

Two Decades, Three Key Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion, and Sacrifice

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As recently as ten years ago, one would have been hard pressed to explain how lawmakers on the European continent¹ were dealing with the growing problem of excessive consumer debt. Over the previous decade, economic crisis and financial deregulation, among other causes, had led hundreds of thousands of individuals into a new debt trap. A handful of states had taken a first step toward addressing the unique problems of these financially over-extended souls, but substantial reforms of these measures were already underway. Legislators across most of Europe were either waiting for their newly adopted solutions to become effective or still debating what, if anything, to do. The last ten years have seen a wealth of policy discussion, practice, and reform in the area of consumer insolvency.

This paper surveys the three most salient questions that have engaged policymakers in the last twenty years—and particularly the last ten—of insolvency law in Europe. This period has seen the discussion, emergence, and often multiple reforms of almost every consumer insolvency law in Europe. Consequently, we can now see not only points in time, but the lines that connect numerous points, and the convergence of these lines across Europe over time. Consumer insolvency policy has been in an almost constant state of flux in Europe since the 1990s, and it will likely to continue to be in the years to come. This paper situates the current status of policy in its historical context with an eye toward predicting what the future holds and offering suggestions for evolving policy, both in the countries that have adopted consumer insolvency laws, and especially for those that have not done so . . . yet.

Part I untangles the numerous strands of argumentation that supported the adoption of distinct consumer insolvency law across Europe. Part II traces the development of consumer insolvency relief in terms of two intertwined sets of defining characteristics: discretion versus uniformity, and preservation versus destruction of contract rights. Over the last decade, a clear trend has emerged, driven largely by practical concerns, favoring uniformity of treatment and aggressive discharge of debt. Finally, Part III concludes with a brief look at the sacrifices demanded of debtors and the reasons for a gradual softening of these demands, along with the sticky question of state financing for relief in a system where most of the beneficiaries cannot afford to bear the administrative costs of that relief.

I. Is Legislative Intervention Necessary, Appropriate?

Logically, the first question European legislators have faced is why they would drift away from centuries of dedication to the notion of *pacta sunt servanda* (agreements must be fulfilled) and intervene in the relationship between consumer debtors and their creditors. Freedom of contract had always been intimately tied to a corresponding duty to bear responsibility for the consequences of contractual choices. Changing the longstanding balance of freedom and responsibility would not be undertaken lightly. Beginning in earnest in the 1980s, European lawmakers began to face two closely related questions: why, after nearly two thousand years of relatively stable contract doctrine, is a re-examination of the most fundamental notion of contract law appropriate now, and why should the balance of benefits and obligations in consumer contracts be disturbed at all.

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¹ I intentionally leave aside the United Kingdom, which like the United States and other common law systems has offered insolvency relief to non-business individuals for decades. I focus here on the quite recent development of such relief in the civil law systems on the continent.

A. Why Now?

The simple answer to the first question is debt—lots of it, like never before. An aggressive philosophy of free-market economic competition led European regulators to unleash consumer credit markets in the late 1970s and early 1980s, lifting restrictions on, for example, down payment requirements and repayment terms. At about the same time, new information technology began to propel these markets forward with new techniques for evaluating, marketing, and administering a largely untapped market for consumer credit.

Adding the spark of technology and capital to the powder of a newly deregulated and hungry market created an explosion of consumer debt. By the mid-1980s, European consumers had begun to risk their future finances by taking on leverage to an unprecedented degree. For example, while median income in Germany grew only 12-fold between 1950 and 1984, per-capita indebtedness increased more than 800-fold during the same period.² Total consumer debt in Germany more than doubled again between 1984 and 1994, from just under 160 billion DM in 1984 to almost 364 billion DM in 1994.³

Widespread availability of consumer credit had the desired effects for many people. Individuals were empowered to leverage future income to support current economic productivity and consumption. From a broader market perspective, this smoothed the demand curve for products and services, increasing economic efficiency, volume, and competitiveness.

Nonetheless, the democratization of credit also had inevitable negative consequences for some. Given the indeterminacy of the predictions that borrowing involves, as well as the inherent limitations and biases of human cognition,⁴ some borrowing decisions turned out in retrospect to have been poor, in some cases devastating. As more and more pipers called to collect their due, some individuals faced economic collapse as a result of, among other things, misjudgments with respect to future financial conditions or the nature and terms of borrowing, unchecked desire for instant gratification, and unexpected financial interruptions (job loss chief among them, though also divorce, child birth, and serious or extended illness). One study in Germany estimated that, in 1989, 1.2 million households—over 3% of the total number of households—suffered from excessive debt.⁵ In Belgium, nearly 14% of consumer credit contracts were registered in default by 1995, with arrearages totaling over €1.2 billion. In 1993, more than 300,000 individuals in Belgium had registered credit defaults of one degree or another, a figure that would rise 28% to just over 385,000 by 2000—just under 5% of the total adult population of Belgium.⁶ Applying a broader definition of financial distress, an EU-

² DETLEV BONNEMANN & THOMAS RICKAL, EINFÜHRUNG IN DEN PROBLEMKREIS VER-/ ÜBERSCHULDUNG § 1 (1997), on-line at <http://www.uni-essen.de/tts/lehrrangebot/verschuldung/schulden.pdf>.

³ LARS RATH, ÜBERSCHULDUNG UND SCHULDNERBERATUNG IN DEUTSCHLAND UNTER BESONDERER BERÜCKSICHTIGUNG DER NEUEN INSOLVENZORDNUNG (INSO) § 2.2 (1996).

⁴ See, eg. Jason J. Kilborn, *Behavioral Economics, Overindebtedness, and Comparative Consumer Bankruptcy: Searching For Causes and Evaluating Solutions*, 22 EMORY BANKR. DEV. J. 13 (2005).

⁵ DIETER KORCZAK & GABRIELA PFEFFERKORN, ÜBERSCHULDUNGSSITUATION UND SCHULDNERBERATUNG IN DER BUNDESREPUBLIK DEUTSCHLAND XL (1992).

⁶ *Doc. parl. Sénat* (1997-1998) no 929/5, p 3; GIANNI BETTI ET AL., ORC MACRO, STUDY OF THE PROBLEM OF CONSUMER INDEBTEDNESS: STATISTICAL ASPECTS 43 & tbl. 4.2 (2001), online at http://europa.eu.int/comm/consumers/cons_int/fina_serv/cons_directive/fina_serv06_en.pdf.

commissioned study reported that, in 1996, 64% of Belgian households and 29% of households in Luxembourg with non-mortgage loans were “overindebted.”⁷

These numbers might have been ignored as marginal cases to be dealt with through market forces, but powerful voices rose up to draw attention to the plight of these casualties of financial market liberalization. These voices and their persuasive power are a great part of the reason why consumer insolvency relief came into being where and when it did. In Germany, a new Justice Minister in the mid-1980s advocated aggressive relief for indebted consumers, in part by uniting the efforts of the Justice Ministry and the Ministry for Youth, Family, Women and Health to commission a report accentuating the growing problem of consumer overindebtedness and its ill effects on families and health.⁸ In Sweden, in contrast, concerned legislators fought for consumer insolvency relief despite opposition from a new justice minister, organizing their colleagues in June 1993 to demand a government bill.⁹ In both Belgium and Luxembourg, consumer counselors pressed legislators for action on behalf of growing numbers of financially overwhelmed consumers facing social withdrawal, isolation, health problems, family tension, and other social ills.¹⁰

Even if a new problem had revealed itself, one might wonder why new intervention was necessary. Shouldn't the famously generous European social safety nets have dealt with these problems? Had the nets become weaker or more porous in a way that necessitated new regulation? Though the specifics of these safety nets had changed somewhat during approximately the same time when the consumer debt crises began to mature, social welfare reforms seem to have contributed rather little to the problem. The late 1970s and 1980s saw only rather modest changes to the various social support structures in Europe, which were never designed to provide blanket protection for all risks, especially in an increasingly volatile labor market. Massive unemployment that gripped Europe in the late 1980s and 1990s would have strained the finances of many consumers in any event. That being said, borrowing only as a means of partial and temporary income replacement during short-term unemployment would have caused financial distress, but limited in both degree and duration. Having already taken on debt levels that seemed manageable while employed, however, many unexpectedly unemployed individuals faced serious challenges from a thick layer of debt with relatively inflexible repayment timelines and serious penalties for default. Many had to borrow simply to refinance older borrowing, service charges and default fees snowballed, and already thin margins quickly disappeared. Even before the modest reforms of the 1970s and 1980s, traditional social welfare programs were not designed to assuage the casualties of the combined new risks of rampant unemployment and overwhelming consumer debt.¹¹

⁷ BETTI ET AL., above n 6, at 2-3 & tbl. 1.1.

⁸ KORCZAK & PFEFFERKORN, above n 5, at XXXVI.

⁹ PROP. 1993/94:123, *Skuldsaneringslag*, § 2.2; Gertrud Lennander, *Debt Adjustment for Private Individuals*, 35 SCANDINAVIAN STUDIES IN LAW 127, 131 (1991); SOU 2004:81, *Ett steg mot ett enklare och snabbare skuldsaneringsförfarande*, 55; Prop. 1993/94:123, §§ 1, 2.2-2.3, 4.1.

¹⁰ *Doc. parl. Chambre* (1991-1992) no 274/3, at 5 (Belgium); *Doc. parl.* no 4409, at 2-3 (1997) (Luxembourg).

¹¹ See Jason Kilborn, *Comparative Cause and Effect: Consumer Insolvency and the Eroding Social Safety Net*, 14 COLUMBIA J. EUROPEAN L. ____ (forthcoming 2008).

B. Even In Light of New Risks, Why Intervene At All?

Accepting that changed circumstances might call for aggressive renegotiation of contracts in individual cases is one thing. Accepting that broad-based legislative suspension of contract rights is the right prescription is quite another. As the next section discusses, not all European lawmakers embraced the most aggressive forms of relief right away, but many did, and more eventually would. The key to understanding why lawmakers accepted a decisive break with the past is a new vision of responsibility, focused not only on individual transactions and obligors, but on the responsible expectations of creditors, the responsible use of the instruments of state power, and a responsible balance of individual and collective economic interests.

Adhering to the rather rigid notion of *pacta sunt servanda* makes some sense when the incidence of contractual default is relatively limited, the public enforcement machinery can be engaged effectively to compel performance or offer substitute performance, and enforcement of obligations produces relatively few side effects outside the debtor-creditor relationship. As the rate of consumer financial distress climbed, substantial doubts arose with respect to each of these factors.

As discussed above, rising debt levels became unmanageable overindebtedness for many consumers in the 1980s and 1990s, leading to a significantly elevated rate of default. Though the legislative record reflects very little of this kind of thinking, one senses hints of a rising feeling of legislative responsibility for the problem. Lawmakers had sought to take advantage of the competitive benefits of free consumer credit and labor markets, and now many were feeling pangs of conscience about the significant downside of that decision. Whatever advantages economic liberalization might bring, inevitable debt traps and social ills accompanied these benefits. While consumers certainly bore a substantial measure of responsibility for their own contractual choices, at least some—and probably many—legislators felt a sense of their own responsibility for easing the pain caused by their choice to expose their constituents to greater risks. Intervening to pull the pendulum back to somewhere near the center represented the responsible move at the governmental level.

More importantly, though, legislators carefully reexamined the responsibility of creditors—particularly lenders—both before and after default by their consumer counterparties. Though legislators feared the moral hazard implicated by relieving consumers of their legitimate contractual obligations, they also began to question how the law had facilitated or even encouraged inefficient and irresponsible extension of credit and enforcement actions by creditors.

The new world of technology-driven lending depended on high volume and segmentation of borrowers by risk profile. As statistical credit scoring and aggressive advertising replaced laborious examination of individualized financial data, lenders accepted higher risks of default in many cases. They did not, of course, warn the consumer borrowers on these riskier loans about their individual higher likelihood of default. Legislators became increasingly concerned that lenders were either ignoring pertinent information about default risk or that they were hawking unsuitable debt to unsophisticated consumer customers. One of the explicit goals of the French and Belgian insolvency laws, for example, was to make lenders more responsible in their

practices of extending credit to consumers.¹² Indeed, the authors of the draft law in Luxembourg placed particular blame on the “manipulation” of consumers by the “aggressive and omnipresent advertising of credit establishments.”¹³

Whatever view one might take of the *pre*-default behavior of creditors, lawmakers in every country focused especially on creditor responsibility *after* default. It seemed increasingly irresponsible for the state to support creditors’ ill-founded expectations that many of these debts could be collected through official enforcement channels, not to mention irresponsible for creditors to continue unchecked use of these channels. Intervention would serve primarily to force creditors to take responsibility by facing facts and internalizing the negative and unjustified externalities of their unrestrained enforcement actions.

At the individual debtor-creditor level, the system allowed—indeed, encouraged—creditors to waste their own resources and the resources of the state by supporting a rapidly proliferating volume of collection efforts on many uncollectible debts. In Sweden, for example, state investigators observed that creditors’ ability theoretically to collect from substantial numbers of debtors was “worthless on the best assessment.”¹⁴ While still the exception rather than the rule, such “worthless” enforcement actions by creditors became so common as to occupy a troubling amount of the attention and resources of the courts and other enforcement authorities.¹⁵ Information asymmetry and indeterminacy (and in some cases creditor obstinacy) made even bilateral compromise solutions difficult. Creditors were unwilling or unable to make the necessary investment of time to determine whether a particular debtor was really unable to pay.

Multiplying this effect over many creditors introduced a further problem of opportunistic behavior. The individualistic nature of the enforcement system allowed creditors irresponsibly to ignore any interests other than their own, imposing avoidable losses on numerous other creditors when a multilateral, collective compromise was the most responsible solution. Each creditor could rationally but irresponsibly assume that its debt was collectible if the debtor could be cajoled into paying only that debt. The state enforcement mechanism became in many cases a tool to elevate the rights of aggressive and selfish creditors over the similar rights of others. Artificially propping up the illusion that all of these debts could be collected without modification or compromise allowed creditors irresponsibly to create losses for themselves, other creditors, and the state, especially as the number of such cases increased. In Belgium, even the national representative of official debt collectors argued for intervention, as the recalcitrance of aggressive creditors all too often derailed attempts to negotiate multilateral settlements, leading to a needless accumulation of fees and expenses and a dead-weight loss of value.¹⁶

On an even broader level, the current system encouraged a myopic concentration on the specific debts at issue when more careful consideration of the world beyond those debts was

¹² Anne Morin, *La loi française relative au surendettement: bilans et perspectives*, in LES CONSOMMATEURS ET L’EUROPE DES SERVICES FINANCIERS 123, 129, 137 (1992); JEAN-JACQUES HYEST & PAUL LORIDANT, SÉNAT FRANÇAIS, RAPPORT D’INFORMATION NO 60, SURENDETTEMENT: PRÉVENIR ET GUÉRIR § III.C.2 (1997); Law of 5 July 1998, Art 19, M.B. 31 July 1998, p 24613, 24621 (Belgium).

¹³ Doc. parl. no 4409, at 11-12 (1997).

¹⁴ Lennander, above n 9, at 140-41.

¹⁵ See, eg., Morin, above n 12, at 126 (noting a substantial increase in consumer debt collections cases in France).

¹⁶ Doc. parl. Chambre (1991-1992) no 274/3, at 23.

called for. Far beyond the strictly economic issues involved in each collections case, debtors suffered such negative externalities as deterioration of their emotional, psychological, and physical health, impairing their personal and work lives. This imposed still further negative externalities on the economic and emotional health and well being of members of debtors' families, especially their children. Lawmakers in Luxembourg aimed explicitly to "reduce[e] the social cost resulting from social exclusion."¹⁷ With these new laws, lawmakers in both Belgium and Luxembourg sought to deliver "dignity and hope" and "offer perspectives for a better life" to overindebted persons.¹⁸

Even if creditors could accept compromise solutions, traditional contract theory encouraged creditors understandably but irresponsibly to elevate their own interests over broader societal interests. Strict adherence to *pacta sunt servanda* would lead to long years of debtors' toiling to repay their creditors, having very little incentive to achieve maximum productivity and development in the present when the reward of payment and release was far in the future. The negative externalities of creditor-focused enforcement action extended to the highest levels, considering the effects on state wealth distribution programs such as tax and welfare regimes. Debtors robbed of incentives to be maximally productive (or to reveal publicly the full extent of their productivity) would return less tax revenue to the state and languish in a state of dependence on welfare support rather than seeking through personal initiative to advance the economic welfare of themselves and their families. Indeed, in an increasingly competitive world, where national economies rested more heavily on consumer confidence, productivity, and spending, robbing significant numbers of consumers of incentives to enhance their productivity and enjoy active participation in the consumer economy would be a death sentence for global competitiveness.

Ambitious European lawmakers were eager to avoid sacrificing tax receipts, welfare expenditures, and economic productivity and competitiveness on the altar of rigid observance of creditor rights. Some mechanism was necessary to force creditors to internalize these numerous negative externalities to achieve a healthier balance of rights and responsibilities. Formal legislative insolvency relief has been the mechanism of choice over the past two decades. German and Dutch reformers, for example, adopted consumer insolvency laws to offer debtors a perspective for their futures, an incentive to remain productive rather than capitulating to a lifetime of essentially involuntary servitude for their creditors.¹⁹ Likewise in Sweden, the driving idea behind formal insolvency relief was to achieve broader benefits for society by minimizing the burdens on the welfare system and recapturing lost economic productivity and tax receipts from newly invigorated debtors.²⁰

C. Residual Ambivalence About Intervention

Though they were among the first to adopt aggressive consumer insolvency laws, Scandinavian legislatures in particular remain to this day somewhat ill-at-ease with respect to

¹⁷ Doc. parl. no 4409, at 3, 5 (1997) (referring to "nefarious human consequences" of financial distress).

¹⁸ Doc. parl. Chambre (1996-1997) no 1073/11, at 7; Doc. parl. no 4409/11, at 12 (2000).

¹⁹ See Jason J. Kilborn, *The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States*, 24 NW. J. INT'L L. & BUS. 257, 271-72 (2004); N.J. Huls, *Etat des lieux en matière d'assainissement légal des dettes aux Pays-Bas*, in LES CONSOMMATEURS ET L'EUROPE DES SERVICES FINANCIERS 141, 150 (Pierre DeJemeppe ed., 1992).

²⁰ See PROP. 1993/94:123, §§ 4.1, 6.3; Lennander, above n 9, at 131 & n. 11, 139 & n. 42.

this new approach to balancing responsibilities. Indeed, perhaps because of their first-mover status (Denmark adopted the first consumer insolvency law in continental Europe in 1984), the Scandinavian systems reflect most clearly the early struggle with the very notion of offering formal insolvency relief to consumers. These systems are marked by a continued vigilance effectuated through a unique process of administrative screening of cases for “reasonableness.”²¹

The Swedish system offers a representative example, highlighting several factors to be considered in this judgment of “reasonableness” in offering relief. First, the debtor is expected to have grappled with debt problems for some substantial time—generally, three or four years—before resorting to formal legal relief. Second, the system is decidedly not designed to offer relief from debts incurred through reckless risk taking, luxury consumption, or bad acts. While it is easy and accurate to observe that “criminal, unfair and speculative debt incurrence shall not be rewarded,”²² however, lawmakers emphasized that no clear line of exclusion could be drawn. Finally, not only *after*, but *before* seeking legal relief, deserving debtors must have attempted to maximize their earnings through work, apply the value of non-essential property to their debts, and fulfill their obligations (or deal with their debt problems in some other way) on their own.²³ Many petitions are rejected at this first stage. From implementation of the new Swedish law in mid-1994 through 2001, the state administrator rejected a fairly consistent average of about 40% of all petitions, though the rejection rate by 2002 and 2003 had fallen to about 30%.²⁴ These reasonableness factors and a consistently high rejection rate reflect residual hesitancy and the continuing struggle with the first question as to the appropriateness of legislative intervention.

II. Discretionary Modification or Uniform Discharge?

Once the decision was made to offer formal insolvency relief, the real work began. The decade between 1998 and 2008 in particular witnessed a continuing struggle to strike an appropriate balance between the sanctity of contracts and the need to make formal relief effective if it was to be offered. On the one hand, all of these systems are designed to a greater or lesser degree as adjuncts to the preferred solution of private renegotiation. On January 1, 2007, Sweden became the first and only state thus far to move away from a uniform model of private or semi-private negotiation as the entry point into any type of formal coercive relief.²⁵ Beyond this initial point of similarity, the systems have differed significantly on the next key question: how to deal with creditor intransigence, forcing creditors to accept a responsible approach. To put it more mildly, when a negotiated solution is not possible because of the refusal of one or more creditors to agree, how far is the state willing to go to abandon the underlying contracts at issue, and how powerfully is it willing to dedicate itself to the most aggressive and thoroughgoing form of relief. More importantly, to what extent will the system produce individualized solutions hand-tailored to each case, rather than routing every case through the same uniform steps toward the same effective relief.

²¹ See PROP. 1993/94:123 § 4.3.3; Johanna Niemi-Kiesiläinen, *Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?*, 37 OSGOODE HALL L. J. 473, 482-97 (1999).

²² See Lennander, above n 9, at 146-47.

²³ See generally SOU 2004:81, above n 9, at 61-63; Jason J. Kilborn, *Out with the New, In with the Old: As Sweden Aggressively Streamlines Its Consumer Bankruptcy System, Have U.S. Reformers Fallen Off the Learning Curve?*, 80 AM. BANKR. L.J. 435, 443-48 (2007).

²⁴ See SOU 2004:81, above n 9, at 110 tbl. 6.1.

²⁵ See Kilborn, above n 23, at 458-60.

In the beginning, the various European insolvency laws arranged themselves on a continuum with respect to this bipartite question. On the one end, relief was little more than a modification of each debtor's various obligations, and the exact form and extent of modification was left in the largely unfettered discretion of the system administrator. This description applies to the systems as initially adopted by countries that might reasonably be categorized as "French" or "Romanistic": France primarily, but also Belgium and Luxembourg. At the other end of the continuum, every debtor received the same predictable treatment, was subject to the same predictable demands, and would receive the same uniform and aggressive relief upon successful fulfillment of the law's demands: a discharge of all remaining debt (with some minor exceptions). This description applies to the systems adopted by countries that might reasonably be categorized as "Germanic": Germany primarily, but also Austria, and to a lesser degree the Netherlands and Sweden (along with the other Scandinavian states). This continuum has been in flux over the last decade, with a clear movement toward the "Germanic" end, but only after a long, slow struggle at earlier points along the way between discretionary modification and uniform discharge.

A. Discretionary Modification à la française

When it was adopted on the very last day of 1989, the French system stood on the far end of the spectrum just described. Indeed, its primary quite limited purpose was to offer formal, structured support for private renegotiation of distressed debts, in much the same way that the various networks of credit and debt counselors had been doing for years in neighboring countries. Each *département* now had its own official state service offering relief to overindebted individuals, a *commission de surendettement des particuliers* (commission on individual overindebtedness). Unlike other credit counseling structures, however, the French *surendettement* system incorporated a secret weapon to maximize the willingness of creditors, especially private banks and finance companies, to accede to informal concessions. At the center of each *commission*, the Banque de France is the primary architect and broker of compromises, and it has been quite successful over the years in achieving informal compromise in a clear majority of cases.²⁶

Once again, though, the difficult question facing these systems is what to do when creditors cannot be convinced to accept a responsible compromise position. For nearly the first decade of its existence, the French system remained unwilling to go beyond discretionary modification. The *commissions* could "recommend" to the local courts that the compromise workout plan that they had developed be formally imposed on creditors, but neither they nor the courts could go any further. The only sorts of relief that could be imposed were quite limited modifications of the original obligations, such as a deferral or extension of time to pay, reduction or elimination of accruing interest, or the creation or substitution of a guarantee. Courts could impose such concessions over a period of five years—increased to eight years in 1999 and then to ten years in 2003—with full discretion to choose the proper duration.²⁷

²⁶ See Jason Kilborn, *La Responsabilisation de l'Economie: What the U.S. Can Learn From the New French Law on Consumer Overindebtedness*, 26 MICH. J. INT'L L. 619, 638-40 (2005).

²⁷ See Céline Rondey, *La réforme du surendettement par la loi "Borloo" du 1er août 2003*, D. 2003, Doctrine, 2162, at 2162.

These measures could be conditioned on the debtor's doing or not doing certain things, and the *commissions* exercised unconstrained and widely varying discretion to make quite stringent austerity demands of debtors. Concerns arose early on regarding the miserly practices of some *commissions* and courts with respect to the amounts of debtors' income budgeted to debtors for personal and household expenses. The economics ministry repeatedly expressed its concern with certain *commissions*' exercising their discretion to recommend workout plans that required too much sacrifice by debtors and their families in order to satisfy creditor demands.²⁸ This dedication to a discretionary model offering limited relief would create problems that would hound the French system for many years, though the legislature would ultimately take some of the most decisive action anywhere in Europe to address these problems, as discussed below. To this day, one of the hallmarks of the French system is the broad discretion of the *commissions* in crafting workout plans of significantly varying demand and duration.

The systems in Belgium and Luxembourg are marked by a similar reliance on official discretion, though at least the system in Belgium has provided for aggressive relief from early on. Both begin with a debt negotiation model similar to that in France. Somewhat like the *commissions* in France, an official "service of information and counsel in matters of overindebtedness" offers debt negotiating support in Luxembourg, while in Belgium, a court-appointed debt-mediator (in most cases, also a local debt counselor) draws up modified payment plans for proposal to creditors. Like in France, in a strong majority of cases, semi-formal persuasion is sufficient to find a negotiated solution, at least temporarily.²⁹ If creditors cannot be convinced to accept a semi-formal workout proposal, the courts in Belgium and Luxembourg can impose limited measures of relief similar to those available in France: deferral or delay of payments, reductions of interest rates, and possibly even discharge of certain kinds of penalties and fees.³⁰ In Luxembourg, no more aggressive relief is available.

We see the first steps toward more invasive intervention in Belgium, where the courts are empowered to discharge any debt remaining after the debtor completes a three- to five-year workout plan. Though legislators clearly intended that such aggressive relief would remain an exception, the courts have imposed a discharge to some degree in nearly three-quarters of cases that have reached the judicial stage.³¹ Indeed, legislators initially resisted offering a *complete* discharge in any case, requiring every debtor to pay at least something during the course of a multi-year payment plan. After the Belgian constitutional court in April 2003 declared this restriction unconstitutional as a violation of equal protection (disfavoring low-income debtors), legislators formally modified the statute in December 2005 to allow for immediate and total discharge for debtors totally unable to pay down any of their debts over five years.³²

As in the early structure of the system in France, the courts in Belgium and Luxembourg are quite free to exercise their discretion in determining the appropriate level of sacrifice from each debtor in exchange for this relief. In Luxembourg, a judicial plan can require payments from the debtor for up to seven years, with no indication of what the "average" plan length

²⁸ See Kilborn, above n 26, at 642-44.

²⁹ See Jason J. Kilborn, *Continuity, Change, and Innovation in Emerging Consumer Bankruptcy Systems: Belgium and Luxembourg*, 14 AM. BANKR. INST. L. REV. 69, 94-95 (2006).

³⁰ CODE JUDICIAIRE/GERECHTELIJK WETBOEK Art 1675/12 (Belgium); Law of 8 Dec. 2000, Art 14 (Luxembourg).

³¹ See Kilborn, above n 29, at 98.

³² See *ibid* at 94.

should be. Judicial plans in Belgium are limited to five years in most cases, though plans that offer a discharge must extend over at least three years. As for the acceptable level of sacrifice from debtors, in both Belgium and Luxembourg, the courts are constrained only by a vague exhortation that debtors and their families must be guaranteed the ability “to lead a life in conformity with human dignity.”³³ Though the courts in Belgium are encouraged to leave all income defined as “exempt” from creditor seizure under other law, the insolvency law gives the court the discretion to deviate from general income protections “by specially motivated decision.”³⁴ Initial surveys suggest that the Belgian courts are balancing creditor demands and debtors’ “human dignity” fairly well,³⁵ but the Belgian law is notably infused with a reliance on court discretion to craft plans with the appropriate duration and demand to maintain human dignity. This core discretion with respect to both remedy and the requirements for that remedy marks the three “French” or “Romanistic” systems as distinct from the other systems in Europe.

B. The “Germanic” Approach: Uniformity, Predictability, Discharge

In Germany, in contrast, from the very beginning, every debtor has been subject to the same demands and offered the same relief. All of the other, “Germanic” systems offer the same statutory relief to all comers who satisfy the law’s demands: discharge of all remaining unpaid debt (with some minor, nondiscretionary exceptions for certain types of debts). This immediately distinguishes the Germanic and Romanistic systems. An equally marked and perhaps more philosophically important contrast, however, is the degree to which the Germanic systems minimize or reject elements of discretion in determining the proper demands for relief. The German system offers the starkest example of this, with the systems in the other “Germanic” systems extending modestly back along the continuum of discretion.

All of these systems (except Sweden since January 1, 2007) require debtors to proceed through a negotiation stage involving significant discretion and non-uniformity, but the discretion is exercised not by system administrators (as in the Romanistic systems), but by debtors and creditors. Even in Germany and Austria, where the in-court process theoretically (in Germany) and actually (in Austria) begins with an attempt to cram down a negotiated solution on dissenting creditors,³⁶ the debtor and his or her projected nonexempt income define the parameters of the proposed relief—not the court exercising any degree of discretion.

After creditors have rejected a negotiated solution, and cram-down has failed, the German and Austrian systems have always funneled all cases into a single discretion-free, “actual receipts” track. Following liquidation by a court-appointed interim trustee of the debtor’s nonexempt property, if any (which is present in few cases), all debtors formally assign to a trustee all of their actual (not projected) nonexempt income, determined according to a uniform national exemption schedule, over a uniform period of years. The period used to be seven years in both Germany and Austria until it was reduced to six in Germany in 2001. In Austria, if the debtor has paid the costs of the proceeding and 50% of all unsecured claims, the debtor earns an early discharge—as a matter of law, with no discretion in the court to demand more. The law in

³³ CODE JUDICIAIRE/GERECHTELIJK WETBOEK Arts 1675/3, 1675/12 § 4, 1675/13 §§ 2, 5 (Belgium); Law of 8 Dec. 2000, Arts 1, 14 (Luxembourg).

³⁴ CODE JUDICIAIRE/GERECHTELIJK WETBOEK Arts 1675/12 §4, 1675/13 § 5.

³⁵ See Kilborn, above n 29, at 98-99.

³⁶ See JASON KILBORN, COMPARATIVE CONSUMER BANKRUPTCY 77-78, 81-82 (2007).

both countries explicitly requires the debtor to exert him or herself to obtain and hold suitable employment during this period and cooperate with the trustee or risk losing the benefit of the discharge, but no other discretionary requirement is or can be imposed on the debtor.³⁷

The unique Austrian system incorporates one small element of discretion, though it applies in relatively few cases as a measure of last resort. As described above, Austrian debtors can earn an early discharge by managing to pay 50% of their unsecured creditors' claims. Conversely, they can lose their discharge by failing to pay at least the costs of the proceedings and 10% of their unsecured creditors' claims. In such cases, the court retains discretion "in fairness" either to confer a discharge immediately (if the debtor has fallen just short of the 10% minimum) or extend the payment period up to three more years. After ten years, if the debtor still has not managed to meet the "10% or nearly so" standard, the court again can exercise discretion to grant a discharge on "fairness" grounds to avoid the debtor's being denied a discharge.³⁸ In either event, though, this discretion differs markedly from that in the Romanistic systems, where the basic course of each case is determined through discretionary interpretation of intentionally vague standards.

While the presence of a uniform discharge places the Dutch and Swedish laws squarely in the uniform "Germanic" group, these laws theoretically slide back down the discretion scale by inviting system administrators to seek more flexible, creative paths to that relief in individual cases. Unlike in the Romanistic systems, however, Dutch and Swedish courts and administrators have largely rejected that invitation and voluntarily limited their own discretion.

In the Netherlands, much like in Germany, the law directs a trustee to collect and liquidate the debtor's nonexempt assets and administer a payment plan drawing on three to five years of the debtor's nonexempt income, applying a uniform national standard.³⁹ Adding a discretionary element, the original Dutch law theoretically gave courts maximum freedom to design payment plans with whatever provisions seemed "reasonable and fair."⁴⁰ Dutch judges largely rejected this discretion early on, however. Most court-imposed plans simply set out a standardized amount of income to be left to the debtor over a standard three-year repayment term. Indeed, judges voluntarily reigned in their discretion to determine the amount left to debtors by adopting a 30-page guide for determining the proper amount.⁴¹ Developed by a working group of Dutch bankruptcy judges (*Recofa*) in late 2000, the semi-official guide for determining how to calculate the amount of income to be left to debtors is updated annually, with detailed standards for calculating the initial percentage of income to be allocated to the debtor along with allowable expense supplements. Indeed, as of January 2007, an interactive program available on the internet can perform the necessary calculations to arrive at the debtor's allowed

³⁷ See BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT, AUSWEG GESUCHT!: SCHULDEN UND PRIVATKONKURS 78-81 (2004).

³⁸ See *ibid* at 79; GEORG KODEK, HANDBUCH PRIVATKONKURS: DIE SONDERBESTIMMUNGEN FÜR DAS KONKURSVERFAHREN NATÜRLICHER PERSONEN 281-89 (2002).

³⁹ FAILLISSEMENTSWET Arts 287(3), 295, 347 (2008).

⁴⁰ FAILLISSEMENTSWET Art 343(1) (*repealed* Jan. 1, 2008); see also *Kamerstukken II 1992/93*, 22 969, nr. 3, p 59 (remarking on the broad discretion theoretically allowed to the court).

⁴¹ See Jason Kilborn, *The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New U.S. Law From Unexpected Parallels in the Netherlands*, 39 VAND. J. TRANSNAT'L L. 77, 99-100 (2006).

budget.⁴² Consistent with widespread judicial practice during the early years of the new law, the Recofa guide has since been adopted as the standard by nearly all Dutch courts.⁴³

In light of these developments, the Dutch legislature has just simplified and streamlined the process, eliminating most judicial discretion to apply varying standards to different cases. As of January 1, 2008, the reform law essentially codifies the unitary model adopted in practice “given the standard character of many consumer debt adjustment cases.”⁴⁴ Judicial discretion to craft “fair and reasonable” plans has now been formally abandoned. Judges retain some discretion with respect to plan length and income to be left to debtors, but consistent with prior practice, reformers expect that the vast majority of cases will continue to be subject to a standard three-year plan on income determined through application of the Recofa guidelines.⁴⁵

Developments in Sweden followed a similar path. In its original form (adopted in 1994), the Swedish system stood at the middle of the discretion spectrum. Though the full discharge relief was not up for debate, the path to that relief was structured very much like in France. Each case began with a negotiation led by an official state administrator (the debt collector, *Kronofogdemyndigheten*, or KFM). If any creditor rejected the KFM’s proposal, the case moved to the courts for, in almost every case, imposition of the KFM’s proposed plan, very much like in France (though the formality of court intervention was recently eliminated in Sweden).⁴⁶ In both Sweden and France, legislators’ original idea had been to allow the system administrator flexibility to be creative in crafting plans in individual cases tailored to individual circumstances. The Swedish statutory protection for “exempt” income was to be considered only “guiding” in the determination of how much of the debtor’s income to allocate to creditors. As for plan length, the original rule in Sweden was that plans should run for five years, though the KFM had discretion to establish a shorter or even longer plan if special circumstances warranted.⁴⁷

Given the narrow constraints of a uniform type of relief (discharge), small incomes, large debts, and human nature, however, Swedish practice in developing workout plans was quickly standardized.⁴⁸ The KFM declined to be simply “guided” by the statutory income exemption and to deviate from a standard five-year repayment period. In practice, the KFM has in most cases simply adopted the general exemption level as the de facto rule, adding allowances for reasonable housing costs and certain other extraordinary expenses based on internal guidelines from the Tax Service (which controls the KFM). In addition, some KFM offices have included in debtors’ budgets a small “buffer” of as much as \$50 per month for unanticipated expenses, though the Tax Service has expressed a particular desire to see a unified policy on the size and frequency of such buffers, also.⁴⁹ Thus, rather than engineering creative solutions, the Swedish KFM simply plugs largely standardized numbers into a simple formula to arrive at 60 monthly payments to creditors equal to the debtor’s projected disposable income over that period.

⁴² Online at http://www.wsnr.rvr.org/frames/fr_vtlb.htm.

⁴³ Werkgroep rekenmethode vtlb recofa, *Vtlb-rapport: Berekening van het vrij te laten bedrag bij toepassing van de wet schuldsanering natuurlijke personen* § 1.1 (2007).

⁴⁴ *Kammerstukken II*, 2004/05, 29 942, nr. 3, pp 6-7

⁴⁵ See *ibid* at 38 (discussing new article 349a); FAILLISEMENTSWET Arts 295(3), 349a (2008).

⁴⁶ See Kilborn, above n 23, at 455, 460.

⁴⁷ SOU 2004:81, above n 9, at 127.

⁴⁸ *Ibid* at 65, 111, 119, 123-24, app 3 at 299-305 (illustrating sample payment plan).

⁴⁹ See Kilborn, above n 23, at 450-53; Skatteverket, *Så upfattar gäldenärer och borgenärer skuldsaneringsprocessen*, Rapport 2004:14, at 9.

C. Movement Toward More Uniformity, More Discharge

Thus, at the mid-point of the continuum from unbridled discretion to strict uniformity, Swedish and Dutch practice migrated toward greater uniformity early on. Discretion is time-consuming and expensive, and experience showed that the benefits of greater flexibility were very small in light of the narrow room to maneuver within debtors' limited resources and large debts. When the relief was preordained, the path to that relief could be standardized with very little danger of moral hazard. Debtors' dedication to fulfilling their financial obligations—both before and after formal relief—would not be substantially undermined by greater clarity of demands for relief if those demands were sufficiently substantial. The greater risk was imposing unrealistic demands on debtors that would produce systematic failure and administrative overload. These low-return, high-complexity cases fit well within a single paradigm: establish a reasonable level of sacrifice, hold the debtor to that level for a reasonable period of time, and little more can be realistically expected.

Indeed, though discretion and flexibility were supposed to facilitate the most attractive compromise proposals for creditors, the Dutch experience suggests that creditors might well have little preference for greater flexibility themselves. Given the choice between a maximally flexible, out-of-court negotiation process and a carefully monitored, in-court coercive process with standard demands, Dutch creditors seemed increasingly eager to choose the latter. Creditors accepted out-of-court negotiated workout plans less and less after the December 1998 entry into force of the Dutch consumer insolvency law. The rate of creditor acceptance of negotiated plans fell from about 35% in 1998 to 28% in 1999 before plummeting to between 10% and 15% per year after 2003.⁵⁰ Credit counselors reported that creditors were generally less willing to enter into voluntary arrangements in light of the standardized and predictable court-imposed alternative.⁵¹

A similar administrative and then legislative movement toward standardization is observable in France. In their zeal to achieve the maximum possible reduction of debt problems, some French *commissions* and courts relegated debtors to lives of extreme austerity, while others heeded government suggestions to use the statutory income exemption level as an informal baseline.⁵² The French system remained mired in the very earliest stage of the discretionary modification model until the first major reform was implemented in 1999.

After nearly a decade of trial and error on the ground, the legislature responded from above by moving the French system mildly toward the “Germanic” uniformity end of the discretion continuum. As of February 1, 1999, the *commissions* and courts lost their discretion to leave debtors less than the statutory income exemption.⁵³ This brought the French system largely into line with the Germanic systems with a similar uniform baseline of income

⁵⁰ See Kilborn, above n 41, at 95.

⁵¹ For an insightful discussion of why creditors might prefer the coercive alternative, see Nick Huls, Nadja Jungmann & Bert Niemeijer, *Can Voluntary Debt Settlement and Consumer Bankruptcy Coexist? The Development of Dutch Insolvency Law*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 269, 273, 274-75 & tbl. 1 (Johanna Niemi-Kiesiläinen, Iain Ramsay & William Whitford eds., 2003).

⁵² See Kilborn, above n 26, at 642-44.

⁵³ CODE DE LA CONSOMMATION Art L.331-2 (2004). This was not an uncontroversial point, as the Senate feared exposing low-income debtors to the moral hazard of shielding all or most of their income in exchange for a discharge. See, eg, SÉNAT, AVIS, DOC. NO 473 (1998); SÉNAT, REP. NO 544 (1998).

protection, though the French law maintains a heavy Romanistic dose of discretion. It describes exempt income only as “*one part of the resources necessary for ongoing expenses.*”⁵⁴ The French process remains more discretionary than any of the Germanic systems, as the law encourages deviation from exempt income (unlike in Germany) with no clear guidance on how that deviation should be made (unlike the guidelines of the Dutch *Recofa* or the Swedish Tax Service).⁵⁵ The future may well see further harmonization efforts in France, as the Banque de France is reportedly considering making greater efforts to unify practice among the *commissions* in allocating income among debtors and creditors. In any event, discretion in the choice of relief remains a distinguishing factor in France.

The greatest changes in France have occurred with respect to the range of choice for available relief, expanding it far beyond simple modification. Legislators wanted their system to offer effective relief, and early experience convinced them that wading into the shallow end of the pool would not accomplish this goal. A series of aggressive French reforms was driven by a legislative desire to make the system do what it was supposed to do, and to avoid wasteful diversions of administrative resources along the way. French law has now made the ultimate leap to the “Germanic” side of the spectrum from modification to discharge, though the traffic-cop role played by the *commissions* in choosing to direct debtors down one of the many roads to relief still situates the French system at the head of the discretionary “Romanistic” group.

Early limits on the types of relief the French *commissions* could recommend for court imposition virtually ensured that the system would fail to offer meaningful relief in many cases. Given the modest financial resources and large debts involved, deferrals and extensions were simply inadequate to allow many debtors to satisfy all of their obligations. One 1995 national study suggested that 28% of debtors could barely cover reasonable living expense, let alone pay anything on their debts, and only 25% of debtors clearly had the capacity to repay any significant portion of their debts after covering reasonable living expenses.⁵⁶

A “revolving-door” trend soon developed, in which the *commissions* and courts would hammer out a “payment plan” imposing a multi-year deferral of all payments, with full expectation that the debtor would be back with a repeat filing for relief upon the expiration of the deferral period. Indeed, a 2001 survey by the Banque de France⁵⁷ revealed a level of financial distress for which even a reformed version of the system was patently unable to offer meaningful solutions. Legislators noted with concern that, although at least a quarter of debtors seeking relief were clearly unable to pay any of their debts and were not likely to be able to do so in the foreseeable future, only a small fraction ultimately received effective relief in the form of a voluntary remission or court-imposed discharge. For these debtors, passage through a system that offered anything less than full (and in some cases immediate) discharge represented little more than a pure formality, and their complex cases placed a grossly disproportionate administrative burden on the *commissions*.⁵⁸

⁵⁴ CODE DE LA CONSOMMATION Art L.331-2 (2007) (emphasis added).

⁵⁵ See above, text accompanying nn 42-44, 48-50.

⁵⁶ See HYEST & LORIDANT, above n 12, § I.B.1(a).

⁵⁷ Direction du Réseau, Banque de France, *Surendettement: Enquête typologique* (2001).

⁵⁸ See ASSEMBLÉE NATIONALE, AVIS, DOC. NO 1003, TOM III, at 36 (2003).

The French legislature in two stages has made available much more aggressive relief in recent years. First, since 1999, the commissions can recommend—and the courts can impose—“extraordinary” measures of relief, going beyond simple modification of existing obligations. After a general moratorium on debt servicing payments on *all* of the debtor’s debts for up to two years,⁵⁹ if an “ordinary” payment plan is still inadequate to put the debtor back on the path to satisfaction of his or her debts, the court can grant a partial, pro-rata discharge of the debtor’s remaining unpaid debts (again, with minor exceptions for non-dischargeable debts, such as child support obligations and criminal fines).⁶⁰ Indeed, an expansive interpretation of the law by the *Cour de cassation* in 2001 offered the possibility of combining “ordinary” payment modifications with the “extraordinary” moratorium and discharge, further broadening the palate of relief options available.⁶¹ Second, since early 2004, the legislature has offered some debtors an immediate and full discharge, by-passing the payment plan/moratorium stage altogether⁶²—even more aggressive relief than that offered by the Germanic systems.

Even as French lawmakers have accepted more intrusive relief, however, they have held fast to a model of relief dispensed as a function of largely unpredictable administrative choice rather than statutory prescription. Both admission to and application of these paths to more effective relief still rely heavily on discretion. Only debtors whom the *commissions* identify as falling within the loose definition of “insolvent” are routed to the “extraordinary” moratorium form of relief, and the law leaves to the case-by-case discretion of the *commissions* and courts exactly what percentage, if any, of the debtor’s obligations to discharge. The *commissions* and courts stand as discretionary guardians at the gateway to the immediate discharge track, as well, admitting only debtors whose financial situation they deem “irremediably compromised” according to yet another loose definition in the law (“the manifest impossibility” to remediate the debtor’s financial troubles with “ordinary” or “extraordinary” measures of relief).⁶³ Indeed, even for the most overextended and financially troubled debtors, the courts retain the discretion to add requirements for the ultimate relief. In immediate discharge cases, the court may, but need not, order the debtor to undertake measures of “social follow-up,” the existence and nature of such measures being vested in the totally unrestricted discretion of each judge.⁶⁴

Fortunately for debtors, the *commissions* and courts have chosen in recent years to exercise their expansive discretion liberally in favor of debtors. They have adopted an arguably overbroad interpretation of the key password of “insolvent,”⁶⁵ and they have found an increasing portion of debtors “irremediably compromised” to be routed to immediate and full discharge.⁶⁶ As the number of debtors routed to a discharge increases, the next step in France seems likely to be a simplification of the system to offer effective relief to all on more predictable terms.

⁵⁹ This period was three years before 2003. See C. CONSOMM. Art L.331-7-1 (1999).

⁶⁰ CODE DE LA CONSOMMATION Art L.331-7-1 (2007).

⁶¹ Arrêt [Order] of Feb. 13, 2001, Bull. civ. 1, no 34, JCP 2001, IV, 1638. “Extraordinary” and “ordinary” are terms of art used in practice to distinguish recommendations made under article L.331-7 from those made under article L.331-7-1.

⁶² CODE DE LA CONSOMMATION Arts L.332-5 to 332-12 (2007).

⁶³ Ibid Arts L.330-1, 331-3 (2007).

⁶⁴ Ibid Art L.332-9 (2007).

⁶⁵ See Kilborn, above n 26, 652-53.

⁶⁶ See KILBORN, above n 36, at 69 (noting that nearly half of all recent cases not disposed of at the agreement stage have been routed to an immediate discharge).

III. Measuring the Appropriate Sacrifice: What Cost to Debtors . . . and to the State?

The final crucial question in every case has been how to balance the *quo* of formal relief against the *quid* of an investment of serious effort and sacrifice by debtor-beneficiaries. On the one hand, this is a philosophical issue that relates back to the first question: if intervention is appropriate, must it not be reserved for those who both deserve and are willing to earn it? On the other hand, it is a very practical question of system effectiveness: human nature being what it is, particularly in light of economic forces beyond the control of most national legislators, what level of investment/sacrifice can debtors reasonably bear to prove their worthiness? Indeed, in an environment where many debtors are unable even to meet basic needs, how should the state finance the operation of the relief system, and is a long-term administrative process worth the investment when the return from most debtors is negligible? In a few places in particular, lawmakers have struggled with and implemented creative solutions to these final questions.

A. Debtors: Demanding Rhetoric Cedes to Harsh Reality

As noted above, most systems either immediately or eventually settled on the statutory income exemption as the threshold for debtor sacrifice. Presumably, these exemptions had been established through careful analysis of the minimum financial support required for modest but sustainable existence. Legislators in France quickly learned that reducing debtors to a subsistence life below this boundary led to almost certain failure, producing much more system-wide harm than good.

Indeed, in Germany, legislators went to the very heart of the matter in reevaluating the effects of their income exception law. When the German insolvency law went in to effect in 1999, debt counselors and other debtor advocates complained about the very modest income exemptions to which debtors were to be subjected for years on end. The German parliament responded in 2002 by increasing the income exemption levels for the vast majority of German households by 50%, in addition to instituting bi-annual indexing. As a result, about 80% of debtors were no longer required to cede any of their meager income to creditors.⁶⁷ These kinds of moves demonstrate that the primary concern in Europe over the past decade has been to ensure successful rehabilitation of debtors—not necessarily to squeeze the last drop of juice from the rind for creditors.

Not only in Germany and France, the trend throughout Europe has been toward demanding less investment from debtors, rather than more, and offering supports and incentives to enhance system success. Dutch practice, in particular, illustrates the types of efforts undertaken to ensure that a rigid uniform standard does not undermine effective delivery of relief.

As discussed above, in both the Netherlands and Sweden (and now also in France), exempt income is only the starting point for ensuring debtors a livable existence and offering the necessary incentives to remain productive. From the very beginning, Dutch judges realized that success would be hard to come by if all debtors were relegated to years of life on the statutorily prescribed 90% of the “existence minimum.” Most immediately increased the allowance, particularly for debtors with income from at least 18 hours of work per week. For especially vulnerable working singles, judges offered a substantial increase (as much as 40%) in the amount

⁶⁷ See Kilborn, above n 19, at 285-86.

left to the debtor as an incentive to earn more than the standard minimum income level. Dutch judges softened the demands for debtor sacrifice in response to an acknowledged need for debtors to have some reserve for large or unexpected expenditures, in addition to encouraging debtors to find and hold work.⁶⁸ In many cases, the Swedish KFM has responded to similar concerns in a similar way, adding allowances for housing and other major expenses, and modestly increasing debtors' monthly allowances with a "buffer" of some small standard amount. Similarly, the German law contains a unique institution of so-called "motivation rebates," urging debtors forward through the final lean years of the process with year-end bonuses of 10% and 15% of their nonexempt income.⁶⁹

Moreover, in Sweden and Germany, legislators have reduced the duration of the required investment from debtors. As of January 2002, the uniform "good behavior period" in Germany was reduced from seven to six years, and a new method for measuring the beginning point of that period avoids previous delays of as many as four more years in some cases. After Swedish legislators noticed that system administrators had largely abstained from imposing plans longer than five years, as of January 1, 2007, they strictly limited the conditions under which plans exceeding five years can be imposed.

In some cases, the reduction of the payment term occurred before enactment of the law. For example, the original bill that ultimately became the Belgian insolvency law proposed a seven-year payment term in all cases. Even this long period was defended in terms of avoiding discouragement for the debtor while maximizing chances for more debtors to pay their debts in full. Proposals for reducing the term to four years immediately followed, with the legislature finally adopting a "five-year compromise."⁷⁰ Similarly in the Netherlands, the government's initial bill proposed vesting the court with full discretion to determine payment terms of up to five years. Legislators preferred a three-year presumptive period, with discretion in extraordinary cases to impose five-year plans, as longer plans led to flagging motivation by consumer debtors and markedly increased levels of repeat debt problems.⁷¹ Expecting debtors to spend longer than three years on minimal exempt income while paying off their debts, legislators suggested, would be "from a social point of view not responsible."⁷² Judicial practice has seen very few deviations from the low end of this range—the vast majority of Dutch plans imposed by courts extend over three years.⁷³

The latest Dutch reform seeks even further to limit the time during which debtors are subjected to formalistic "payment plans" that offer little payment to creditors. As of January 1, 2008, cases can be terminated with a discharge after only one year—avoiding the burden on the debtor as well as the waste of administrative resources in the usual second and third years—if the trustee "has no expectation that the debtor can satisfy his obligations in such a way that the continuation of the proceedings is *justified*."⁷⁴ This "justified" criterion is broader, and reformers hope it will be applied more frequently, than the previous provision, which allowed

⁶⁸ Werkgroep rekenmethode vtlb reconfa, above n 43, §§ 4.2, 5.1-5.2.

⁶⁹ INSOLVENZORDNUNG § 292(1) (2007).

⁷⁰ *Doc. parl. Chambre* (1996-1997) no 1073/11, at 69, 70, 83, 127-28.

⁷¹ *Kamerstukken II* 1992/93, 22 969, nr. 3, pp 18, 59; *Handelingen II* 1994/95, 99, pp 6075, 6077, 6079, 6081.

⁷² *Kamerstukken II* 1994/95, 22 969, nr. 19, p 5; see also *Handelingen II* 1994/95, 99, p 6071.

⁷³ See Kilborn, above n 41, at 102.

⁷⁴ FAILLISSEMENTSWET Art 354a (2008) (emphasis added).

early discharge only for debtors unable to satisfy *any* of their debts, even in part. The legislative history suggests that an expected distribution of less than 2% of unsecured creditors' claims would trigger this new provision.⁷⁵ Freeing debtors from payment plans early because they would not offer *significant* payments to creditors is an innovation that suggests a fundamental reevaluation of the responsibility-inculcating role of the process. Given the expense that these insolvency systems involve, this innovation may well spread to other areas soon.

B. Redirecting Administrative Costs To Debtors and Creditors To Reduce State Expense

In the final analysis, these systems have to be paid for. To reduce the administrative and cost burden on the judicial system, French and Swedish legislators in 1995 and 2007, respectively, removed the courts from the process as much as possible. Administrators had done a fine job of weeding out undeserving cases and establishing reasonable compromises with creditors, so court involvement had proven to be little more than an exercise in outmoded formalism. Courts would provide backup to these now wholly administrative systems, but further expenditures of time and resources by the courts had proven to be inefficient and unnecessary.

In places where the courts have remained in a central role, lawmakers have struggled with controlling costs. In Germany, the original insolvency law mandated dismissal of insolvency petitions filed by debtors whose available assets obviously would not produce sufficient proceeds to cover substantial court costs. Most courts refused to extend litigation cost assistance to support consumer insolvency cases. Thus, nearly 90% of all consumer insolvency cases were doomed at the outset, ironically, because these debtors had so few assets that they could pay neither their debts nor even court costs.⁷⁶ A 2001 reform law adopted a deferral solution—debtors could put off paying court costs until after they had gone through the insolvency process.⁷⁷ In the meantime, the federal states (*Länder*) bore the substantial budgetary burden of financing a rather expensive process of official notices and hearings in 80% of consumer cases.

In August 2007, after years of study and consideration of a series of controversial proposals, the German government finally introduced a reform bill, which the Bundesrat approved in October 2007.⁷⁸ If the Bundestag passes the bill, as widely expected, debtors with insufficient projected nonexempt income to cover court costs will be required to make monthly contributions toward defraying the minimum costs of the interim and permanent trustees (approximately €20 to €25 per month for the 72-month “good behavior period”). Debtors unable to make this sacrifice from their exempt income will be denied access to relief. This represents a serious shift in the “responsibility” burden from the state back onto debtors, and it brings the German system almost full circle back to where it began in 1999, when most consumer cases were immediately dismissed for “asset insufficiency” to cover administrative expenses. Perhaps those unable to spare even €25 per month are so judgment proof as to not “need” insolvency relief, but this debate will doubtless continue into the next decade.

Belgium has developed the most brilliantly creative solution to the task of assigning duties, encouraging responsibility, and containing state costs. In contrast to their German

⁷⁵ See *Kamerstukken II* 2004/05, 29 942, nr. 3, pp 5-6, 36-37.

⁷⁶ See Kilborn, above n 19, at 279 & n 130.

⁷⁷ *INSOLVENZORDNUNG* §§4a-4d, 26(1), 298 (2007).

⁷⁸ *BUNDESRATS DRUCKSACHE* 600/07 (Oct. 12, 2007).

counterparts, Belgian legislators were most concerned about hampering access to relief for low-income debtors unable to pay the debt-mediator's administrative fees in full (precisely the same group that is the focus of the recent German reform movement).

The creative Belgian solution to financing a fund to defray these administrative costs returns to the first question of responsibility. Legislators reasoned that these costs could be most fairly and effectively spread by assigning them to creditors, in particular to creditors who bore the most responsibility for the predicament faced by these poorest of debtors. The supply side of the consumer credit market had benefited handsomely at the expense of consumers, and their credit-score-based, large-portfolio lending practices were responsible for much of the pain of the new consumer insolvency crisis. "It is normal," one legislator opined, "that the costs tied to the treatment of overindebtedness should be, in part at least, incorporated into the cost of credit."⁷⁹ Part of the driving idea was to force creditors to internalize their overly aggressive risk-taking and to encourage more responsible analysis of the future solvency of potential consumer borrowers. Thus, to focus the negative incentive on excessively risky lending, a fractional percentage "tax" to supply the fund is assessed only on that portion of the total consumer lending portfolio *in default* as of the end of each year.⁸⁰ As problems with financing the relief system become more acute in places like Germany, solutions like this one offer broad advantages that tie in nicely with the responsibility concerns that gave rise to these systems in the beginning.

Conclusion

What a difference a decade makes! A new, broader vision of responsibility has swept across European consumer credit markets. The time-honored slogan of honoring contracts at virtually all costs has yielded to a healthier balance of individual and collective interests in the enforcement process. Rhetorical demands of maximum sacrifice by debtors and minimal interference with contracts have eroded as the realities of human nature, incentives, and economics have shown that only more fundamental relief and more modest demands would produce the desired rehabilitation. At the detail level, individual tailoring of solutions has largely given way to mass production of standard debt adjustment routines. European policymakers seem to be gradually converging on a unitary paradigm of consumer insolvency treatment, though many areas in Europe have yet to offer their answers to the questions explored here. As they begin to do so, and as existing systems continue to evolve along the lines described here, the next decade promises to be even more interesting than the last.

⁷⁹ *Doc. parl. Chambre* (1996-1997) no 1073/10, at 5.

⁸⁰ Law of 19 April 2002, Art 2, M.B. 7 June 2002, p 26229.