount of credit and its costs. This kind of required information has been detailed by the Bank of Italy and a framework agreement regarding current accounts has also been negotiated between the Italian Banking Association ('ABI') and a number of consumer associations[50].

As demanded by the CCD, article 124-bis of the TUB introduces a specific provision requiring lenders to assess a borrower's creditworthiness before concluding a credit agreement, or before significantly increasing the amount of credit to be provided under an existing agreement. In truth, article 124-bis simply provides a general "know your borrower" rule: the lender is allowed to take personal information from the consumer and consult specific databases[51]. As far as responsible lending is concerned, the Bank of Italy detailed these provisions with the above-mentioned directive issued on 9 February 2011[52].

A bank's obligation to carry out a creditworthiness assessment is not properly a public law duty and there are no administrative penalties imposed as result of a breach of this duty. It is therefore relevant to mention that Italy does not seem to have introduced any appropriate penalties against lenders who fail to assess the borrower's creditworthiness, even though article 25 of the CCD clearly provides that Member States shall lay down the rules on penalties applicable to infringements of the national provisions - and the penalties provided for "must be effective, proportionate and dissuasive".

[50] Framework agreement, *Trasparenza semplice nella documentazione informativa del conto corrente offerto ai consumatori* (14 April 2011).

[51] See Mazzeo, "La verifica del merito di credito [Commento a: Art. 2, D.lg. 13 agosto 2010, n. 141]", 6(12) *Obbligazioni e Contratti*, (2010), 860-863.

[52] Bank of Italy (9 February 2011), *supra* note 49, para. 4.3 and 4.4.

The opinions of some scholars'[53] and arbitration case law on unfair banking practices[54] demonstrate that the actual interpretation of creditworthiness in the Italian system, moving from the basic ideas of financial market protection, has shifted the focus to the basic principles of responsible lending ('duty to warn' and 'duty to explain'). Nonetheless, in the above-mentioned cases the arbitrators merely propose as a solution the hypothesis of compensation for damages and losses suffered by the consumer under the general Civil Code rules[55], without any reference to the invalidity of the credit agreement.

According to article 125-bis of the TUB, agreements imposing costs on the consumer that are not included in the annual percentage rate disclosed in the pre-contractual documentation is banned and voided. The consumer has the right of withdrawal ("at any time without penalty and without charge": 125-quater TUB), the right to early termination and to early repayment at any time. The TUB also regulates the case of unilateral changes in consumer credit contracts and, as demanded by the CCD, Italy has also specified the discipline of linked credit agreements; the TUB provides for the right of the consumer to end agreements in the case of non-fulfilment by the supplier of goods or services of the actual or implied terms of the contract governing that kind of supply. Under Article 125-quinquies of the TUB the consumer can exercise this right against the transferee in the case of transfer of the relevant receivables. Finally, according to article 125-sexies of the TUB the consumer may discharge his or her obligations under a loan agreement and shall be entitled to a reduction in the total cost of the loan. The consumer shall be informed of the assignment of the loan agreement in accordance with the formalities set out by the Bank of Italy (125-septies TUB).

5.1.2 Mortgage credit

Italy is expected to implement the MCD during 2015. As far as responsible lending is concerned, the above-mentioned provisions also apply to mortgage credit, including the

[53] See Natoli, *Il contratto "adeguato". La protezione del cliente nei servizi di credito, di investimento e di assicurazione* (Giuffrè, 2012).

[54] The new banking arbitration and dispute resolution system: see Arbitro Bancario Finanziario (hereinafter ABF) Collegio Roma n. 153/2013; ABF Collegio Milano n. 2464/2013 and in particular ABF Collegio Roma n. 4440/2013.

[55] Article 1175 of the Italian Civil Code provides that "the debtor and the creditor shall behave according to rules of fairness". According to Article 1337 "parties must behave in good faith during the pre-contractual bargaining and contract drafting". On 3 May 2012 the Italian Consumer Code (Decree 206/2005) was amended, prescribing that a bank that forces a consumer to enter into a loan is implementing an "unfair commercial practice". On this point see in particular ABF Collegio Roma n. 4440/2013.

general duties of fairness and good faith and including, in particular, articles 124-124-bis TUB and the provisions issued by the Bank of Italy on 9 February 2011.

The legal framework was strengthened by recent rules concerning mortgage loan renegotiations and 'portability' from one bank to another, termination and withdrawal. This reform process has contributed to rebalancing Italian mortgage law and the market[56]. Furthermore, as provided by article 2 of Decree n 185/2008, banks now have a duty to inform consumers of different types of loans linked to the deal concerning their primary residence and explicit administrative penalties apply if this duty is breached, in accordance with article 144 TUB. As far as creditworthiness is concerned, banks also have a duty to verify that the mortgage payment does not exceed a certain portion of the income of the borrower and that the amount does not exceed a specific portion of the value of the property.[57]

Analysis of case law demonstrates that interpretation of the principles of responsible lending, according to the provisions laid down in article 124-bis TUB, has focused on the creditworthiness and the affordability of the agreement for the consumers. Nonetheless, similarly to the above-mentioned cases on consumer credit, the arbitrators in these cases also only forced the bank to pay compensation for damages and losses suffered by the consumer under the general Civil Code rules, in accordance in particular with article 1337.[58]

5.2 *Financial difficulty, personal insolvency or debt solutions*

Legislation addressing debt solutions for consumers does not have a long tradition in Italy.

As far financial difficulty is concerned, Italy has recently provided for the right of borrowers under mortgage loans related to the primary residence to request the suspension of the loans for a maximum of twice and for a maximum period of 18

[56] Finally, as a result of Article 1, paragraph 48 c) of Law 147/2013, Italy has also implemented a new scheme to guarantee mortgage credit to specific types of borrowers. This Fund became operational at the end of January 2015 and aims to support lending to consumers - first time buyers under 35 years of age - who may not have sought, or been granted, access to credit since the financial crisis. Under the scheme, the government will guarantee up to 50% of the loan balance of new mortgages, with a maximum size. But the scheme also enables banks to recover the guaranteed portion of the loan 18 months after a borrower's default.

[57] At present, the loan-to-value ratio cannot exceed 80 percent and a loan-to-value of 100 percent can be achieved under the condition that additional securities such as bank or insurance guarantees are delivered.

[58] See ABF Collegio Napoli n. 2805/2014 and ABF Collegio di coordinamento n. 5718/2013.

months[59]. A private framework agreement was signed in December 2009, between the Italian Banking Association and a number of consumer associations, with the aim of supporting families in difficulty because of the financial crisis. It has provided for the suspension of mortgage repayments for at least 12 months and the events leading to suspension are dismissal, suspension or reduction of work and death or injury of the mortgage holder.

Then, Italy also provided for a public Fund[60] aimed at addressing problems and costs deriving from financial difficulty. The Ministry of Economy and Finance enacted the implementing regulations providing for the possibility for borrowers of mortgage loans to request a suspension of the relevant mortgage loan upon the occurrence of termination of employment contract, death, or in cases of non-self-sufficiency.[61]

As far as personal insolvency is concerned, in January 2012 Italy defined debt settlement procedures to reduce the impact of over-indebtedness. In particular, Law 3/2012[62] introduces new debt settlement procedures for consumers.[63]

Under Law 3/2012, over-indebtedness has been defined as "the persistent imbalance between obligations assumed and the personal assets to solve them". On this basis, consumers have different debt settlement procedures. First of all, consumers can enter into a debt restructuring agreement ('*accordo di ristutturazione dei debiti e soddisfazione dei crediti*'), an out-of-court settlement, which entitles debtors to seek a solution with creditors with the involvement of the bodies operating as facilitators of crisis-indebtedness. These consist of operators who need to be listed in a special register for offering assistance activities aimed at helping debtors to overcome solvency problems and supervising a debt repayment plan.[64] To go ahead, the plan needs the approval of 60 percent of the creditors by value.

Alternatively, consumers may apply for a consumer plan ('*piano del consumatore*'), a court settlement procedure which also involves the above-mentioned operators. It is a procedure led by the Courts, and in the end the local Tribunal accepts the consumer plan if the applicant is able to demonstrate his/her good faith - the judge has the authority to exclude approval of the plan when the consumer has caused over-indebtedness through

[59] Law 244/2007, as amended by Law 92/2012.
[60] The so-called "*Fondo di Solidarietà*".
[61] Ministry of Economy and Finance, Decree 132/2010 as amended by the Decree 37/2013.
[62] As amended by the Law 221/2012.
[63] In Italy there is no other specific system of personal insolvency and individuals cannot be subject to general insolvency proceedings.
[64] Ministry of Justice, Decree 202/2014.

negligence - and if the plan itself looks reasonable. As recent case law demonstrates[65], the Courts have a significant role of supervision with discretion in approving and revoking the plan.[66]

A 12 month moratorium of payments affecting creditors not willing to enter into a Debt Restructuring Agreement may be granted and a stay of foreclosure proceedings and seizures applies for a maximum period of one year from ratification of the debt restructuring agreement by the Court.

6. GREECE

6.1 Responsible lending

6.1.1 Consumer credit

Greece transposed into national law the CCD 2008/48 on credit agreements for consumers on 23 June 2010 by the Common Ministerial Decision (CMD) Z1-699/2010.

According to article 8 of CMD Z1-699/2010, the creditor assesses the consumer's creditworthiness on the basis of sufficient information, where appropriate obtained from the consumer during the pre-contractual period and those who have been provided during long-term trading relationship, and after consultation of the relevant database[67] in accordance with the specific provisions for the supervision of credit institutions and financial institutions. Unlike the CCD 2008/48, the database research is compulsory.

One point of criticism[68] of CCD 2008/48 is that it does not provide any legal consequences for the creditor that acts contrary to the obligation of article 8. CMD Z1- 699/2010 goes beyond the Directive, as it regulates the legal consequences in paragraph 3 of Article 8 of the CMD, according to which: “if the creditor breaches through his fault his obligations according to paragraphs 1 and 2 (obligations to assess the creditworthiness of the consumer)

[65] See Tribunale di Pistoia, 28 February 2014.

[66] On this point see Fabbi, “Sovraindebitamento, ‘consumer bankruptcy’, discrezionalità del giudice civile”, in Capponi, Sassani, Storto and Tiscini (eds), *Il Processo Esecutivo – Liber amicorum Romano Vaccarella* (UTET, 2014).

[67] Such data is provided by the company ‘Tiresias SA’ which specialises in the collection and supply of credit profile data about corporate entities and private individuals and the operation of a risk consolidation system regarding consumer credit.

[68] Tasikas, Creditor's obligation to assess the creditworthiness of the consumer in consumer credit (in greek: Τασίκας, Η υποχρέωση του πιστωτικού φορέα για αξιολόγηση της πιστοληπτικής ικανότητας του καταναλωτή στην παροχή καταναλωτικής πίστης, NoB 2011, 2292.

of this article, the consumer is discharged from the total cost of the credit, including interests; and he has the obligation to pay only the amount of the capital according to the contracted instalments''.

In other words, the national law provides the discharge of debt due to the inability of the debtor to repay his debt[69], if this inability is caused by the fault of the creditor, including fraud or negligence, gross or otherwise. The legal consequence is the discharge of the total amount of the cost of the credit, including interests, default interest, litigation interest, judicial costs, and fees[70]. The provision has a punitive character, as the creditor loses not only the profits expected for the service but also the actual service cost that is normally passed to the debtor. In this way, there is a strong motive for the creditor not to breach his obligations.

Yet, the legal consequence of discharge is considered as an argument for the private law character of the provision, as it actually serves as a specification of civil responsibility.[71] However, it is not clear if the provision sets an obligation for the creditor to deny credit in case the consumer does not meet the creditworthiness criteria,[72] or whether it is up to the former to decide whether to provide credit or not.[73]

Apart from CMD Z1- 699/2010, the obligation to assess the creditworthiness of the consumers is provided in L. 3601 / 2007, as amended, and the Bank of Greece Governor Acts 2588/2007, 2589/2007, 2594/2007, 2563/2005, 2565/2005, 2526/2003 and 2253/2003, which, beyond other legislative texts, established the new supervisory framework (Basel II). Specifically, according to articles 11 par. 1 and 27 par. 3 L. 3601/2007, banks activities include collecting and processing business information, including customer credit rating services and credit applicants provide complete and accurate information for assessing their solvency and creditworthiness. Furthermore, according to chapter A1 of GA 2523/2003, funding is provided by criteria adopted and applied by the bank, relating, in particular, to assess the creditworthiness of borrowers.

Article 36 of 1997 Bank Deontology Code provides that the banks, when considering any credit request, may require the applicant every necessary, at their option, information about a)

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[69] Domurath, Comparato, and Micklitz, The Over-indebtedness of European Consumers – a View from Six Countries, *EUI Working Papers Law 2014/10* (2014), 27.

[70] *Ibid*.

[71] Tasikas, Creditor's obligation to assess the creditworthiness of the consumer in consumer credit (in greek: Τασίκας, Η υποχρέωση του πιστωτικού φορέα για αξιολόγηση της πιστοληπτικής ικανότητας του καταναλωτή στην παροχή καταναλωτικής πίστης, ΝοΒ 2011, 2296-7.

[72] Mentis, Defense and Release of the over-indebted debtor, (2012), 33-34. [in greek: Μεντής, Άμυνα και Ελευθέρωση του Υπερχρεωμένου Οφειλέτη, (2012)].

[73] Perakis, The responsible lending principle and the recent consumer credit directive, (in greek: Περάκης, Η αρχή του „υπεύθυνου δανεισμού“ και η πρόσφατη κοινοτική Οδηγία για την καταναλωτική πίστη, ΧρηΔ 2009, 357.

the age, occupation, family status of applicants and guarantors, b) the financial and asset condition of the above and c) their ability to correspond in time to their obligations towards the bank. This provision offers some basic criteria of assessment that can be used by the creditors. Of course, the main drawback of this provision is its voluntary character and this is one of the reasons why the Bank Deontology Code requires important amendments in order to comply with the CCD and the - under implementation - MCD.

Further assessment criteria can be found in Bank of Greece document 1635/21.10.2005 that further set the generally acceptable debt-to-income ratio in the pre-assessment stage at 30-40% and laid down the minimum factors to be taken into account for the calculation of the above ratio (income stability, level of income in absolute terms, adequacy of information etc.).[74]

6.1.2 Mortgage Credit

As the CCD excludes mortgage credit from its scope of application, the latter is going to be ruled by the transportation of the MCD in the Greek legislation. Until now, mortgage credit is ruled by some general credit provisions included in the 1997 Bank Deontology Code and some Bank of Greece Acts.[75]

6.2 Insolvency – Over-indebtedness

6.2.1 Bank Deontology Code 2014 regarding loans in default

Loans in arrears that have not been terminated for individuals and businesses are in the scope of the Bank Deontology Code that was introduced in 2014. It is an out-of-court procedure, which aims to bring into contact debtors and banks, according to some rules set. It is characterized by two main notions, the notion of "cooperative debtor"[76] and "reasonable living expenses".

The procedure consists of five steps: 1) contact the borrower, 2) collection of debtor's financial and other data, 3) evaluation of the data, 4) proposal of appropriate solutions to the borrower, on the basis of his income and the reasonable living expenses and 5) appeals

[74] See Bank of Greece at http://www.bankofgreece.gr/Pages/en/Supervision/LegalF/creditinstitutions/supervisionrules/forecast.aspx.

[75] Especially, see Act 2502/2001.

[76] A co-operative debtor is someone who: 1) Provides full and updated contact information to the banks; 2) is available for communication and responds to calls and letters from the bank, within 15 working days; 3) provides full information on the current or future financial position, within 15 working days from the date of change or when requested.

procedure, if the proposals do not satisfy the debtor. The use of the Code is voluntary for the debtor, who may choose either not to follow the procedure or, if he does, not to agree with the proposal of the bank. In both cases, debtor is obliged to respond as “cooperative”. The obligatory part refers to banks procedure obligations.

6.2.2 Law 3869/2010 (insolvency legislation)

In 2010, Law 3869/2010 ‘for the debt settlement of over-indebted natural persons’ was adopted and along with Bankruptcy Code for companies and entrepreneurs, it consists of insolvency legislation.

a) Scope and requirements

Natural persons that cannot file for Bankruptcy (‘non merchants’) are able to benefit from Law 3869/2010, in case they cannot meet their financial obligations permanently. According to article 1, the debtor must be a natural person, unable to file for Bankruptcy (‘non merchant), having permanent inability to pay debts that was not caused by deceit. Ex merchants may appeal provided they stopped their professional operations before they became insolvent.

According to article 1 of Law 3869/2010, debts that have been undertaken during the last year before the submission of the discharging application, as well as debts stemming from illegal acts committed by fraudulent intention, administrative fines/sanctions, fines, tax/debts due towards the State and Organizations of Local Authorities, Public law corporate bodies charges and contributions towards social security funds, are excluded from the scope of the provision.

b) Procedure

Law 3869/2010 has a two steps procedure. Before applying to (Piece) Court, one may seek amicable settlement with his debtors, with the aid of consumer associations or Consumer Ombudsman or through mediation procedure. Before the 2013 amendments[77], this step was obligatory and only if there was not settlement debtor could move forward to Court. Because of the failure of this provision to an almost 100% percentage, it became optional.

The application must contain: i) a statement of the debtor's property and his and his spouse income, ii) statement with his creditors and their claims in capital, interest and expenses and iii) debt settlement plan. After the submission of the petition, which is served to all creditors, two hearings are set. The main hearing must be set within six months after the submission, but in practice is set many years after. There is also another hearing set before the main

[77] Amendments of Law 4161/2013.

hearing, when the court notes if there is a creditor’s agreement on the settlement plan (pre-court settlement) and if not, decide at the request of the debtor or creditor or ex officio the suspension of enforcement measures against the debtor, maintaining factual and legal situation of his assets and the payment of monthly instalments, until the final ruling on the application. Monthly payments should be reasonable, based on the financial situation of the debtor, but may not be less than 10% of the monthly instalments required to pay all creditors until the time of the submission, and no less than 40 euro per month. There is an exception to the above limit, if the applicant meets the requirements of Article 8 paragraph 5[78], so lower or zero instalments are set. Service of the petition does not interrupt the accrual of interest on secured claims (contractual interest rather than default interest applies), unlike for unsecured claims, where interest accrual is interrupted by that service.

After the main hearing, hi the debtor's assets are insufficient, the court, taking into account all kinds of income, especially those from his own work, the ability of the spouse contribution and weighting of the living needs of himself and his protected family members, sets monthly payments for a period of three to five years, symmetrically distributed to all the creditors. In exceptional cases, such as chronic unemployment without fault of the debtor, serious health problems, insufficient income to cover basic living needs of the debtor or other reasons, the court may set small amount or zero monthly payments. If the debtor delays the instalments set by court for more than three months, the court orders the debtor discount from the settlement at the request of the creditors application.

If there is liquidable property, the sale of which is necessary for the satisfaction of creditors, the court appoints a liquidator. The debtor may submit a liquidation proposal, requesting the exclusion of his principal residence from the liquidation. In this case, the debtor has to pay a total amount up to eighty percent (80%) of the objective value of the house. A grace period may also be provided. In practice, during the grace period the debtor is able to pay for his article 8 settlements, so as not to have to pay simultaneously for these two payment plans. This amount is paid at the contract interest rate at the average mortgage rate, variable or fixed. Secured debts are satisfied first. To determine the period of amortization payment of the prescribed total debt, the court takes into account the duration of the contracts and the age of the debtor, but this period cannot be more than thirty years. According to a part of the jurisprudence and theory, the beneficial provision of article 8 par. 5 must be analogically implemented for the exclusion of the principal residence payment, meaning that there may be set a percentage less than 80% of the objective value, even if debts are more.

[78] The provision refers to debtors with serious health problems, long period unemployment or zero incomes.

c) Auction suspension measures

Since the crisis break out in 2008, the government passed a law that suspended public auctions against all immovable properties for debts to banks less than 200.000 euro. After the Law 3869/2010 introduction, the suspension was extended to all debts – not only banks - but only for the principal residence. These two measured were being taken until 2013. During 2014, only the principal residence was protected with certain income and house value criteria. Since 1/1/2015 there is no protection against public auctions until now, as the new government is going to re-introduce such legislation for 2015.

7. Comparative analysis: shortcomings and best practices

7.1 Responsible lending

Consumer over-indebtedness is a growing phenomenon in the EU and all four compared Member States show full awareness of the problem displaying brand-new legal initiatives to tackle it.

A number of these measures are clearly the result of the impact of EU policies and law, especially as regards the preventive side of financial difficulty in the form of 'responsible credit'. This is not surprising given the relative maturity of EU law in the area of consumer credits. Indeed, according to the European Commission's evaluation, no systematic deficiencies in the transposition of the CCD by Member States have been identified so far.[79]

As the CCD is based on full maximum harmonisation, the Member States have been precluded from adopting or retaining different national law provisions within the harmonised areas, other than to the extent permitted by the CCD itself.

Yet, differences still exist and some additional convergence in specific areas may be desirable.

It is true that all four surveyed countries have implemented the CCD in similar terms but the extent of official guidelines given is very different.

The UK seems to provide an example of good practice in issuing very detailed guidance to lenders on the meaning of responsible lending and its application, providing a more effective legal environment for consumer protection backed by clear public and private law

[79] See European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Directive 2008/48/EC on credit agreements for consumers*, COM(2014) 259 final (May 2014).

enforcement. Moreover, it has gone as far as anticipating detailed measures in relation to mortgages despite the term for implementing the MCD still lays well ahead.
In his respect, the UK seems to show an approach of particular care and attention towards consumers in line with its traditional 'market economy' model, where consumers are economic agents in an economically imbalanced relationship with suppliers and they need protection or support to sustain, promote, curtail and adjust the structure of a free and competitive market.[80]
The failure of issuing guidelines and absence of clarity about the meaning and methods of creditworthiness assessment, the existence of a public vs. private law dispute and enforcement uncertainty, and the lack of clearly defined or light consequences for creditors (but not in Greece) appear the most marked differences in the implementation of responsible credit provisions in the other surveyed jurisdictions, which remain mostly anchored to a legal tradition grounded in the Roman principle of *caveat emptor* – let the buyer beware.
Germany in particular exhibits a minimal implementation of EU law and low enthusiasm about responsible lending, which is against the tradition of German case-law[81] and represents an opposing thrust to the ideology of the self-responsible consumer.[82] This may also explain the apparent lack of consequences for the creditworthiness assessment whose violation does not lead to prohibition of lending or discharge of the debtor's obligations.
Italy, to some extent, displays a similar attitude of minimal implementation. No guidelines are offered for responsible credit and the assessment of the creditworthiness of consumers. Moreover, the implementation of responsible lending obligations seems to find its home in the pre-contractual responsibility of the creditor whose breach results in the ensuing soft award of damages.
Like Germany and Italy, Greece offers no guidelines for responsible lending and the creditworthiness assessment. Unlike the other two countries, however, it has introduced punitive consequences to the breach of the creditworthiness obligation allowing for the discharge of the total cost of credit and the interests – arguably a measure introduced in the aftermath of the severe economic and social crisis to alleviate the burden on severely over-indebted consumers, as well as a political one driven by the scope and intensity of the crisis.
The different approach in the issuing of guidelines incorporated into national law does not appear a secondary element for a concept of 'responsible credit' that has already been

[80] E.g. see Howells and Weatherill, *Consumer Protection* (Ashgate 2005), esp. 1-98
[81] BGH, NJW 1989, 1665.
[82] E.g. Rohe, BKR (2003), 267, 273.

criticised for not been clear and for having failed to be truly absorbed into EU law.[83] Moreover, not only they have the effect of granting a different type of protection to consumers in the various Member States, but they may have major consequences in the way the common market operates in the granting of credit and the behaviour of lenders, where a level playing field does not find its way and regulatory barriers remain in place.

Enforcement may also represent a ground of concern. Again, the UK appears at the forefront where a system of both public and private enforcement exists and which provides for strong measures, indicating that the problem is taken seriously. By contrast, the debate in the other countries over the legal nature of the lenders' obligation to carry out the creditworthiness assessment and acting 'responsibly' carries an element of uncertainty over an effective or efficient enforceability, which once again risks fragmenting the common market.

The Court of Justice of the EU (CJEU) may play a role in this area. In *LCL Le Crédit Lyonnais*[84] the CJEU has pointed out *incidenter tantum* that "the creditor's obligation, prior to conclusion of the agreement, to assess the borrower's creditworthiness is intended to protect consumers against the risks of over-indebtedness and bankruptcy".[85] This passage may be relied on to conclude that the assessment is not exclusively a public law duty but it is also one owed to the borrower, thereby entitling him to private law remedies in case of breach of this obligation.[86] Opposing views, however, may still insist that the creditworthiness assessment remains solely a public law duty, and that the only effect the CJEU decision in *LCL Crédit Lyonnaise* should have is to reconsider the sanction system under the national laws.[87] Further clarification by the CJEU may be necessary in this area if proper harmonisation has to be achieved. To the extent that the EU accepts and pursues the liberalisation of financial markets and an expansion of consumption, the approach taken by the UK seems more routed into a consistent harmonised framework.

7.2 Debt solutions

[83] E.g. Rott shows the frustration of the emphasis given to such a policy in the earlier drafts of the CCD that was not retained in the final version. The author shows how the Commission originally aimed at avoiding the consumer's over-indebtedness by evading unreasonable credit contracts, introducing duties of lenders to assess and advise consumers on the risks of default and holding them responsible during all phases of the contractual relationship. Instead, the final version of the CCD remains anchored on the usual paradigm of transparency and information requirements by both lenders and borrowers, adding a focus on an undetermined requirement of creditworthiness assessment. Rott, "Consumer Credit", *supra* note 16.

[84] *LCL Le Crédit Lyonnais SA v Fesih Kalhan* (Case C-565/12) of 27 March 2014.

[85] *Ibid*.

[86] Rott, EWS Europäisches Wirtschafts- und Steuerrecht 2014, 201. 202 f; Maier, VuR Verbraucher und Recht 2015, 21; Barta/Braune, BKR Zeitschrift für Bank- und Kapitalmarktrecht 2014, 324, 329f.; Freitag, LMK - Kommentierte BGH-Rechtsprechung Lindenmaier-MöhringLMK 2014, 358, 906.

[87] Herresthal, EuZW Europäische Zeitschrift für Wirtschaftsrecht 2014, 497, 500.

Arguably, the most striking feature of the common market revealed by a general observation and comparison of the four jurisdictions is that all Member States have moved towards new or renovated national regimes for the protection of consumers in financial distress and the treatment of the insolvency of natural persons. However, the major shortcoming is that these seem individual but uncoordinated legal initiatives in the Member States which uncover a complete absence of common, harmonised or appropriately resourced strategies at EU level. Without the harmonising intervention of the EU - as in the case of responsible lending with all its limits - personal insolvency or debt-discharge systems have developed in different ways which still reflect economic, cultural or legal traditions. The UK has an established system of personal bankruptcy laws that it has reformed to adapt to the needs of over-indebted consumers as an inevitable side-effect of the free market, whereas in other countries such as Italy and Greece – where personal bankruptcy and a debt discharge had not traditionally been available for non-business debtors – have introduced consumer debt-relief provisions as a new legal instrument to repair the effects of the liberalisation of markets or following the financial crisis.

The literature has already illustrated how continental European personal insolvency systems differ from the Anglo-Saxon ones. For Germany, it has identified a 'liability model' emphasising the debtor's responsibility for debt repayments.[88] These is confirmed by the general approach taken and by recent measures that only formally aim to reduce the time to obtain a debt relief but that in practice leave the system unaltered from the past.

Another typical classification within continental Western Europe is that of a 'mercy model' underpinned by social and political notions of 'deservingness', good faith, or innocent over-indebtedness, which focuses on the debtor's needs or abilities to repay alongside the granting of broad discretionary powers to bankruptcy officials. Examples are usually the personal insolvency systems of the Scandinavian countries, Belgium, and France.[89]

Whilst Italy seems to have endorsed this 'mercy model' based on the good faith of the consumer debtor and ample discretionary powers of the judiciary, Greece appears more hybrid, having developed its law from that of Germany and providing for a tighter liability of the debtor and his assets towards the creditors but showing an attitude of increased forgiveness.

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[88] Ramsay, "Models of Consumer Bankruptcy. Implications for Research and Policy", 20(2) *Journal of Consumer Policy* (1997), 269-287; Kilborn, "Two decades, three key questions, and evolving answers in European consumer insolvency law. Responsibility, discretion, and sacrifice", in Niemi, Ramsay, and Whitford (eds.) *Consumer Credit, Debt, and Bankruptcy. Comparative and International Perspectives* (Hart 2009), 307-329.

[89] *Ibid*. See also Niemi (1999), *supra* note 11.

7.3 The four jurisdictions in the EU dimension

If from the above comparison it has to be captured the real extent to which the EU addresses consumer over-indebtedness the resulting picture appears confusing.

At present, in the area of insolvency law, Council Regulation (EC) 1346/2000[90] and its proposed reform[91] - which extend to proceedings providing for a debt discharge of consumers and self-employed persons - do not attempt to enforce a common system at EU level, but instead to ensure that insolvency proceedings opened in one Member State are recognized in all other Member States. Any European consumer who meets the qualification criteria of a country which does permit consumer bankruptcy has the ability and right to access this, effectively making their domestic legislative position irrelevant. The regulation outlines that the domestic law of the country where the case is opened is applicable as long as the individual has established a 'centre of main interest' (COMI) in the relevant jurisdiction. Moreover, the Regulation's rules have given raise to forum shopping also by natural persons through abusive COMI-relocation. The proposed reform is designed to improve the co-ordination of insolvency proceedings within the EU; ensure the equitable treatment of creditors and to minimise 'forum shopping', i.e. the movement of assets from one country to another so as to take advantage of a more favourable legal position.

In any event, COMI provisions and the proposed reform could be capable of affecting a minority of skilled or well-informed consumers/small traders, but they can hardly be applicable to the majority of people in financial distress, i.e. the vulnerable consumers. Moreover, the *Radziejewski* case suggests that national insolvency procedures for natural persons may be restrictive of the fundamental free movement rights of the EU prohibited by Article 45 TFEU. The CJEU held that national law which makes the grant of debt relief subject to a condition of residence is capable of dissuading an insolvent person from exercising his right to freedom of movement. In particular, a person can be dissuaded from leaving his Member State of origin to go and work in another Member State if by doing so he is denied the possibility of obtaining debt relief in that Member State of origin.[92]

[90] OJ L 160/1.
[91] See European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings*, COM (2012) 744 final - followed by the endorsement from the European Parliament's Legal Affairs Committee (JURI) on 17 December 2013 (MEMO/13/1164).
[92] *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm* (Case C-461/11) of 8 November 2012.

8. Concluding Remarks

A comparison of the selected Member States shows how EU action on responsible lending has brought a degree of convergence as far as the preventive side of consumer over-indebtedness is concerned. However, the EU and the Member States should engage more with the guidelines over a concept that still remains unclear and applied unevenly.

At any rate, the major shortcoming lies in the curative side of over-indebtedness in the form of personal insolvency. All the surveyed Member States, like the majority in the EU, now have separate legal regimes for corporate and personal insolvency. However, these are national but uncoordinated initiatives that entrench themselves and operate in a limping common market.

Arguably, a reformed common system for the treatment of the insolvency of natural persons at EU level, which departs radically from the current approach of mutual recognition, should step-in to provide a more complete response to address the over-indebtedness of European consumers, not as a form of social assistance but rather as a social insurance protecting individuals and society from ruin and degradation, as well as counterproductive and destructive debt management and enforcement practices that are also detrimental for creditors. Ultimately, the intended stance questions the use of mutual recognition in the context of over-indebtedness and the insolvency of natural persons. Mutual recognition and private international law in the EU are used when it is difficult for Member States to reach agreement on the substantive laws.[93]

Besides, the integration of retail financial markets, consumer protection, responsible lending, and social and economic cohesion are derived from the EU Treaties to justify the EU competence for a common, harmonised or resourced strategy at Union level.[94]

Recent scholarship demonstrates how empirical evidence provides little support for arguments grounded on the national legal traditions, local institutional structures or cultural attitudes of consumer insolvency laws. Therefore, these should not represent further obstacles for an EU reformed system.[95] Deregulation and integration of financial markets were brought in by the EU regardless of pre-existing national legal traditions, institutions and cultures. By

[93] Council of the European Union, *The Hague Programme: strengthening freedom, security and justice in the European Union* available at http://ec.europa.eu/justice_home/doc_centre/doc/hague_programme_en.pdf, 31. See also: Mills, *The Confluence of Public and Private International Law*, (Cambridge University Press 2009).

[94] E.g. see the competence attributed to the EU by Article 2(2) TFEU, falling within the areas detailed in Article 4 TFEU of (a) internal market, (b) (c) social and economic policy and cohesion, and (f) consumer protection. Under Article 2(2) TFEU, the Union and the Member States may legislate and adopt legally binding acts in such areas, but the Member States shall exercise their competence to the extent that the Union has not exercised its competence or has decided to cease exercising its competence.

the same token, the EU should not find obstacles to step in with measures to fix the very same market with the treatment of its side effects.

The EU competence on the matter is arguably important to the effective operation of the single market to avoid the fragmentation between the various national jurisdictions when dealing with the effects generated by the very same market. The legal basis for a uniform or harmonised procedure looks solid under Article 38 of the Charter of Fundamental Rights (Consumer Protection), as well as Articles 114 TFEU (Establishment and Functioning of the Internal Market) and 81 TFEU (Judicial Cooperation in Civil Matters).[96]

To the extent that consumer over-indebtedness is taken seriously, no policy designed to prevent it can on its own address the problem. Preventive measures alone, however designed but without ex-post debt solutions, cannot be conclusive.

[95] Spooner, "Fresh Start or Stalemate? European Consumer Insolvency Law Reform and the Politics of Household Debt", 3 *European Review of Private Law* (2013), 747-794.

[96] Opinion of the Economic and Social Committee on '*Consumer protection and appropriate treatment of over-indebtedness to prevent social exclusion*' (Exploratory opinion), INT/726 (Brussels, 29 April 2014).